









THE  
NEW CIVIL COURT MANUAL,

UNIFORM WITH THE

“NEW CRIMINAL COURT MANUAL”

CONTAINING

THE NEW CODE OF CIVIL PROCEDURE AND VARIOUS  
OTHER ACTS RELATING TO CIVIL MATTERS.

*ANNOTATED WITH*

**RULINGS OF THE HIGH COURTS IN INDIA UP TO DEC. 1892.**

IN TWO VOLUMES

**VOL. I.**

THIRD EDITION

*GREATLY IMPROVED AND ENLARGED.*

BY

**T. COOPPOOSWAMI NAICKER & CO.,**

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**M A D R A S :**

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**NO. 379, MINT STREET.**

# PREFACE.

THIS is the *Third Edition* of the New Civil Court Manual, in two volumes.

Like the second edition of the Manual the present one includes the rulings of the Bengal, Madras, Bombay, N.-W. P. and Agra High Courts Reports, the Calcutta Law Reports, Moore's Indian Appeals, Law Reports Indian Appeals, Sutherland's Weekly Reporter and the Indian Jurist, the reports of Messrs. Hays, Marshall, Coryton, Hyde and Bourke and the four series of Indian Law Reports up to December 1892 and contains all the Acts most of which are amended and brought up to October 1893. It is therefore hoped that this Manual would be very useful in this and other Presidencies both to the Bench and to the Bar.

The increasing demand for our Manual as shown by the rapid sale of the second edition, has much encouraged us in the compilation of this edition to devote considerable time and labour to its further improvement, thus rendering the Manual to prove itself most useful both to the Judge and to the Practitioner.

It is our pleasant duty to express our thanks for many useful suggestions with which several gentlemen favoured us from time to time. We hope we may be favoured with many more such.

In conclusion we must thank our friend Mr. Cokala Cunniah Naidu for the valuable help rendered to us by him in passing this work through the press.

T. C. NAICKER & Co.

. . . *November 1st, 1893.*



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# THE NEW CIVIL COURT MANUAL. GENERAL CLAUSES.

## ACT No. I. OF 1868.\*

RECEIVED THE G.-G.'S ASSENT ON THE 3RD JANUARY 1868.

*An Act for shortening the language used in Acts of the  
General of India in Council and for other purposes.*

Preamble. WHEREAS it is expedient to shorten the language used in  
Acts made by the Governor-General of  
India in Council, and to make certain  
provisions relating to such Acts; It is hereby enacted as  
follows:—

Short title. 1. This Act may be cited as “The  
General Clauses’ Act, 1868.”

Interpretation-clause. 2. In this Act and in all Acts made by the Governor-  
General of India in Council after this  
Act shall have come into operation, un-  
less there be something repugnant in the subject or context,—

(1.) Words importing the masculine gender shall be  
taken to include females;

(2.) Words in the singular shall include the plural, and  
*vice versa*;

(3.) “Person” shall include any company, or association,  
or body of individuals, whether incorporated or not;

(4.) “Year” and “month” shall respectively mean a  
year and month reckoned according to the British calendar;

(5.) “Immoveable property” shall include land, benefits  
to arise out of land, and things attached to the earth, or per-  
manently fastened to anything attached to the earth;

### Note.

The obligee of a bond, dated the 29th October, 1869, sued to recover  
the amount due thereunder from the property hypothecated therein. By  
the terms of the bond the obligor agreed to pay the sum of Rs. 75 with  
interest at two rupees per cent. per mensem on the 12th May, 1873. The  
amount thus secured exceed Rs. 200. The property mortgaged was the

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\* See *Gazette of India*, 22nd October 1881, Part I., page 504.

tenant holding of the obligor. *Held* that the interest of a tenant in his holding was right or interest to or in immoveable property; that consequently such bond, which affirmed as a security a right of which the value, estimated by the amount secured, exceed Rs. 100, ought to have been registered; that being unregistered it could not affect the "immoveable property comprised therein," or be "received in evidence of any transaction affecting" the same; and that the suit brought on the basis of such bond, for the enforcement of the lien, must, in the absence of the bond, fail.—I. L. R., 3 Al. 422.

See I. L. R., 13 Al. 432, noted under section 3 of the Transfer of Property Act. (IV of 1882.)

(6.) "Moveable property" shall mean property of every description, except immoveable property;

(7.) "Her Majesty" shall include Her heirs and successors to the Crown;

(8.) "British India" shall mean the territories for the time being vested in Her Majesty by the Statute 21 & 22 Vic., cap. 106 (*An Act for the better Government of India*);\*

(9.) "Government of India" shall denote the Governor-General of India in Council, or, during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone, as regards the powers which may be lawfully exercised by them or him respectively;

(10.) "Local Government" shall mean the person authorized by law to administer executive government in the part of British India in which the Act containing such expression shall operate, and shall include a Chief Commissioner;

(11.) "High Court" shall mean the highest Civil Court of appeal in such part;

(12.) "District Judge" shall mean the Judge of a principal Civil Court of original jurisdiction, but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction;

(13.) "Magistrate" shall include all persons exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure;

(14.) "Barrister" shall mean a barrister of England or Ireland, or a member of the Faculty of Advocates in Scotland;

(15.) "Section" shall denote a section of the Act in which the word occurs;

(16.) "Will" shall include a codicil and every writing making a voluntary posthumous distribution of property;

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\* In cl. 8, the words, "other than the Settlement of Prince of Wales's Island, Singapore, and Malacca," have here been omitted, having been repealed by Act XII of 1891.

(17.) "Oath," "swear," and "affidavit," shall include affirmation, declaration, affirming, and declaring in the case of persons by law allowed to affirm or declare instead of swearing ;

(18.) "Imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code ;

(19.) And in the case of any one whose personal law permits adoption, "son" shall include an adopted son, and "father" an adoptive father.

**Note.**

See I. L. R., 13 Bom. 87, noted under Article 5 Sch. I. of Act I of 1879 (Stamp Act.)

**3.** In all Acts made by the Governor-General of India in Council after this Act shall have come into operation—

(1.) for the purpose of reviving, either wholly or partially, a Statute, Act, or Regulation wholly or partially\* repealed, it shall be necessary expressly to state such purpose ;

Revival of repealed enactments.

(2.) for the purpose of excluding the first in a series of days or any other period of time, it shall be sufficient to use the word "from "

Commencement of time.

(3.) for the purpose of including the last in a series of days or any other period of time, it shall be sufficient to use the word " to ;"

Termination of time.

(4.) for the purpose of expressing that a law relative to the chief or superior of an office shall apply to the deputies or subordinates lawfully executing the duties of such office in the place of their superior, it shall be sufficient to prescribe the duty of the superior ;

Official chiefs and subordinates.

(5.) for the purpose of indicating the relation of a law to the successors of any functionaries, or of corporations having perpetual succession, it shall be sufficient to express its relation to the functionaries or corporations ; and

Successors.

(6.) for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, it shall be sufficient to mention the official title of the officer at present executing such functions, or that of the officer by whom the functions are commonly executed.

of functionaries.

\* The words "wholly or partially" are to be deemed to have been inserted here from the Commencement of the Act.—See Act I. of 1887, sec. 9.

and the first appeal therefrom heard, subsequently to the passing of that Act. *Hurrosundari Debi v. Bhojohari Das Manji*, I. L. R., 13 Cal. 86, approved.—15 Cal. 107.

Section 21, sub-section 2 of Act VIII of 1885 is expressly retrospective, and applies to suits pending at the date of the commencement of that Act. *Jogessur Das v. Aisani Koyburto*, I. L. R., 14 Cal. 553, followed.—15 Cal. 376.

Before the Bengal Tenancy Act of 1885 came into operation, a decree for rent was obtained under Bengal Act VIII of 1869. After the Bengal Tenancy Act of 1885 had become law, the tenancy, in respect of which the rent had become due, was attached in execution of such decree. A claim was subsequently put in to the attached property by a third person, which claim was disallowed as being forbidden by sec. 170 of the Bengal Tenancy Act of 1885: *Held* that the provisions of the Bengal Tenancy Act of 1885 were applicable to the proceedings in execution; the term "proceedings" in sec. 6 of Act I of 1868 not including proceedings in execution after decree.—16 Cal. 267.

*Held*, in the case of a document executed while Act VIII of 1871 was in force, the registration of which under that Act was optional, and which was not registered thereunder, and of a document executed after Act III of 1877 had come into force, the registration of which under that Act was compulsory, and which was registered thereunder both documents relating to the same property, that under the provisions of sec. 50 of Act III of 1877, the registered document took effect as regards such property against the unregistered document, the provisions of sec. 6 of Act I of 1868 notwithstanding.—2 Al. 851.

Prior to the 1st May, 1882, the Secretary and Manager of a projected Company (which was to be limited by shares) applied to the Registrar of Joint Stock Companies for a certificate of incorporation of the Company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force, and forwarded the memorandum and articles of association with the necessary stamp-fees, and did everything that was required to be done by or on behalf of the Company to obtain a certificate under that Act. No order was passed by the Registrar upon this application until the 6th May, and owing to delay, for which the applicants were not responsible, registration was not effected and the certificate was not issued until the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile, on the 1st May, 1882, the Indian Companies Act (VI of 1882) repealing Act X of 1866 came into force, sec. 28 of which provided that every share in any Company should be deemed to have been taken and held subject to payment of the whole amount thereof in cash, unless the same had been otherwise determined by a contract in writing filed with the Registrar. No such provision existed in Act X of 1866. The shareholders of the Company paid nothing upon their shares in cash; but had agreed (not in writing filed with the Registrar) that, in consideration of certain property conveyed by them to the Company at the time of its formation, fully paid-up shares were to be allotted to them. Subsequently the Company having gone into liquidation, the official liquidator sought to make the shareholders contributories to the assets of the Company as the holders of shares upon which nothing had been paid, with reference to sec. 28 of the Indian Companies Act, VI of 1882. *Held* that the proceedings for obtaining registration of the Company and a grant of a certificate of such registration commenced, within the meaning of sec. 6 of

the General Clauses Act, when the memorandum and articles of association were received in the Registrar's office in April 1882, while Act X of 1866 was in force; that therefore the repeal of that Act by Act VI of 1882 did not affect those proceedings; that consequently the Company must be taken to have been incorporated under the former Act; and that the provisions of sec. 28 of Act VI of 1882 not being applicable, the shareholders were not liable to be placed on the list of contributories as not having paid the full amount of their shares.—11 Al. 349.

Judicial notice to be taken  
of Acts and Regulations.

7. [*Repealed by Act I of 1872.*]

Recitals in Acts to be *prima*  
*facie* evidence of truth of  
fact recited.

8. [*Repealed by Act I of 1872.*]

## ACT No. I. OF 1887.

RECEIVED THE G.-G.'S ASSENT ON THE 14TH JANUARY 1887.

*An Act for further shortening the language used in Acts of the Governor-General in Council, and for other purposes.*

WHEREAS it is expedient further to shorten the language used in Acts made by the Governor-General in Council, and to make certain further provisions relating to those Acts and to Regulations under the Statute 33 Victoria, chapter 3, section 1; It is hereby enacted as follows:—

Title and commence-  
ment.

1. (1) This Act may be called the  
General Clauses Act, 1887; and

(2) It shall come into force at once.

### PART I.

#### ADDITIONAL CLAUSES.

This Part shall apply to this Act and to all Acts made by the Governor-General in Council under the Indian Councils Act, 1861, after the passing of this Act.

3. In any Act to which this Part applies, unless there is something repugnant in the subject or context,—

Definitions.

(1) “abet,” with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code:

(2) “Chapter,” “Part,” and “Schedule,” shall denote, respectively, a Chapter and Part of, and Schedule to, the Act in which the word occurs:

(3) “sub-section” shall denote a sub-section of the section in which the word occurs :

(4) “commencement,” used with reference to an Act, shall mean the day on which the Act comes into force :

(5) “financial year” shall mean the year commencing on the 1st day of April :

(6) “local authority” shall mean a municipal committee, district board, body of port commissioners, or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund :

(7) “ship” shall include every description of vessel used in navigation not exclusively propelled by oars :

(8) “master,” used with reference to a ship, shall mean any person (except a pilot or harbour-master) having for the time being control or charge of the ship :

(9) “offence” shall mean any act or omission made punishable by any law for the time being in force :

(10) “public nuisance” shall have the meaning assigned to that expression in section 268 of the Indian Penal Code :

(11) “registered” shall mean registered under the law for the time being in force for the registration of documents :

(12) “sign,” with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include “mark,” with its grammatical variations and cognate expressions :

(13) “value,” used with reference to a suit, shall mean the amount or value of the subject-matter of the suit : and

(14) “write,” with its grammatical variations and cognate expressions, shall include “print” and “lithograph,” with their grammatical variations and cognate expressions.

4. Where, by an Act to which this Part applies and which is not to come into force immediately on the passing thereof, a power is conferred on the Governor-General in Council or on a Local Government or a High Court to make rules, or to issue orders with respect to the application of the Act, or with respect to the establishment of any Court or office, or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act, the power may be exercised at any time after the passing of the Act, but

Making of rules and issue of orders between passing and commencement of Act.

rules or orders so made or issued shall not take effect till the commencement of the Act.

**5.** Any power conferred on the Governor-General in Council or on a Local Government by an Act to which this part applies may be exercised from time to time as occasion requires.

Powers to be exercisable by the Government from time to time.

**6.** Where, by an Act to which this Part applies, a power to make rules is expressed to be given subject to the condition of the rules being made after previous publication, the following provisions shall apply, namely :—

Provisions applicable to making of rules after pre-publication.

(1) The authority having power to make the rules shall, before making them, publish a draft of the proposed rules for the information of persons likely to be affected thereby.

(2) The publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Governor-General in Council or the Local Government prescribes.

(3) There shall be published with the draft a notice specifying a date at or after which the draft will be taken into consideration.

(4) The authority having power to make the rules, and, where the rules are to be made with the sanction, approval, or concurrence of another authority, that authority also shall consider any objection or suggestion which may be received by the authority having power to make the rules from any person with respect to the draft before the date so specified.

(5) The publication in an official Gazette of a rule purporting to have been made in exercise of a power to make rules after previous publications shall be conclusive proof that the rule has been duly made.

**7.** (1) Where a limited time from any date or from the happening of any event is appointed or allowed, by an Act to which this Part applies, for the doing of any act or the taking of any proceeding in a Court or office, and the last day of the limited time is a day on which the Court or office is closed, then the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.

Computation of time.



(2) Where, by an Act to which this Part applies, any act or proceeding is directed or allowed to be done or taken in a Court or office on a certain day, then, if the Court or office is closed on that day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.

(3) This section does not apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

**8.** Where an act or omission constitutes an offence under two or more enactments of which either or any is an Act to which this Part applies, the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

Provisions as to offences under more than one enactment.

## PART II.

### SUPPLEMENTAL PROVISIONS.

**9.** The words “wholly or partially” shall be inserted before the word “repealed” in clause (1) of section 3 of the General Clauses Act, 1868, and shall be deemed to have been there from the commencement of that Act.

Amendment of section 3 (1), Act I, 1868.

**10.** The provisions of this Act and of the General Clauses Act, 1868, shall, so far as they can be made applicable, apply to all Regulations which may receive the assent of the Governor-General under the Statute 33 Victoria, chapter 3, section 1, after the commencement of this Act.

Application of this Act Act I, 1868, to Regulations under 33 Vic. chap. 3, sec. 1.

## M. ACT No. I. OF 1867.

PASSED BY THE GOVERNOR OF FORT ST. GEORGE IN COUNCIL.

*An Act to shorten the language used in Acts of the Governor of Fort Saint George in Council, and to make certain provisions relating thereto.*

WHEREAS it is expedient to enact once for all certain definitions of terms usually employed in the Acts of the Governor of Fort Saint George in Council, and to make certain other provisions regarding such Acts; It is enacted as follows:—

Preamble.



**1.** Whenever in any future Act of the Governor of Fort St. George in Council, any word or expression shall be employed which has been defined in Chapter II of the Indian Penal Code, or in Chapter I of the Code of Criminal Procedure, such word or expression shall be taken to have the meaning assigned to it in those Chapters, unless it be otherwise provided by the Act, or unless there be something either in the subject or context repugnant to such construction.

**2.** *First.*—The words “Magistrate of Police” shall denote any person exercising the powers of a Magistrate of Police, within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Madras for the time being.

*Second.*—The words “Town of Madras” shall denote such places as are within the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Madras.

**3.** Where any Act repealing in whole, or in part, any former enactment is itself repealed, such last repeal shall not revive the enactment, or any of the provisions thereof before repealed, unless words be added reviving such enactment or provisions.

**4.** The repeal of any Act or Regulation shall not affect any act which shall have been done, or any offence which shall have been committed, or any fine or penalty which shall have been incurred, or any proceedings which shall have been commenced, before the repealing Act shall have come into operation.

**5.** Where in any future Act of the Governor of Fort Saint George in Council no time is mentioned at which the same shall come into operation, such Act shall take effect from such date as the Governor in Council may notify by publication in the *Fort St. George Gazette*.

**6 & 7.** [*Repealed by Act XVI. of 1874.*]

**8.** This Act may be cited for all purposes as “The Madras General Clauses’ Act, 1867.”

Words defined in Penal and Criminal Procedure Codes to be taken in the same sense.

“Magistrate of Police.”

“Town of Madras.”

Repeal of any Act not to revive laws repealed by such Act.

Matters done under Act before its repeal to be unaffected.

Acts to come into operation from date notified in Gazette.

Short title.

**M. ACT No. I. OF 1891.**

PASSED ON THE 14TH MAY 1891.

*An Act for further shortening the language used in Acts of the Governor of Fort St. George in Council and for other purposes.*

WHEREAS it is expedient to further shorten the language used in Acts made by the Governor of Fort St. George in Council and to make certain further provisions relating to those Acts; It is hereby enacted as follows:—

1. (a) This Act may be called the “The Madras General Clauses Act, 1891”; and

Short title.

(b) It shall come into force on the first day of January 1892.

Commencement.

2. Notwithstanding anything contained in the Madras General Clauses Act, 1867, provisions of that Act shall not apply to this Act or to

Saving clause.

any Act of the Governor of Fort St. George in Council which may be passed subsequent to the commencement of this Act.

**CHAPTER I.****DEFINITIONS.**

3. In this Act and in every Act made by the Governor of Fort St. George in Council after the commencement of this Act unless there be something repugnant in the subject or context—

Definitions.

(1) “Abet,” with its grammatical variations and cognate expressions, shall have the same meaning as in the Indian Penal Code.

Abet.

(2) “Barrister” shall mean a barrister of England or Ireland or a member of the Faculty of Advocates in Scotland.

Barrister.

(3) “British India” shall mean all territories and places within Her Majesty’s dominions which are, for the time being, governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India.

British India.

(4) “Chapter,” “part,” “section,” and “schedule,” shall mean respectively a chapter, part and section of, and schedule to, the Act in which the word occurs.

Chapter, part, section,

- (5) “City of Madras” shall mean such local area as is declared from time to time to be the City of Madras under any Act for the time being in force relating to the Municipal affairs of such City.  
City of Madras.
- (6) “Collector” shall include every officer who, for the time being, is authorized to exercise the powers of a Collector.  
Collector.
- (7) “Commencement,” used with reference to an Act, shall mean the time at which the Act comes into force.  
Commencement.
- (8) “District Collector” shall mean the chief local officer in charge of the Revenue administration of a district.  
District Collector.
- (9) “Document” shall mean any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.  
Document.
- (10) “Financial year” shall mean the year commencing on the 1st day of April.  
Financial year.
- (11) Nothing is said to be done or believed in “good faith” which is done or believed without due care and attention.  
Good faith.
- (12) “Government” shall mean the Governor of Fort St. George in Council.  
Government.
- (13) “Her Majesty” shall include Her heirs and successors to the Crown.  
Her Majesty.
- (14) “Immoveable property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.  
Immoveable property.
- (15) “Imprisonment” shall mean imprisonment of either description as defined in the Indian Penal Code.  
Imprisonment.
- (16) “Judicial proceeding” shall mean any proceeding in the course of which evidence is, or may be, legally taken.  
Judicial proceeding.
- (17) “Local authority” shall mean a Municipal Committee, District Board, body of Port Commissioners or other authority legally

entitled to, or entrusted by the Government with, the control or management of a Municipal or Local Fund.

(18) “Magistrate” shall mean any person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure 1882.

Magistrate.

(19) “Movable property” shall mean property of every description except immovable property.

Movable property.

(20) “Oath,” “swear” and “affidavit” shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.

Oath, swear and affidavit.

(21) “Offence” shall mean any act or omission made punishable by any law for the time being in force.

Offence.

(22) “Person” shall include any company or association of individuals, whether incorporated or not.

Person.

(23) “Place” includes also a house, building, tent and vessel.

Place.

(24) “Presidency of Madras” shall mean the territories within British India for the time being under the administration of the Governor of Fort St. George in Council.

Presidency of Madras.

(25) “Presidency town” shall mean the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Madras.

Presidency town.

(26) “Public” includes any class of the public or any community.

Public.

(27) “Public nuisance” shall have the meaning assigned to that expression in section 268 of the Indian Penal Code.

Public nuisance.

(28) “Registered” shall mean registered in British India under the law for the time being in force for the registration of documents.

(29) “Sign,” with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include “mark” with its grammatical variations and cognate expressions.

Sign.

(30) In the case of any one whose personal law permits adoption, "son" shall include an adopted son and father. "father" an adoptive father.

(31) "Sub-section" shall mean a sub-section.

occurs.

(32) "Value," used with reference to a suit, shall mean the amount or value of the subject-matter of the suit, computed according to the law for the time being in force regulating the valuation of suits for purposes of jurisdiction.

(33) "Will" shall include a codicil and every writing making a voluntary posthumous distribution of property.

(34) Words importing the masculine gender shall include females.

(35) Words in the singular shall include the plural, and words in the plural shall include the singular.

(36) Words which refer to act done extend also to illegal omissions.

(37) "Writing," with its grammatical variations and cognate expressions, shall include "Printing," "Lithography," "Photography,"

with their grammatical variations and cognate expressions and other modes of representing or reproducing words in a visible form.

(38) "Year" and "Month" shall, respectively, mean a year and month reckoned according to the British Calendar.

## CHAPTER II.

### *General Provisions applicable to future Acts.*

4. This chapter shall apply to all Acts made by the Governor of Fort St. George in Council after the commencement of this Act, unless a contrary intention appears in such Acts.

5. Every Act to which this chapter applies and in which no time is mentioned or provision made for its commencement, shall come into force upon the first publication, made in

pursuance of section 40 of the Indian Councils Act, 1861, by the Governor of Fort St. George, of the assent thereto of the Governor-General of India; and in every such Act, the date of such first publication shall be printed either above or below the title of the Act and shall form part of every such Act.

**6.** Where, by an Act to which this chapter applies and which is not to come into force immediately on the passing thereof, a power is conferred on Government or other authority to make rules, or to issue orders, with respect to the application of the Act, or with respect to the appointment of any officer thereunder, such power may be exercised at any time after the passing of the Act, but rules or orders so made or issued shall not take effect till the commencement of the Act.

Making of rules and issue of orders between passing and commencement of Act.

**7.** Where, by an Act to which this chapter applies, a power to make rules is expressed to be given, subject to the condition of the rules being made after previous publication, the following provisions shall apply, namely—

Provisions regulating making of rules after previous publication.

(a) The authority having the power to make the rules shall, before making them, publish a draft of the proposed rules.

Publication of draft rules.

(b) The publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Government prescribes.

Manner of publication.

(c) There shall be published with the draft a notice specifying a date at or after which the draft will be taken into consideration.

Notice to accompany draft rules.

(d) The authority having power to make the rules, and, where the rules are to be made with the sanction, approval or concurrence of another authority, that authority also, shall consider any objection or suggestion which may be received by the authority having power to make the rules from any person with respect to the draft, before the date so specified.

Consideration of suggestions in regard to draft rules.

(e) The publication in the *Fort St. George Gazette* of a rule purporting to have been made in exercise of a power to make rules after previous publication, shall be conclusive proof that the rule has been duly made.

Publication to be proof of due making of rules.

**8.** Where any Act, to which this chapter applies, repeals any other enactment, then the repeal shall not—

(a) affect anything done or any offence committed, or any fine or penalty incurred or any proceedings begun before the commencement of the repealing Act ; or

(b) revive anything not in force or existing at the time at which the repeal takes effect ; or,

(c) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed ; or,

(d) affect any right, privilege, obligation, or liability, acquired, accrued, or incurred under any enactment so repealed ; or,

(e) affect any fine, penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed ; or,

(f) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture, or punishment as aforesaid ; and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such fine, penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed.

**9.** In any Act to which this chapter applies—

(a) for the purpose of reviving either wholly or partially an Act or Regulation, wholly or partially repealed, it shall be necessary expressly to state such purpose ;

(b) for the purpose of excluding the first in a series of days or any other period of time, it shall be sufficient to use the word “from” ;

for the purpose of including the last in a series of days or any other period of time, it shall be sufficient to use the word “to”

(d) for the purpose of expressing that a law relative to the chief or superior, of an office shall apply to the deputies or subordinates lawfully executing the duties of such office in the place of their superior, it shall be sufficient to prescribe the duty of the superior ;

Effect of repealing an Act.

Revival of repealed enactments.

Commencement of term.

Termination of term.

Application to subordinates of law relative to official superiors.

for the purpose of indicating the relation of a law to the successors of any functionaries, or of corporations having perpetual succession, it shall be sufficient to express its relation the functionaries or corporation; and

(f) for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, it shall be sufficient to mention the official title of the officer at present executing such functions, or that of the officer by whom the functions are commonly executed.

**10.** Where an Act, to which this chapter applies, confers power to make rules or bye-laws or to issue orders, expressions used in such rules, bye-laws or orders shall, unless a contrary intention appears in the rules, always been orders, have the same respective meanings as in the Act conferring the power.

**11.** Where, by an Act to which this chapter applies, any act or proceeding is directed or allowed to be done or taken in a Court or office, on a certain day or within a prescribed period, if the Court or office is closed on that day or the last day of the prescribed period, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards on which the Court or office is open.

This section does not apply to any act or proceeding to which the Indian Limitation Act, 1877, applies.

### CHAPTER III.

#### *General Provisions applicable to all Acts.*

**12.** This chapter shall apply to all Acts made by the Governor of Fort St. George in Council, unless a contrary intention appears in any such Act, but it shall not affect anything done or commenced prior to the commencement of this Act under any enactment now in force.

**13.** Where an Act confers a power or imposes a duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires.



**14.** Where an Act confers a power or imposes a duty on the holder of an office, as such, then the power may be exercised and the duty shall be performed by the holder for the time being of the office.

*Exercise of power and performance of duty by temporary holder of office.*

**15.** Where an Act confers a power to make any rules or bye-laws, or to issue orders, the power shall be construed as including a power exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, bye-laws or orders.

*Revocation and alteration of rules, bye-laws and orders.*

**16.** Whenever by an Act any duty of customs or excise or in the nature thereof is leviable on any given quantity, by weight, measure, or value, of any goods or merchandise, a like duty shall be leviable according to the same rate on any greater or less quantity.

*Duty leviable pro rata.*

**17.** Whenever by an Act authority is given to confer powers or impose duties, such powers may be conferred or duties imposed by name or by office or on classes of officials generally by their official title.

*Mode of conferring powers and imposing duties.*

**18.** Where an Act repeals and re-enacts, with or without modification, all or any of the provisions of a former Act, references in any other Act to the provisions so repealed shall be construed as references to the provisions so re-enacted, and if notifications have been published, proclamations or certificates issued, powers conferred forms prescribed, local limits defined, offices established, orders, rules and appointments made, engagements entered into, licenses or permits granted, and other things duly done, under the provisions so repealed, the same shall be deemed, so far as the same are consistent with the provisions so re-enacted, to have been respectively published, issued, conferred, prescribed, defined, established, made, entered into, granted or done under the provisions so re-enacted.

*References to provisions in Acts repealed and re-enacted.*

**19.** The provisions of sections 63, 68, 69 and 70 of the Indian Penal Code shall apply to all fines imposed under the authority of any Act.

*Recovery of fines.*

**20.** Where an act or omission constitutes an offence under two or more enactments, the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same act or omission.

Punishment for offences under more than one enactment.

**21.** Where in any Act, or in any rule passed under any Act, it is directed that any order, notification, or other matter shall be notified or published, such notification or publication shall, unless the Act otherwise provides, be deemed to be duly made if it is published in the *Fort St. George Gazette*.

Publication of orders and notifications in the *Fort St. George Gazette*.

**22.** When by an Act, Government is empowered to extend or apply an Act, or any provision of an Act to any place in, or to any portion of, the Presidency of Madras, the Government may, in any order extending or applying such Act or provision or in a subsequent order, notify the time at which the same shall come into force in the place or portion of the Presidency to which it is so extended or applied; and unless it is otherwise provided in the Act, Government may, by notification in the *Fort St. George Gazette*, from time to time postpone the time at which the Act or provision shall come into force in such place or portion of the Presidency, or cancel the order for extending or applying the same to such place or portion of the Presidency.

Provided that no order postponing the time at which an Act or provision shall come into force, or cancelling an order for extending or applying the same, shall be made after the Act or provision has actually come into force in the place or portion of the Presidency to which such order relates.

Proviso.

# TRANSFER OF PROPERTY.

## ACT No. IV. OF 1882.

RECEIVED THE G.-G.'s ASSENT ON THE 17TH FEBRUARY 1882.

(As amended up to date.)

*An Act to amend the Law relating to the Transfer of Property by act of Parties.*

**Preamble.** WHEREAS it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties ; It is hereby enacted as follows :—

### CHAPTER I.

#### PRELIMINARY.

**Short title.** 1. This Act may be called “ The Transfer of Property Act, 1882 :”

**Commencement.** It shall come into force on the first day of July 1882 :

**Extent.** It extends in the first instance to the whole of British India except the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governor of Punjab, and the Chief Commissioner of British Burma.

But any of the said Local Governments may, from time to time, by notification in the local official Gazette, extend this Act to the whole or any specified part of the territories under its administration.

And any Local Government may, with the previous sanction of the Governor General in Council, from time to time, by notification in the local official Gazette, exempt, either retrospectively or prospectively, any part of the territories administered by such Local Government from all or any of the following provisions, namely :—

Sections 54, paragraphs 2 and 3, 59, 107, and 123.

Notwithstanding anything in the foregoing part of this section, sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven, and one hundred and twenty-three, shall not extend or be extended to any district or tract of country for the time being excluded from the operation of

the Indian Registration Act, 1877, under the power conferred first section of that Act or otherwise.\*

**Note.**

In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage money, or in default for the sale of the mortgage property; *Held*, (*semble* under the Transfer of Property Act) that the decree for sale was the right decree.—I. L. R., 11 Madr. 91.

In the territories to which this act extends for the time being, the enactments specified in the schedule hereto annexed shall be repealed to the extent therein mentioned. But nothing herein contained shall be deemed to affect—

**Repeal of Acts.**

(a) the provisions of any enactment not hereby expressly repealed :—

(b) any terms or incidents of any contract or constitution of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :  
Saving of certain enact-  
ments, incidents, rights,  
ties, &c.

(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or,

(d) save as provided by section 57 and chapter 4 of this Act, any transfer by operation of law, or by, or in execution of, a decree or order of a Court of competent jurisdiction ; and nothing in the second chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan, or Buddhist law.

**Notes.**

The procedure laid down in the Act may be applied to the case of foreclosure of a mortgage executed before the Act came into operation, provided it be so applied as not to affect the rights saved by sec. 2, clause (c). Where, therefore, under the provisions of Regulation XVII of 1806 notice of foreclosure had been served on a mortgagor by conditional sale, the mortgage having been executed, and the foreclosure proceedings taken before the Act came into force, and after the expiry of the year of grace the money not having been paid, the mortgagee instituted a suit for possession on foreclosure, and when such suit was defended by a third party who had purchased the mortgaged property at an execution sale and obtained possession before the commencement of the foreclosure proceedings and the necessary notice had not been served upon him :—*Held*, that it was competent to the Court to apply the procedure prescribed by the Act and grant the mortgagee a decree in the terms of sec. 86, substituting the period of "one year" for the period of "six months" therein mentioned. *Ganga Sahai v. Kishan Sahai*. I. L. R., 6 Al. 622, referred to.—I. L. R., 11 Cal. 582.

A decree holder, who had obtained a decree in the year 1880 against his judgment-debtor, declaring his title on certain mortgaged properties and

authorizing a sale, sought, after several previous applications keeping the decree alive, to execute his decree again on the 15th April 1885. The judgment-debtor objected on the ground that no suit had been instituted or decree obtained under sec. 67 of the Act as directed by sec. 99 :—*Held*, that sec. 99, of that Act was not intended to apply to decrees already obtained declaring a lien and authorizing a sale, but even assuming that it was so intended, sec. 2 of the Act saved the right of the decree-holder to obtain a sale of the mortgaged properties. *Ganda Sahai v. Kishen Sahai*. I. L. R., 6 Al. 262, distinguished.—12 Cal. 436.

Where a suit is brought, after the date of the Act, for the foreclosure of a mortgage dated previous to the Act the procedure to be followed is that given by the Act; the procedure of Regulation XVII, 1806 not being saved by sec. 2 clause (c.) of Act IV of 1882. I. L. R., 6 Al. 262, approved. *F. Wilson, J.*—It is a General rule in construing Statutes that in matters substantive right they are not to be so read as to take away vested rights but that in matters of procedure they are general in their operation. There is nothing in the Transfer of Property Act from which it can be beyond reasonable doubt concluded that the Legislature intended to depart from this settled principle of legislation. *Per Trevelyan, J.*—There is a clear distinction between “relief” and the mode or procedure for obtaining such relief. The “relief” remains unaffected by a change of procedure. The “rights and liabilities” of a mortgagor and mortgagee, and the “relief” in respect of such rights and liabilities, are the same under Act IV of 1882, as they were before. A different procedure for enforcing such rights and obtaining such relief has however been adopted by the Transfer of Property Act.—12 Cal. 583.

The year of grace allowed by sec. 8, Regulation XVII of 1806, is a matter of procedure, which it was open to the parties to extend by mutual agreement without prejudice to the proceedings already had under the section, and upon the expiration of such extended period the mortgagee acquired an immediate right to have a decree declaring the property to be his absolutely. The right so acquired by the mortgagee while the Regulation was in force is a right which falls within the meaning of cl. (c), sec. 2 of the Transfer of Property Act. Proceedings under sec. 8 had come to a close by the expiration of the stipulated period of extension while the Regulation was still in force, and the mortgagee brought his suit for possession in pursuance thereof after the passing of the Transfer of Property Act. *Held* that the mortgagee was entitled to a decree such as he would have had if the Regulation had been still in force.—14 Cal. 451.

A suit was brought on the 24th January, 1885, by a mortgagee upon a mortgage by conditional sale asking for a declaration that the mortgagor's right to redeem had been extinguished and that he was entitled to possession of the mortgaged properties. The mortgage was dated the 6th April, 1881, and the mortgage money was repayable on the 13th May, 1881. On the 9th July, 1881, the mortgagee caused a notice to be served on the mortgagor in compliance with the provisions of secs. 7 and 8 of Regulation XVII of 1806. The year of grace expired on the 10th July, 1882. It was contended by the mortgagor that, as the Transfer of Property Act came into force on the 1st July, 1882, the proceedings taken by the mortgagee should be regulated by the procedure laid down in secs. 86 and 87 of that Act, and not by the procedure prescribed by Regulation XVII of 1806. *Held*, that the procedure laid down by the Transfer of Property Act could not be applied to the case. Although the year of grace had not expired

when that Act came into force, and the full and complete right of the mortgagee had not accrued, he had acquired the right to bring a suit under the provisions of Regulation XVII of 1806 at the expiration of the year of grace, and the mortgagor was under a liability to part with his property upon a suit being brought at the expiration of that year, and such right and liability came within the meaning of these terms as used in clause (c), sec. 2 of the Transfer of Property Act.—14 Cal. 599.

In a suit for foreclosure under a deed of conditional sale, where the due date of the deed expired and notice of foreclosure was served while Regulation XVII of 1806 was in force, but before the expiration of the year of grace that Regulation had been repealed by the Transfer of Property Act, *Held*, following *Mohabir Pershad Narain Singh v. Gungadbur Pershad Narain Singh*, I. L. R., 14 Cal. 599, that, proceedings for foreclosure having been commenced under the Regulation, those proceedings were saved by sec. 6 of the General Clauses Consolidation Act I of 1868. The "Proceedings" referred to in that section are not necessarily judicial proceedings only, but ministerial proceedings, as, in the present case, the service of notice of foreclosure.—15 Cal. 357.

In 1884, a mortgagee obtained a decree for arrears of interest due under a mortgage deed of 1879 and in execution of the decree attached and applied for the sale of the land mortgaged :—*Held*, that by reason of sec. 99 of the Transfer of Property Act, 1882, the land could not be sold otherwise than by a suit instituted under sec. 67 of the said Act.—I. L. R., 10 Madr. 129.

In a suit in 1888 to recover principal and interest due on a usufructuary mortgage executed on 15th June 1870 which contained a covenant for repayment of the secured debt on 5th June 1878 the defendant pleaded and proved that the mortgagee had permitted certain buildings on the mortgage premises to fall into a ruinous condition, and it appeared that the mortgagee had remained in possession after June 1878 :—*Held*, (1) that the defendant was entitled to have the amount of the loss occasioned by the plaintiff's failure to make repairs brought into the mortgage account under Transfer of Property Act, sec. 76, and a separate suit by him for that amount was not necessary ; (2) that the profits derived by the mortgagee after the date fixed for repayment should be regarded as having been enjoyed in lieu of interest.—15 Madr. 290.

In the course of the winding up of a Company, the official liquidator, with the sanction of the Court, sold the remainder of a lease for a long term of years, reserving a rent, which was held by the company. No written assignment was ever executed, but the official liquidator handed over the lease to the purchaser, who entered into possession. In a suit by the lessors against the purchaser for rent, *Held* that whether the assignment was invalid because not in writing and registered, or whether it fell within sec. 2 (d) of the Transfer of Property Act (IV of 1882), the defendant, even if not liable as assignee in law of the lease, was liable for rent as for the use and occupation, and under such circumstances the rent fixed by the lease would be a fair basis for the amount to be decreed.—14 Al. 176.

See I. L. R., 15 Madr. 382, noted under section 135.

**3.** In this Act, unless there is something repugnant in the subject or context,—“immovable property” does not include standing timber.

Interpretation-clause.  
“immovable property :”



“instrument :”

“instrument” means a non-testament-

“registered” means registered in British India under the law for the time being in force regulating the registration of documents :

“attached to the earth :”

“attached to the earth” means—

(a) rooted in the earth, as in the case of trees and shrubs ;  
(b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached :

and a person is said to have “notice” of a fact when he actually knows that fact, or when, but for wilful abstension from an inquiry or search which he ought to have made, or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent under the circumstances mentioned in the Indian Contract Act, 1872, Section 229.

“notice.”

#### Notes.

In a suit for the declaration of the priorities of mortgages and for foreclosure, it appeared that the mortgage premises had been purchased by the mortgagor from the second defendant and others in 1878, under a conveyance containing a covenant that they were free from incumbrances, and the mortgagor then received, *inter alia*, a Collector's certificate which was recited in another title-deed also handed over to her. The premises were mortgaged to defendant No. 2, who was an experienced sowcar in 1879 and to the plaintiff company in 1883 and again in 1884 and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff company on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff company and defendant No. 2 had no notice at the respective dates of their mortgages and conveyance of any previous incumbrance. The plaintiff company received the title-deeds of the estate from the mortgagor (but not the Collector's certificate) on the execution of the mortgage of 1883 ; the second defendant alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that before the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody :—*Held*, (1) that the plaintiff company were not affected with constructive notice of the mortgage of the second defendant by reason of its registration or of their failure to search the registry or to inquire after the Collector's certificate ; (2) that the second defendant not having given a reasonable explanation of his conduct in leaving the title-deeds with the mortgagor four years after his mortgage, lost his priority by reason of his gross neglect under Transfer of Property Act, sec. 78, apart from the circumstances raising a suspicion of fraud on his part.—*Quære* : whether the not have been decided against the second defendant on the

ground that his mortgage was merged in the conveyance of 1886.—I. L. R., 15 Madr. 268.

A and B jointly mortgaged certain immovable property to X by a simple mortgage-deed on the 10th September 1882. They again mortgaged the same property to X on the 23rd February 1884. On the 6th August 1885, A mortgaged a portion of the said property to Y. On the 12th August 1885, B mortgaged a portion of the same property to X. On the 21st August 1885, A mortgaged a portion of the same property to Z. On the 20th September 1886, A and B sold to X the property mortgaged to him and with the proceeds of that sale X's three mortgages were paid off. On the 8th January 1887, Y sued A, B and X for cancelment of the deed of sale of the 20th September 1886, and for sale of the property mortgaged to him under his deed of the 6th August 1885. Y did not make Z a party to this suit. He did not ask for redemption of X's mortgages nor for foreclosure of Z's mortgage. Upon these facts it was held by EDGE, C. J., Straight, Tyrrell and Knox, J. J :—Mahmood, J. *dissentiente*. (1) That X not having exhibited any intention of foregoing altogether his rights in respect of the mortgages of the 10th September 1882 and the 23rd February 1884, was entitled to keep those securities alive and to use them as a shield against the claim of Y, the subsequent mortgagee, to the extent of the amount which was due under them on the 20th September 1886. *Gokuldoss Gopaldoss v. Rambux Seochand*; *Gaya Prasad v. Salik Prasad*; *Mul Chand Kuber v. Lallu Trikam*; *Shantapa v. Balapa*; *Ramu Naikan v. Subbaraya Mudali*; *Sirbadh Rai v. Raghunath Prasad*; *Janki Prasad v. Sri Matra Mantangui Debia*, and *Gangadhara v. Sivarama* referred to. (2) That Y as subsequent mortgagee could not bring to sale under his mortgage-deed the property mortgaged to him without first redeeming X's two prior mortgages. *Syud Wajed Hossein v. Hafez Ahmud Rezah*; *Khub Chand v. Kalian Das*; *Kasum-un-nisa Bibi v. Nilratna Bose*; *Har Prasad v. Bhagwan Das*; *Muhammad Ibrahim v. Tek Chand*; *Ali Hasan v. Dhirja and Zalim Gir v. Ram Charan Singh* referred to, in addition to the cases cited above. *Raghunath Prasad v. Jurawan Rai*, distinguished. *Vencata Chella Kandian v. Panjanadien*; *Gangadhara v. Sivarama* and the judgments of Mahmood, J., in *Sirbadh Rai v. Raghunath Prasad* and in *Janki Prasad v. Sri Matra Mantangui Debia* dissented from. (3) That Z's mortgage of the 21st August 1885 having been registered, Y must be taken to have had notice of it, and, having had notice thereof, was bound to make Z a party to the suit for sale under his (Y's) mortgage. *Damodar Dev Chand v. Naro Mahadev Kelkar and Dullabhdas Dev Chand v. Lakshmandas Sarup Chand* referred to. (4) That the term "property" as used in Chapter IV of Act IV of 1882, means an actual physical object and does not include mere rights relating to physical objects. *Held* by the Full Bench. That the Transfer of Property Act (Act IV. of 1882), so far as the question of reliefs and procedure is concerned, applies to mortgages executed before the coming into force of the Act. *Ganga Sahai v. Kishen Sahai*; and *Bhobo Sundari Debi v. Rakhal Chunder Bose* referred to. Mahmood, J., *contra* :—Inasmuch as a mortgagee cannot bring the mortgaged property to sale without the intervention of a court, a private purchase by the mortgagee of the rights remaining to the mortgagor in such property, though it may be valid as against the mortgagor, can have no effect in defeating the rights of puisne and mesne incumbrancers. Moreover, where a second mortgage to a third party intervenes between the mortgage to and the purchase by the prior mortgagee of the rights of the mortgagor, such intermediate mortgage prevents the merger of the rights of the prior mortgagee as such with those which he



might acquire by his purchase. The right of sale is an essential incident of a simple mortgage, and inheres as well in puisne and mesne as in prior mortgagees, subject to the rights of the prior mortgagees. The puisne or mesne mortgagee is not bound by the terms of the prior mortgage, or mortgages, but is entitled to bring the property mortgaged to sale, subject to such prior mortgage or mortgages. The provisions of sec. 85 of Act IV of 1882 are not absolutely imperative, and though thereunder a subsequent incumbrancer ought to be made a party to a suit by a prior mortgagee on his mortgage, the non-joinder of such subsequent incumbrancer is not a fatal defect in the suit. Registration of a subsequent mortgage is not necessarily any notice to a prior mortgagee of the existence of such subsequent mortgage; it being no part of a mortgagee's duty to be on the watch for incumbrances subsequent to his own. The term "property" throughout Act IV. of 1882 is used in its most generic sense and will include the right known as an "equity of redemption."—13 Al. 432.

Enactments relating to contracts to be taken as part of Act IX of 1872.

4. The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872.

And sections fifty-four, paragraphs two and three, fifty-nine, one hundred and seven, and one hundred and twenty-three, shall be read as supplemental to the Indian Registration Act, 1877.\*

## CHAPTER II.

### OF TRANSFERS OF PROPERTY BY ACT OF PARTIES.

(A).—*Transfer of Property, whether moveable or immoveable.*

5. In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons, and "to transfer property" is to perform such act.

6. Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force :

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

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\* This paragraph has been added by Act III. of 1885, sec. 3.

An easement cannot be transferred apart from the dominant heritage.

(*d*) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(*e*) A mere right to sue for compensation for a fraud or for harm illegally caused cannot be transferred.

(*f*) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(*g*) Stipends allowed to military and civil pensioners of Government and political pensions cannot be transferred.

(*h*) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an illegal purpose, or (3) to a person legally disqualified to be transferee.

(*i*) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee.\*

#### Notes.

The office of *mutwali* is a personal trust and may not be transferred, nor the endowed property conveyed to any person whom the acting *mutwali* may select.—I. L. R., 8 Cal. 732.

Under the Transfer of Property Act, property includes an actionable claim. There was sold in execution of a decree the judgment-debtor's right to get by division a quantity of land which had been reserved by him for his own use in a deed of gift, but which, at the time of the execution sale, was in the possession of the donee of the estate, the land never having been appropriated by measurement as provided in the deed. In a suit brought by the auction-purchaser decree-holder, for the area of the land reserved, by measurement and division: *Held*, that the claim of the judgment-debtor to the land was a transferable claim, and therefore capable of being attached and sold in execution under sec. 266 of the Civil Procedure Code.—14 Cal. 241.

An Archaka (a priest who alone is allowed personally to attend upon the idol) cannot sell the office and emoluments of Paricharaka (assistant to the Archaka—not allowed to touch the idol), inasmuch as they are *extra commercium*.—4 Madr. 391.

A condition in a lease providing that the landlord may re-enter on non-payment of rent is penal and will be relieved against, apart from the provisions of the Transfer of Property Act. *Semble*: The transfer of the reversion based on a clause for forfeiture is not invalid by reason of Transfer of Property Act, sec. 6, clause. (*b*).—15 Madr. 125.

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\* This paragraph has been added by Act III. of 1885, sec. 4.

Hereditary offices, whether religious or secular, are no doubt treated by the Hindu text writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property by means of a performance of the duties of the office and the enjoyment of the emoluments by the different co-parceners in rotation. The alienation, therefore, by a divided member of a Hindu family to his sister's son, of the right of worshipping a goddess and receiving a share of the offerings was upheld.—6 Bom. 298.

The income of a religious endowment *may be temporarily* pledged for necessary purposes, such as repairs &c. But the endowment cannot be sold or permanently alienated.—6 Bom. 546.

The property of a temple cannot be sold away from the temple; but there is no objection to the sale of the right, title and interest of a servant of a temple in the land belonging to the temple which he holds as remuneration for his service; the interest sold being subject in the hands of the alienee to determination by the death of the original holder, or by his removal from his office on account of his failure to perform the service.—6 Bom. 596.

The right of managing a temple, which is a religious endowment, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, cannot, in default of proof to the contrary, pass outside the family of the trustee until absolute failure of succession in his family, and such rights are therefore not saleable in execution of decree.—4 Al. 81.

The mere right to sue for compensation for the wrongful attachment of moveable property in execution of a decree is not transferable by sale.—5 Al. 207.

See I. L. R., 13 Al. 432, noted under sec. 3.

**7.** Every person competent to contract, and entitled to transfer. *Persons competent to transfer.* transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part, and either absolutely or conditionally, in the circumstances, to the extent, and in the manner, allowed and prescribed by any law for the time being in force.

**8.** Unless a different intention is expressed or necessarily implied, a transfer of property *Operation of transfer.* passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth; and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing after the transfer, and

the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith ;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer ;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.

9. A transfer of property may be made without writing in every case in which a writing is not expressly required by law.

Oral transfer.

10. Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him : provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

Condition  
alienation.

restraining

#### Note.

In a suit for possession of certain shares in certain villages, a compromise was effected between the plaintiffs and B the defendant. The terms of the compromise were embodied in a deed, the terms of which were (*inter alia*) as follows :—“ The said B will hold possession as a proprietor, generation by generation, without the power of transferring in any shape..... The following shares recorded in B's name shall not be transferred or sold in auction in payment of any debt payable by the said B, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession.” B obtained possession of the shares allotted to him by the compromise. Subsequently, certain creditors of B attached the shares referred to in the deed in execution of a decree obtained against the heirs of B for money lent to B on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them. The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment :—*Held*, by Oldfield, J., that the deed of compromise passed an absolute estate to B and his heirs to which the law annexed a power of transfer, and that, in reference to sec. 10 of the Transfer of Property Act, the stipulation against alienation on B's part, or against sale by auction in execution of decrees against him, was void. *Per* Mahmood, J.—That the rule contained in sec. 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession or inheritance, to be governed by sec. 24 of the Bengal Civil

Courts Act; that it was for those objecting to the attachment to show that, under the Hindu Law, the rights of B in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that, the Hindu Law being silent on this subject, the principles of justice, equity and good conscience must be applied, to which, so far as transfer was concerned, effect was given by sec. 10 of the Transfer of Property Act; that the restriction imposed by the deed of compromise upon B's powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognized; and that B must be held to have had an absolute estate which would devolve upon his heirs, and which could be sold in execution of decrees for his debts. *The Tagore Case* referred to.—I. L. R., 7 Al. 516.

**11.** Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Nothing in this section shall be deemed to affect the right to restrain, for the beneficial enjoyment of one piece of immoveable property, the enjoyment of another piece of such property, or to compel the enjoyment thereof in a particular manner.

#### Notes.

According to Hindu law a restriction against alienation in a gift of land to Brahmans is inoperative as being a condition repugnant to the nature of the grant.—I. L. R., 4 Madr. 200.

M, a co-sharer in a village, transferred to A, another co-sharer a two annas share by deed of sale. Upon the same date A executed an *ikrar-namah* in which he agreed that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of A committing any breach of covenant the sale should be avoided, and the proprietary rights in the two annas share should re-vest in M. A suit was subsequently brought by M, upon the allegations that, in breach of the covenants of the *ikrar-namah*, A had collected the rents of the share; that he had sought to obtain partition of the same by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff had been compelled to sue the tenants; that in these suits the tenants exhibited receipts given by A, on the basis of which the suits were dismissed, and that he had been subjected to various costs and expenses. He therefore claimed, by way of damages, from A the amount of these costs and expenses, and also to recover certain sums of money realized by A as rent from the tenants, and further, by reason of the *ikrar-namah* to avoid the sale-deed which preceded it:—*Held*, that the deed of sale and the *ikrar-namah* must be regarded as recording one single transaction, i. e., they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which on the face of it professed to be a sale of a two annas share to the other by the former; and that, in this view, it was clear from the *ikrar-namah* that the proprietary

title created by the sale-deed was cut down to nil, and limitations palced upon it which rendered it useless as a proprietary right. *Sital Purshad v. Luchmi Purshad* referred to :—*Held*, that provisions of this kind which absolutely debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought; to recognize or give effect to; that a covenant in a sale-deed the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principal of sections 10 and 11 of the Transfer of Property Act; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fall. *Kolman v. Johnson*, *Anantha Tirtha Chariar v. Nagmuthu Ambulagaren v. Bradley v. Peixoto* and *Hussain Khan Bahadur v. Materi Srinivasa Charlu* referred to. *Balaji J. Rahalkar v. Narayanbhat* distinguished. *Held* by Mahmood J.—With reference to the sums realized by the defendant as rent, that whatever may be the rights of a lambardar in reference to the collection of rents, the defendant, being a co-sharer in the village, and having, though perhaps irregularly, realized sums of money from the tenants, could not, in a Civil Court and in a suit of this nature, be made to repay the lambardar; and the latter's only remedy was to deduct the items when the bujharat or rendition of accounts between the co-sharers and himself took place. *Held* by Mahmood, J.—With reference to the costs incurred by the plaintiff in the Revenue Court, that such Court in the suit former was entitled to deal with the question of costs, and dealt with it, and the costs could not be made the subject-matter of fresh litigation, and therefore could not be claimed in this suit by way of damages. *Chengulva Raya Mudali v. Thangakhi Ammal*, *Jalam Punja v. Khoda Javra*, *Kabir v. Mahadu* and *Praushankar Shivshankar v. Govindhral Parbhudas* referred to.—8 Al. 452.

**12.** Where property is transferred subject to a condition or limitation making any interest therein, reserved or given to or for the benefit of any person, to cease on his becoming insolvent or endeavouring to transfer or dispose of the same, such condition or limitation is void.

Condition making interest determinable on insolvency or attempted alienation.

Nothing in this section applies to a condition in a lease for the benefit of the lessor or those claiming under him.

**13.** Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Transfer for benefit of unborn person.

*Illustration.*

A transfers property of which he is the owner, to B, in trust for A and his intended wife successively for their lives, and after the death of the survivor for the eldest son of the intended marriage for life, and after his



death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

**14.** No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Rule against perpetuity.

**15.** If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in Sections thirteen and fourteen, such interest fails as regards the whole class.

Transfer to class some of whom come under Sections 13 and 14.

**16.** Where an interest fails by reason of any of the rules contained in Sections thirteen, fourteen, and fifteen, any interest created in the same transaction, and intended to take effect after or upon failure of such prior interest, also fails.

Transfer to take effect on failure of prior transfer.

**17.** The restrictions in Sections fourteen, fifteen, and sixteen, shall not apply to property transferred for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

Transfer in perpetuity for benefit of public.

**18.** Where the terms of a transfer of property direct that the income arising from the property shall be accumulated, such direction shall be void, and the property shall be disposed of as if no accumulation had been directed.

Direction for accumulation.

*Exception.*—Where the property is immoveable, or where accumulation is directed to be made from the date of the transfer, the direction shall be valid in respect only of the income arising from the property within one year next following such date; and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed.

#### Note.

A bequest was held void for uncertainty, and because a portion of the estate was left to accumulate for ever without a disposition of the profits.—I. L. R., 7 Cal. 269.

Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

*Vested interest.*

A vested interest is not defeated by the death of the transferee before he obtains possession.

*Explanation.*—An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that, if a particular event shall happen, the interest shall pass to another person.

**20.** Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appear from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

**21.** Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event; in the latter, when the happening of the event becomes impossible.

*Contingent interest.*

*Exception.*—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

to members of  
a class who attain a parti-  
age.

**22.** Where, on a transfer of property, an interest therein is created in favour



of such members only of a class as shall attain a particular age, such interest does not vest in any member of the class who has not attained that age.

**23.** Where, on a transfer of property, an interest therein is to accrue to a specified person if a specified uncertain event shall happen, and no time is mentioned for the occurrence of that event, the interest fails, unless such event happens before, or at the same time as, the intermediate or precedent interest ceases to exist.

Transfer contingent on happening of specified uncertain event.

**24.** Where, on a transfer of property, an interest therein is to accrue to such of certain persons as shall be surviving at some period, but the exact period is not specified, the interest shall go to such of them as shall be alive when the intermediate or precedent interest ceases to exist, unless a contrary intention appears from the terms of the transfer.

Transfer to such of certain persons as survive at some period not specified.

*Illustration.*

A transfers property to B for life, and after his death to C and D, equally to be divided between them, or to the survivor of them. C dies during the life of B. D survives B. At B's death the property passes to D.

**25.** An interest created on a transfer of property, and dependent upon a condition, fails if the fulfilment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Conditional transfer.

*Illustrations.*

(a.) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(b.) A gives Rupees 500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(c.) A transfers Rupees 500 to B on condition that she shall murder C. The transfer is void.

(d.) A transfers Rupees 500 to his niece C if she will desert her husband. The transfer is void.

**26.** Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Fulfilment of condition precedent.

*Illustrations.*

(a.) A transfers Rupees 5,000 to B on condition that he shall marry with the consent of C, D, and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rupees 5,000 to B on condition that he shall marry with the consent of C, D, and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

**27.** Where, on a transfer of property, an interest therein is created in favor of one person, and by the same transaction an ulterior disposition of the same interest is made in favor of another if

I transfer to coupled with to another on failure of prior disposition.

under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

*Illustrations.*

(a.) A transfers Rupees 500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he should neglect to do so, to C. B dies in A's lifetime. The disposition in favor of C takes effect.

(b.) A transfers property to his wife; but in case she should die in his lifetime, transfers to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favor of B does not take effect.

**28.** On a transfer of property, an interest therein may be created to accrue to any person with the condition superadded that, in case a specified uncertain event shall happen, such interest shall pass to another person, or that, in case a specified uncertain event shall not happen, such interest shall pass to another person. In each case the dispositions are subject to the rules contained in Sections ten, twelve, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, and twenty-seven.

Ulterior transfer conditional on happening or not happening of specified event.

**29.** An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Fulfillment of condition subsequent.

*Illustration.*

A transfers Rupees 500 to B, to be paid to him on his attaining his majority or marrying, with a proviso that, if B dies a minor, or marries without C's consent, the Rupees 500 shall go to D. B marries when only 17 years of age, without C's consent. The transfer to D takes effect.

Prior disposition not affected by invalidity of ulterior disposition.

**30.** If the ulterior disposition is not valid, the prior disposition is not af-

*Illustration.*

A transfers a farm to B for her life, and, if she do not desert her husband, to C, B is entitled to the farm during her life as if no condition had been inserted.

**31.** Subject to the provisions of Section twelve, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen.

*Illustrations.*

(a.) A transfers a farm to B, for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life-interest in the farm.

(b.) A transfers a farm to B, provided that, if B shall not go to England within three years, after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

**32.** In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be one which could legally constitute the condition of the creation of an interest.

Such condition must not be invalid.

**33.** Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Transfer conditional on performance of act, no time for performance.

**34.** Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfilment of which the interest is to pass from him to another person, and a time is specified for the performance

Transfer conditional on performance of act, time being specified.

of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non fulfilment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But, if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfilment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

*Election.*

**35.** Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of,

subject nevertheless,

. where the transfer is gratuitous, and the transferor has, before the election died or otherwise become incapable of making a fresh transfer,

and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

*Illustration.*

The farm of Sultanpur is the property of C and worth Rupees 800, A by an instrument of gift professes to transfer it to B, giving by the same instrument Rupees 1,000 to C. C elects to retain the farm. He forfeits the gift of Rupees 1,000.

In the same case, A dies before the election. His representative must, out of the Rupees 1,000, pay Rupees 800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his own capacity takes a benefit under the transaction may in another dissent therefrom.

*Exception to the last preceding four rules.*—Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such

benefit is expressed to be in lieu of that property, if such owner claim the property, he must relinquish the particular benefit, but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect, any of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

*Illustration.*

A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine, and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not, within one year after the date of the transfer, signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

*Apportionment.*

**36.** In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends, and other periodical payments in the nature of income, shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Apportionment of periodical payments on determination of interest of person entitled.

**37.** When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favor of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed, and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose:

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes, unless and until the Local Government, by notification in the official Gazette, so directs

*Illustrations.*

(a.) A sells to B, C and D a house situate in a village, and leased to E at an annual rent of Rupees 30 and delivery of one fat sheep, B having provided half the purchase-money, and C and D one quarter each. E, having notice of this, must pay Rupees 15 to B, Rupees  $7\frac{1}{2}$  to C, and Rupees  $7\frac{1}{2}$  to D, and must deliver the sheep according to the joint direction of B, C, and D.

(b.) In the same case, each house in the village being bound to provide ten days' labor each year on a dyke to prevent inundation, E had agreed as a term of his lease to perform this work for A, B, C, and D, severally require E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C, and D, may join in giving.

**Notes.**

The necessity for the apportionment of benefit of obligation arises in case where property held by one owner is transferred in bits to several.

A sale of a share in a tenure, let out to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure or an apportionment of the rent; but if a purchaser of the share desires to have such a severance, he is entitled to enforce it. If he takes no steps for the purpose, then, the tenant is justified in paying the entire rent to all the parties jointly entitled to it. But, if the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect; and then, if the parties cannot agree to an apportionment the purchaser may sue the tenant for the purpose of having the rent apportioned, making all other co-sharers parties to the suit.—I. L. R., 5 Cal. 902.

*(B).—Transfer of Immoveable Property.*

**38.** Where any person, authorized only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

Transfer by person authorized only under certain circumstances to transfer.

*Illustration.*

A, a Hindu widow, whose husband was left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed.

**39.** Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immoveable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention, or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Transfer where third person is entitled to maintenance.

*Illustration.*

A, a Hindu, transfers Sultanpur to his sister-in-law B in lieu of her claim against him for maintenance in virtue of his having become entitled to her deceased husband's property, and agrees with her that, if she is dispossessed of Sultanpur, A will transfer to her an equal area out of such of several other specified villages in his possession as he may elect. A sells the specified villages to C, who buys in good faith, without notice of the agreement. B is dispossessed of Sultanpur. She has no claim on the villages transferred to C.

**Notes.**

Plaintiff purchased a house in execution of a decree against R, while a suit was pending against R by the defendant for maintenance against the house, which was since decreed in her favour. *Held*, that what the plaintiff brought from R was his right, title and interest in the house, which, being subject to the decree in the defendant's pending suit, the plaintiff's purchase was likewise subject to the same, and the circumstance that the plaintiff had placed a prior attachment on the house made no difference. The plaintiff therefore could not eject the defendant during her life-time.—I. L. R., 6 Bom. 567.



An owner of property made a grant therefrom of an annuity, with a proviso that, in case of failure to pay the same, the grantee and her heirs should be entitled to take possession of the property. He subsequently mortgaged the same property, by an instrument which set out that it was his absolutely. After this he paid the annuity till the death of the grantee, whose heir he was. The mortgagees obtained a decree upon their deed, and in execution thereof the property was attached and sold, and the decree-holders obtained possession. The heirs of the mortgagor sued the decree-holders for recovery of possession, and for arrears of the annuity claiming under the terms of the grant:—*Held*, that the charge merged and was extinguished, and as the grantor had professed to transfer the property to the mortgagees unincumbered, he was bound to give it over to them free from incumbrance, and it would not lie in his mouth, nor in the mouths of his heirs, to set up the charge against the mortgagees and their vendees.—7 Al. 864.

**40.** Where, for the more beneficial enjoyment of his own immoveable property, a third person has, independently of any interest in the immoveable property of another or of any easement thereon, a right to restrain the enjoyment of the latter property, or to compel its enjoyment in a particular manner, or

where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon,

such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands.

*Illustration.*

A contracts to sell Sultanpur to B. While the contract is still in force, he sells Sultanpur to C, who has notice of the contract. B may enforce the contract against C to the same extent as against A.

**Notes.**

A, by oral agreement, agreed to grant two *mokurari* leases of certain properties upon certain terms to B, and thereupon executed two *mokurari* leases in favor of B, which were not however registered and delivered. Afterwards, A granted two *mokurari* leases of the same *mouzas*, upon terms more favourable to himself, to C and D, who, at the time of such grant, had notice of A's previous agreement with B. *Held*, in a suit for specific performance brought by B against A, to which C and D were added as defendants, that, notwithstanding the provisions of sections 49 and 50 of the Registration Act III of 1877, B could obtain decree for specific relief, and a declaration that the leases to C and D were void as against him.—6 Cal. 534. See also M. H. C. R., 2-14 and 6-75.



In January 1883 a decree was obtained upon a bond executed in October 1875, whereby certain immoveable property was made security for a loan, the transaction being described not by the word "*rehan*" or mortgage, but by the words "*arh*" and "*mustaghraq*." The instrument contained no express covenant for sale of the property in default of payment, but it contained a covenant prohibiting alienation until payment, and a stipulation that, in the event of the property specified being destroyed or proving insufficient to satisfy the debt, the obligee might realize the amount from the obligor's person and other property. The decree directed the sale of the property as in the terms of an ordinary decree for the sale of mortgaged property. In 1885, before any steps had been taken in execution of the decree, the same property was sold in execution of a simple money decree against the obligor, and the purchaser obtained possession. It was found as a fact that at the time of the sale the bond of October 1875, and the decree thereon of January 1883, were not notified, but through no fault of the obligee decree-holder, and that the purchaser was a *bona fide* transferee for value without notice of the bond and decree. *Held* that the words "*arh*" and "*mustaghraq*" used in the bond implied a power of sale in default and denoted a mortgage without possession: that the transaction, though entered into prior to the passing of the Transfer of Property Act (IV of 1882), must be regarded as amounting to a simple mortgage as defined in sec. 58 (b) of that Act, and not as merely creating a charge as defined in sec. 100; and that consequently the rights of the obligee must prevail over those of the subsequent *bona fide* purchaser for value without notice of the bond and the decree thereon. *Held* also by Mahmood, J., that the title of the judgment-debtor at the time of the sale in 1885 in execution of the simple money decree was subject to the mortgage decree of January 1883, and the purchaser at that sale could acquire no higher title than the judgment-debtor possessed, and was equally bound by the terms of the decree of January 1883, in respect of the property which he had purchased, and could not prevent the property being sold under that decree except by paying up the decretal money. *Unnopoorna Dassee v. Nufur Poddar and Rajah Enayet Hossein v. Giridhari Lal* referred to. *Per* Mahmood, J.—The power of sale mentioned in sec. 58 (b) of the Transfer of Property Act is not a power in the mortgagee to bring the mortgaged property to sale independently of a Court. The observations on this point of Muttuswami Ayyar, J., in *Rangasami v. Muttu Kumarrappa*, of Birdwood and Jardine, J J., in *Khemji Bhagvandas v. Rama* and of Petheram, C. J., in *Sheoratan Kuar v. Mahipal Kuar*, dissented from. The nature of simple mortgage, hypothecation, charge, and lien discussed. *Aliba v. Nann*, *Martin v. Pursram Raj Coomer Ram Gopal Narain Singh v. Ram Dutt Chowdhry*, *Moti Ram v. Vitai*, *Gopal Pandey v. Parsotam Das*, *Shib Lal v. Ganga Prasad*, *Girdhar Ranchoddas v. Hakamchand Revachand*, *Sobhagchand Gulabchand v. Bhaichand*, *Naran Purshotam v. Daolatram Virchand*, and *Durga Prasad v. Shambhu Nath* referred to.—I.L.R., 13 Al. 28

Where, with the consent, express or implied, of the

Transfer by ostensible persons interested in immoveable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

**Notes.**

In a suit by a mortgagee against the father and sons to recover the mortgage-debt created by the father :—*Held*, that it was incumbent on the plaintiff to shew for what purpose the loan was contracted, and that that purpose was one which justified the father in charging, or which the plaintiff had at least good grounds for believing did justify the father in charging, the son's interests in the ancestral immoveable property.—I. L. R., 2 Cal. 438.

A purchaser for value from the ostensible owner without notice of the right of the *benamidar* was held entitled to get possession of the property purchased, from the *benamidar*.—7 Cal. 199.

See also I. L. R., 5 Cal. 855, 6 Cal. 749 and 8 Cal. 131. Also 6 Bom. 165 and 168.

**42.** Where a person transfers any immoveable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another

Transfer by person having authority to revoke former transfer.

transferee, such transfer operates in favor of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

*Illustration.*

A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make a use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

**43.** Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such

Transfer by unauthorized person who subsequently acquires interest in property transferred.

transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

*Illustration.*

A, a Hindu, who has separated from his father B, sells to C three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields, Z does not belong to A, it having been retained by B on the partition ; but, on B's dying, A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

**Note.**

*Held*, that a statement in answer to interrogatories, which was made by the purchaser of mortgaged property, to the effect that at the time of the purchase, he was aware of the mortgage and believed that it had been satisfied, was no proof of the purchase having been made after notice of a prior mortgage, inasmuch as it was inconsistent with the knowledge of existing incumbrance.—I. L. R., 7 Al. 590.

See I. L. R., 14 Madr. 459, noted under sec. 18 of the Specific Relief Act.

Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

**Note.**

A purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral family property cannot sue for a partition of that portion alone and obtain an allotment to himself by metes and bounds of his vendor's share in that portion of the property.—I. L. R., 13 Madr. 275.

Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares

which they respectively advanced, such persons shall be presumed to be equally interested in the property.

**46.** Where immoveable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

transfer for consideration  
by persons having  
distinct interests.

*Illustrations.*

(a.) A, owning a moiety, and B and C, each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(b.) A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rupees 1,000. A's life-interest is ascertained to be worth Rupees 600; the reversion, Rupees 400. A is entitled to receive Rupees 600 out of the purchase-money; B and C to receive Rupees 400.

**47.** Where several co-owners of immoveable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and where they were unequal, proportionately to the extent of such shares.

by co-owners of  
in common property.

*Illustration.*

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer, one-anna share is taken from the share of A, and half-an-anna share from each of the shares of B and C.

**48.** Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

Priority of rights created  
by transfer.

**49.** Where immoveable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the

Transferee's right under  
policy.

contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

**50.** No person shall be chargeable with any rents or profits of any immoveable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Rent *bona fide* paid to holder under defective title.

*Illustration.*

A lets a field to B at a rent of Rupees 50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

**51.** When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof irrespective of the value of such improvement.

Improvements made by *bona fide* holders under defective titles.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

**Note.**

Although a successful pre-emptor becomes substituted for the original transferee, and thus becomes entitled to the benefits of the transfer, those benefits cannot be claimed by him for any period antecedent to such substitution itself, and a pre-emptor, before his pre-emption is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property which he is entitled to take but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as a trespasser, who would have no right to enjoy the usufruct of the property which he has purchased. *Udan Singh v. Muneri Khan* dissented from. *Manik Chand v. Rameshwar Rae*, *Buldeo Pershad v. Mohun*, and *Ajudhia v. Baldeo Singh* followed:—*Held*, with reference to the last paragraph of sec. 51 of the same Act, that the Courts below were wrong in subjecting their decrees in favour of the plaintiff to the condition

that the defendant should not be evicted till the crops he had sown were cut.—I. L. R., 8 Al. 502.

**52.** During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Transfer of property  
pending suit relating there-  
to.

#### Notes.

A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession. A and B being owners of an 8-annas share of certain immoveable property sold it under a kobala to C and D. At the time of the sale X and Y were in adverse possession of the share :—*Held*, that the transaction was a sale under section 52 of the Transfer of Property Act, to which the provisions of Chapter 8 of the Act, specially those of Section 135, were inapplicable. *Semble*, Section 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property.—I. L. R., 13 Cal. 297.

A on the 9th September 1883 sold certain immoveable property to S for Rs. 99-12 by means of a conveyance which was not registered. On the 29th September 1883 S instituted a suit against A on that conveyance to obtain possession of the property. On the 5th October 1883, when that suit was pending, but before the summons was served on A, A by a duly registered conveyance sold the same property to R for Rs. 198-8. In the suit filed by S, A filed a written statement, but did not further contest it, and S obtained a decree and got possession of the property. In a suit subsequently brought by R to obtain possession of the property from S upon the ground that his registered conveyance was entitled to priority over the unregistered document of S, it was contended that, R's purchase having been made whilst S's suit was pending, his title could not prevail against that of S. *Held*, that the doctrine of *lis pendens* did not apply to the facts of the case, as at the time of R's purchase there was no contentious suit or proceeding in existence, the summons in S's suit not having been then served.—15 Cal. 647.

As soon as the filing of the plaint is brought to the notice of the defendant, the proceeding becomes contentious, and any alienation subsequent to that is subject to the doctrine of *lis pendens*. A mortgage was executed on 25th June and was registered. On the same day, a prior mortgagee filed a suit against the mortgagors on an unregistered mortgage of the same land : he obtained a decree and attached the mortgage property :—*Held*, that the registered mortgagee was entitled to priority and his mortgage was not affected by the rule of *lis pendens*.—12 Madr. 180.

Pending a suit for partition of land, &c., two of the parties to the suit sold part of the land in question to a stranger who was not brought on to the record. After the execution of the sale-deed the parties to the suit entered



into a compromise and a decree was passed by consent accordingly. In a suit by the purchaser for possession of the land sold to him: *Held*, the purchaser was not bound by the decree passed by consent.—12 Madr. 439.

Of the three owners of certain properties, two executed a mortgage of their interest in December 1872. In 1879 a creditor of the three obtained a money-decree against them, and, in execution, attached, *inter alia*, the properties subject to the mortgage. In July 1880 the mortgagee intervened in execution, and an order having been made directing that the property be sold subject to his mortgage lien, filed a suit upon his mortgage. The property was brought to sale in execution of the money-decree in November 1880, and the defendant became the purchaser. The mortgagee obtained a decree in the following February, and the mortgaged property was sold in execution in March 1884 and was purchased by one who assigned his interest to the plaintiff:—*Held*, that the defendant's purchase was subject to the doctrine of *lis pendens*.—14 Madr. 491.

The plaintiffs sought to recover possession from the defendants of certain land claiming under a *kararnama* executed to them by one Mutyawa. The defendants contended that Mutyawa had never been in possession of the land. The lower appellate Court held that as Mutyawa was not in possession at the time when the *kararnama* was executed, the plaintiff's claim was not maintainable. On appeal to the High Court:—*Held*, reversing the decree of the lower appellate Court, that the circumstance of Mutyawa's not having been in possession at the time the *kararnama* was executed, did not prevent the plaintiffs from recovering possession from the defendants.—9 Bom. 324.

Two properties, A and B, belonging to different owners, were mortgaged under a joint bond for the same debt. The mortgagee put his bond in suit, and, having obtained a decree, caused property A to be sold, the proceeds of which proved more than sufficient to satisfy the whole mortgage-debt. Before such sale, however, X had, in execution of a simple money-decree, acquired a share in property A. X accordingly sued for contribution from property B, in that, so far as his share in property A went, he had satisfied the mortgage-debt, and ultimately obtained a decree in his favor; but, during the pendency of that litigation, property B had been transferred to Y. *Held* that Y must take the property subject X's right to contribution from it in respect of the loss of his share in property A.—13 Al. 371.

**53.** Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated, or delayed.

Fraudulent transfer.

Where the effect of any transfer of immoveable property is to defraud, defeat, or delay any such person, and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration.

**Notes.**

A voluntary transfer of property by way of gift, if made *bona fide* and not with the intention of defrauding creditors, is valid as against creditors.—4 M. H. C. R., 84.

*Held* that one co-sharers in a joint and undivided estate cannot deal with his share so as to affect the other co-sharers, but his assignee takes subject to their rights.—I. L. R., 4 Cal. 510.

The creditors of the ancestor, or testator, may follow his lands into the possession of a purchaser from the heir or devisee, if it can be proved that such purchaser knew (1) that there were debts of the ancestor or testator left unsatisfied; and also (2) that the heir or devisee to whom he paid his purchase-money intended to apply it otherwise than in the payment of such debts. But a purchaser ignorant on either of these points as a safe title, for no duty is cast upon the purchaser from the heir or devisee, to enquire whether there any debts of the ancestor, or testator, or to see to the application of his purchase-money, even when there is an express charge of debts by the testator on the devised estate; at least when the devisee is also executor, and in such a case, the burden of proof is entirely on the creditor to show that the purchaser from the devisee had notice that the latter intended to misapply the purchase-money.—4 Cal. 897. Also 8 Cal. 79.

In 1861, A mortgaged by deed certain land to B, who obtained a decree thereon in 1864. The decree, remained unexecuted. In 1869, the lands were sold in execution of a money-decree against A; and C became the purchaser. Thereupon, B, (the defendant,) began to attach the lands in execution of his decree obtained in 1864. Then, C (the plaintiff) objected to the attachment by petition, which was rejected. Hence this suit by C for possession on the ground that the mortgage on which decree was obtained in 1864 was a fictitious transaction, which was found to be so by the lower Courts.

*Judgment.*—"The contention is that the decree obtained (by B), whatever basis it rested on, caused a transfer of ownership to the intended extent; but looking to the current of recent decisions, we think that they shew a strong tendency to refuse effect to fraudulent and fictitious transactions, and undo them even in the interest of a party, where that can be done without unreasonable prejudice to the other party. And, if such transactions will be set aside even at the suit of a party, much more may they be treated as a nullity in the interest of an innocent purchaser for value. If the ostensible sale or mortgage was really a mere colorable transaction, the vendee from the mortgagor can claim that it be disregarded, even though the fraud has been carried a stage further, so as to give to the sham mortgage the corroboration of a decree, which is then allowed to lie by unexecuted for several years. The Courts will be slow and cautious in arriving at a conclusion that, where a decree has actually been obtained, it has not had its natural effect; but they must at the same time guard against its being made a means of furthering fraud and duplicity. Here, the Courts below have concurred in finding that this was the purpose of the mortgage, and we feel justified therefore in refusing to allow it to operate as against C's subsequent purchase."—3 Bom. 30.

A decree-holder instituted a suit against his judgment-debtor and the latter's son for a declaration that a gift by the judgment-debtor to his son of certain property was fraudulent, and that such property was liable to be taken in execution of the decree. *Held*, that, such gift having been made by the donor out of natural love and affection for the donee and in order to secure a provision for him and his descendants, and therefore for good con-



sideration, and having operated, and the donor having reserved to himself sufficient property to satisfy the decree, the mere fact that the donor reserved to himself no property within the jurisdiction of the Court which made the decree was not a ground for holding that such gift was fraudulent and not made in good faith, and for setting it aside and allowing the decree-holder to proceed against the property transferred by it.

The law relating to voluntary alienations explained.—2 Al. 891.

See I. L. R., 13 Al. 371, noted under sec. 52.

### CHAPTER III.

#### OF SALES OF IMMOVEABLE PROPERTY.

**54.** “Sale” is a transfer of ownership in exchange for a price paid or promised, or part-paid and part promised.  
 “Sale” defined.

Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.  
 Sale how made.

In the case of tangible immoveable property of a value less than one-hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.  
 Contract for sale.

It does not, of itself, create any interest in or charge on such property.

#### Notes.

“*Tangible immoveable property*”—means property that can be touched at once, *i. e.*, capable of being possessed or realized.

“*Intangible thing*”—means property incapable of being touched or possessed at once, as in the case of sale of reversion, &c.

It is to be observed that from the date of this Act, a sale could be effected only by a registered instrument or by delivery of the property. Accordingly, it was held that one who holds under an unregistered deed of sale, the registration of which is not compulsory, and is in possession of the property conveyed, has a superior title to one who sets up a registered conveyance of a later date unaccompanied by possession. The second purchaser presumed to have notice of the title of the first purchaser from the fact of possession having been given.—I. L. R., 7 Cal. 753.

This section virtually abolishes optional registration. No transfer can now be made, by an instrument in writing, unless it is registered. It is true that, in the case of possessory interests, the value of which is less than Rs. 100, an oral transfer coupled with possession will pass the property; but there will be no such thing as a *transfer in writing* unless it is registered.—8 Cal. 612.

A registered transfer *without delivery of possession* will pass any interest in land whether in possession or otherwise; and when the value of the interest amounts to Rs. 100, there is no other means of transferring it.—8 Cal. 612.

Section 54 of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property of less than Rs. 100 should be made only by one of the modes there stated so as to confer a valid title. Where the plaintiff bought from the heirs of M, who were out of possession, their right title and interest in certain immoveable property, and such property was conveyed to the plaintiff by an unregistered deed, registration of the deed (the property being of value of less than Rs. 100) not being compulsory: *Held*, in a suit to recover the property from persons in possession without title, that the sale conferred a valid title on the plaintiff, though not made by registered deed or by delivery of the property. The *dictum* of Garth, C. J., in *Narain Chunder Chuckerbutty v. Dataram Roy*, dissented from I. L. R., 8 Cal. 597.—16 Cal. 622.

The transfer by sale of tangible immoveable property of a value less than one hundred rupees can be effected only by one of the two modes mentioned in sec. 54, para. 3 of the Transfer of Property Act, *viz.*, by a registered instrument or by delivery of possession. *Khatu Bibi v. Madharam Barsick* overruled.—19 Cal. 623.

Plaintiff being in possession of certain land as an incumbrancer under a registered instrument agreed orally with the mortgagor in 1885 to purchase it. The mortgagor subsequently sold the land to others who took the conveyance which was registered with notice of the plaintiff's mortgage and of the oral agreement with him. Plaintiff now sued for a declaration that the conveyance was not binding on him and for specific performance of the oral agreement:—*Held*, (1) that the suit was not bad for want of a prayer for delivery up and cancellation of the conveyance; (2) that the plaintiff's possession under his incumbrance together with the agreement to sell was equivalent to delivery of possession within the meaning of Registration Act, sec. 48; (3) that the plaintiff was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.—13 Madr. 324.

The *wajib-ul-arz* of a village gave the co-sharers a right of pre-emption in cases where any one of them should wish to "transfer his share wholly or partly by sale or mortgage." One of the co-sharers entered into a transaction by which he transferred the possession of his share to a stranger for Rs. 300 and had mutation of names effected in the Revenue Department, but, in order to avoid the right of pre-emption, the parties omitted to execute or register a deed of sale in respect of the transfer:—*Held*, by the Full Bench (Mahmood, J. dissenting) that the transaction gave rise to the right of pre-emption within the meaning of the *wajib-ul-arz*. *Per Pethram, C. J.*—That the terms of the *wajib-ul-arz*, meant that if any co-sharer transferred his right wholly or partly, the right of pre-emption should arise; that although the legal interest in the share was never transferred, the effect of the transaction in question was to transfer absolutely the whole right of

possession from the vendor to the vendee, and that it was therefore such a transfer as let in the right of pre-emption. *Per Straight J.*—That inasmuch as the defendants deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right, it was very doubtful whether a Court of equity would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law. *Per Oldfield and Brodhurst J. J.*—That the failure of the parties to the transfer to comply with the requirements of section 54 of the Transfer of Property Act (IV of 1882), as to the manner in which the transfer should be made, did not alter the nature of the transaction or affect the fact that a sale had been made, and could not affect a pre-emptor's right in respect of it. *Per Mahmood. J.*—That a valid and perfected sale was a condition precedent to the exercise of the pre-emptive right; that in the present case nothing had happened which could properly be termed a "sale" within the meaning of the *wajib-ul-arz*; that the application for mutation of names not having been registered, the provisions of section 54 of the Transfer of Property Act prevented it from taking effect as a sale, or passing the ownership from the vendor to the vendee; and that therefore, under the *wajib-ul-arz* the right of pre-emption could not arise.—7 Al. 482.

Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser; and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property, subject to such equities, restrictions or conditions as the nature of the case may require. *Mohun Singh v. Shib Koonwer, Goor Parshad v. Nunda Singh, Heera Singh v. Ragho Nath Sahai and Umedmal Motiram v. Dawa* referred to. The difference between an executed contract of sale and an executory contract to sell observed on. *Ikbāl Begam v. Gobind Prasad* dissented from. A deed of sale of immoveable property having been duly executed and registered and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors—*held*, with reference to sec. 54 of the Transfer of Property Act (IV of 1882) that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed.—11 Al. 244.

See I. L. R., 10 Al. 20, noted under sec. 17 of the Indian Registration Act (III of 1877.)

**55.** In the absence of a contract to the contrary, the Rights and liabilities of buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold :

(1) The seller is bound—

(a) to disclose to the buyer any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover ;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power ;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto ;

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place ;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession, as an owner of ordinary prudence would take of such property and documents ;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits ;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all incumbrances on such property due on such date, and, except where the property is sold subject to incumbrances, to discharge all incumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same :

provided that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is incumbered, or whereby he is hindered from transferring it.

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power :

provided that (a), where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and (b), where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer or by any of the other

buyers, as the case may be, and at the cost of the person making the request, to produce the said documents, and furnish such true copies thereof or extracts therefrom as he may require; and, in the meantime, the seller or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident;

(4) The seller is entitled—

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.

(5) The buyer is bound—

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from incumbrances, the buyer may retain out of the purchase-money the amount of any incumbrances, on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury, or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any incumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled—

(a) where the ownership of the property has passed to him, to the benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof;

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery, and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract, or to obtain a decree for its rescission.

An omission to make such disclosures as are mentioned in this section, paragraph (1), clause (a), and paragraph (5), clause (a), is fraudulent.

#### Notes.

On 16th August 1885 the defendant, having agreed to purchase a house belonging to the plaintiff, executed an agreement, in which it was stated "that that he had this day purchased the house belonging to Ghousiah Begum Sahiba (plaintiff) for Rs. 16,000, that he had paid Rs. 1,000 as an advance and taken possession, that he would pay the balance with interest at the rate of Re. 1 per cent. per mensem within fifteen days, and obtain a sale-deed from the said Begum." The plaintiff at the time of the agreement had not obtained a conveyance of the house to her, and was not able to tender a conveyance to the defendant until January 1887, when she did so. Meanwhile the defendant took possession under the agreement, paying only a portion of the balance of the purchase money; he also executed certain repairs on the house and let it to a tenant and enjoyed the rent. It further appeared that shortly after the above agreement he sought to obtain a sale-deed from the plaintiff and attempted to raise a sum of money on a mortgage of the house. On 22nd December 1885 the defendant wrote to the plaintiff demanding a conveyance and giving notice that if the sale be not completed in the following month, the interest on the balance of the purchase money should cease; but no evidence was given as to any appropriation of the purchase money by the defendant. In 1887 the plaintiff filed the present suit to recover the unpaid purchase money with interest at 12 per cent. :—*Held*, that the acts of the defendant amounted to a waiver of the implied covenant for title, and that the plaintiff was entitled to recover the unpaid purchase money with interest at the agreed rate up to the date of payment, and that he was further entitled to a lien on the property for that amount.—I. L. R., 13 Madr. 158.

When a vendee, who sues to cancel a sale on the grounds of fraud, misrepresentation or concealment by his vendor, fails to establish these grounds of relief, he is not entitled to set up in second appeal a case founded on the implied covenant for title under Transfer of Property Act, sec. 55 (2).—15 Madr. 50.

In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed but denied receipt of consideration. The deed was dated in January, 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration :



—*Held* that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been with-held because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed :—*Held*, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed.—8 Al. 641.

**56.** Where two properties are subject to a common charge, and one of the properties is sold, the buyer is, as against the seller, in the absence of a contract to the contrary, entitled to have the charge satisfied out of the other property, so far as such property will extend.

Sale of one of two properties subject to a common charge.

*Discharge of Incumbrances on Sale.*

**57.** (a) Where immoveable property subject to any incumbrance, whether immediately payable or not, is sold by the Court or in execution by Court for sale freed therefrom.

Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court,

(1) in the case of an annual or monthly sum charged on the property, or of a capital sum charged on a determinable interest in the property,—of such amount as, when invested in securities of the Government of India, the Court considers will be sufficient, by means of the interest thereof, to keep down or otherwise provide for that charge, and

(2) in any other case of a capital sum charged on the property—of the amount sufficient to meet the incumbrance and any interest due thereon.

But in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to require a larger additional amount.

(b) Thereupon the Court may, if it thinks fit, and after notice to the incumbrancer, unless the Court, for reasons to be recorded in writing, thinks fit to dispense with such notice, declare the property to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for

giving effect to the sale, and give directions for retention and investment of the money in Court.

(c) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(d) An appeal shall lie from any declaration, order, or direction under this section as if the same were a decree.

(e) In this section "Court" means (1) a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, (2) the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situate, (3) any other Court which the Local Government may, from time to time, by notification in the official Gazette, declare to be competent to exercise the jurisdiction conferred this section.

## CHAPTER IV.

### OF MORTGAGES OF IMMOVEABLE PROPERTY AND CHARGES.

**58.** (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold, and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage, and the mortgagee a simple mortgagee.



Mortgage by conditional  
sale.

(c) Where the mortgagor ostensibly  
sells the mortgaged property—

on condition that, on default of payment of the mortgage-  
money on a certain date, the sale shall become absolute, or

on condition that, on such payment being made, the sale  
shall become void, or

on condition that, on such payment being made, the buyer  
shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale,  
and the mortgagee a mortgagee by conditional sale.

(d) Where the mortgagor delivers possession of the mort-  
gaged property to the mortgagee, and  
Usufructuary mortgage. authorizes him to retain such possession

until payment of the mortgage-money, and to receive the rents  
and profits accruing from the property, and to appropriate  
them in lieu of interest, or in payment of the mortgage-money,  
or partly in lieu of interest and partly in payment of the  
mortgage-money, the transaction is called an usufructuary  
mortgage, and the mortgagee an usufructuary mortgagee.

(e) Where the mortgagor binds himself to repay the  
mortgage-money on a certain date, and  
English mortgage. transfers the mortgaged property abso-

lutely to the mortgagee, but subject to a proviso that he will  
re-transfer it to the mortgagor upon payment of the mort-  
gage-money as agreed, the transaction is called an English  
mortgage.

#### Notes.

An instrument, mortgaging villages for a sum payable within a certain period by instalments, and making distinct provision that, upon default in payment of an instalment, the mortgagee by his servants was to take possession, and after paying the revenue and the expenses of collection, to credit the balance towards payment of the instalment, also contained the following: "Should on the expiration of the term of this instrument, any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this, then, as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of instalment by sale of the villages and of other moveable and immoveable property belonging to me." *Held*, that such an instrument must be taken as a whole, and that the true construction to be put on it should be that which, being reasonable, would also give effect to all parts of it:—*Held*, accordingly, (on the contention that these words negatived the mortgagee's right to take possession upon default in payment of an instalment, leaving him only a right to proceed to sale) that, as this construction would not give due effect to the first part of the instrument, it must yield to a construction which, not only would give such effect, but would also be the more reasonable one, *viz.*, that the mortgagee should take possession upon such a default, and also might sell if the mortgagor objected to his apply-

ing the rents in reduction of the principal and interest due.—I. L. R., 11 Cal. 237.

An instrument, mortgaging villages for a sum payable within a certain period by instalments, and making distinct provision that, upon default in payment of an instalment, the mortgagee by his servants was to take possession, and after paying the revenue and the expenses of collection, to credit the balance towards payment of the instalment, also contained the following: "Should on the expiration of the term of this instrument, any money remain due, then, till payment thereof, possession will continue according to the terms herein set out. If I do not accept this, then, as soon as the breach of promise occurs, they will at the end of the year realize the whole amount of instalment by sale of the villages to get possession. In a suit by the purchaser against B and A :—*Held*, that B's interest in the joint family property was unaffected by decree passed in the mortgage suit, and that the purchaser was not entitled to the relief he sought as regards his share. *Subramaniyayan v. Subramaniyayan*, I. L. R., 5 Madr. 125 followed.—11 Cal. 293.

A mortgage in the English form between Hindus of lands in the mofussil, outside Calcutta, has always been treated by the Courts as a mortgage by conditional sale.—12 Cal. 614.

The mortgage of Indigo crops that may be grown upon a certain plot of land is a valid transaction. The transaction is neither governed by the Transfer of Property Act nor by the Contract Act; but it is in the nature of an agreement to mortgage moveable property that may come into existence in future.—13 Cal. 262.

In 1832 a Muhamadan mortgaged certain land with possession on condition that if the money lent was not repaid within eight years, the land should be enjoyed by the mortgagee after that period as if conveyed by sale. In 1883 a suit was brought to redeem :—*Held*, that the title of the mortgagee became absolute by virtue of the terms of the contract on default of payment within the time specified. The obligation cast by Regulation 34 of 1802 upon a mortgagee to account for profits does not prevent a mortgage by way of conditional sale from becoming, after the period for redemption has elapsed, an absolute sale where no account has been rendered by the mortgagee. The rule laid down in *Pattabhiramier's case* (13 M. I. A., 560) applies to a mortgage executed by a Muhamadan.—8 Madr. 185.

The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of Property Act came into operation, is twelve years under sch. II, art. 132, of the Limitation Act of 1877—*Aliba v. Nanu* (I. L. R., 9 Mad., 218) followed. *Per Muttusami Ayyar, J.*—"The transaction in suit appears to be of the kind described in sec. 100 of the Transfer of Property Act, which defines how a charge is created;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages."—10 Madr. 509.

In a suit for sale by a mortgagee, it appeared that the mortgage comprised a covenant by the mortgagor for payment of the mortgage amount, but otherwise answered the definition of an usufructuary mortgage contained in Transfer of Property Act, sec. 58 (d) :—*Held*, that the mortgagee was not precluded by Transfer of Property Act, sec. 67, from bringing the property to sale under the mortgage.—14 Madr. 232.

An unregistered mortgage-deed executed in 1885 contained a personal covenant by the mortgagors to pay the debt secured thereby :—*Held*, the mortgagee was entitled to sue on the covenant and obtain a personal decree against the mortgagors.—15 Madr. 253.

The jenmi of land in Malabar sued in 1886 to redeem a kanom of 1849, to which it was subject, and obtained a decree which merely directed the surrender of the land to the plaintiff, on payment of the kanom amount and the value of improvements, within three months of the date of the decree. This decree remained unexecuted, the money not being paid. The jenmi now brought another suit to redeem the same kanom :—*Held*, that the present suit was not barred by the former decree. The nature of a *kanom* discussed.—15 Madr. 366.

In 1866, R executed a *sun* mortgage of certain land to the plaintiff, and four years afterwards mortgaged the same land with possession to the defendant. In 1875 the plaintiff brought a suit against R alone upon the mortgage, obtained a decree, and he himself purchased the property at the Court sale held in execution of that decree. In attempting to take possession he was obstructed by the defendant, who was in possession of the property as mortgagee. The plaintiff now sued the defendant for possession. Both the lower Courts held that the plaintiff should satisfy the defendant's subsequent mortgage before he could recover possession. On appeal by the plaintiff to the High Court :—*Held*, reversing the lower Court's decree, that the plaintiff's claim should be allowed. The plaintiff having brought to sale, in execution of his decree, the estate as it stood at the date of his mortgage free from all subsequent incumbrances, the fact that he himself was the purchaser could not affect the estate which passed by that sale. As the defendant had not been a party to the plaintiff's suit against R, he was entitled to redeem the property if he wished.—10 Bom. 224.

In 1865, N was in possession of six shops in a market-place at Etawah. He was in possession of two as mortgagee, and of the remaining four as proprietor. The Municipal Committee of Etawah, having decided to establish the market in a fresh place, and to use the site of the old market for other purposes, arranged with N to take the sites of his six shops in the old market-place, and to give him in lieu of them sites for six shops in the new. Under this arrangement, he built six shops in the new market-place. Subsequently, the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage-money, and cost of constructing the shop :—*Held* that the claim could not be allowed, inasmuch as it could be justified only by proof of an agreement binding upon the parties at the time when the transaction occurred that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage, and it had not been found that any such agreement was made.—7 Al. 436.

The mortgagee of immoveable property under a hypothecation bond entered into an agreement with one who has not a party to his mortgage, to release part of the property from liability under his mortgage. This agreement was not in writing and registered. The mortgagee subsequently sought to enforce the hypothecation against the whole of the mortgaged property :—*Held* that the agreement, being a new contract for a fresh consideration between persons who were not parties to the mortgage, was not, as between the parties to the mortgage, a release which the law required to be in writing and registered :—*Held* also that the party to the agreement with the mortgagee might have come into Court as a plaintiff to enforce the same, and

that it was equally competent for him to plead it in avoidance of the mortgagee's claim to bring to sale the property referred to therein.—7 Al. 820.

By a deed of usufructuary mortgage dated in 1875, a sum of Rs. 30,000, with interest at Re. 1 per cent. per mensem, was advanced on the security of certain property, for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and among these a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that, in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re. 1-6 per cent. per mensem. The mortgagee did not take possession of the mortgaged property, and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November, 1884 the mortgagee brought a suit against the mortgagors to recover the mortgage-money, claiming interest from the date of the mortgage-deed to the date of the suit at Re. 1-6 per cent. per mensem :—*Held* that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked at as simply one of a loan for the specified period at the agreed rate, *i e.*, Re. 1 per cent. per mensem.—8 Al. 194.

A deed of mortgage executed in 1879 for a consideration of Rs. 300 provided that the term of the mortgage should be four years certain, that certain interest should be payable, that the mortgagee should have possession, that the profits should be appropriated first in lien of yearly interest and any balance appropriated in payment of the principal debt, and that the mortgagor should be entitled to redeem if the principal and interest were paid at the expiration of the four years. The mortgagee never obtained possession ; and in 1882 he brought a suit against the mortgagor to recover the unpaid interest then due, and obtained a decree, which was satisfied by the sale of property belonging to the judgment debtor. In 1886 he brought another suit for recovery of the principal together with the residue of interest up to the date of suit. *Held* that, inasmuch as there was no stipulation in terms that the mortgagee was to remain in possession until payment of the mortgage money, the instrument did not strictly fall within sec. 58 (d) of the Transfer of Property Act (IV. of 1882), and that the rights and liabilities of the parties must be determined in accordance with the principles enunciated in sec. 98 of that Act. *Held* upon the construction of the instrument, that it must be regarded as a usufructuary mortgage not only during the four years, but after their expiration. *Held* that the cause of action in the suit of 1882 was the mortgagor's non-delivery of possession of the mortgaged property, by reason of which the mortgagee had been unable to realize his interest from the usufruct ; that the cause of action accrued to the mortgagee from the moment the instrument came into operation and possession was not delivered ; that the cause of action to recover the principal accrued at the same time and was the same cause of action ; that the plaintiff was therefore bound in the suit of 1882 to sue for the principal ; and that the present suit was consequently barred by sec. 43 of the Civil Procedure Code.—12 Al. 203.

The transaction known to Muhammadan law as a *bai-bil-wafa* is a mortgage within the meaning of sec. 58 of Act IV. of 1882, and not a sale. The plaintiff in a suit for pre-emption had, prior to the sale of the property claim-

ed, executed a deed in respect of his share in the village in virtue of which he claimed the right to preempt, the material portion of which deed was as follows:—"Thirdly, if I, the vendor, or the heirs of me, the vendor, Ali Jan, *alias* Ali Ahmad, should pay off the entire consideration money mentioned above on the Puranmashi of Jeth Sudi 1299 fasli to the said purchaser, she should without any objection or hesitation receive the money, and, returning the property sold, described above in the document, to me the vendor, revoke the sale." *Held* that this deed was a *bai bil-wafa* or mortgage by conditional sale and that as the conditional sale had not become absolute at the time when the right of pre-emption accrued, the conditional vendor or mortgagor had still a subsisting right of pre-emption. *Bhagwan Sahai v. Bhagwan Din* distinguished.—14 Al. 195.

See I. L. R., 13 Al. 28, noted under sec. 40.

**59.** Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi, and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon.

#### Notes.

A creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage or lower its priority, by taking a subsequent mortgage, including the same lands with other lands, for the same debt. Whether the earlier mortgage becomes merged and extinguished or not in a question of intention.—I. L. R., 3 Cal. 307.

In India, as in England, a mortgagee may transfer his rights to a third person by way of assignment. But such transfer must be without prejudice to the rights of the mortgagor.—2 Madr. 212.

In a recent case, Chief Justice Turner, of the Madras High Court, has expounded the law on mortgages as follows:—

The effect of a mortgage is to transfer to the mortgagee a portion more or less extensive according to the nature of the mortgage of the rights of the mortgagor.

In the absence of a condition restricting his powers, a mortgagor is clearly not precluded by the fact that he has entered into a contract of mortgage from dealing with the interest remaining in him as freely as he may deal with any other property, provided of course that, apart from the contract of mortgage, he enjoys a power of alienation.

It is clear that even where such a condition has been imported into a mortgage, it does not absolutely debar the mortgagor from dealing with

the interest remaining in him. Where the mortgagor has transferred in whole or in part such interest, the transferee acquires against the mortgagee similar rights to those possessed by the mortgagor, so far as they are necessary for the enjoyment and preservation of the interest transferred to him.

If the mortgagee desires to foreclose the mortgage or to bring the property to sale, a purchaser from the mortgagor or a second mortgagee is entitled to redeem the first mortgage and thus to protect his own interest in the property mortgaged.—5 Madr. 184.

In another Full Bench Case Justice West of the Bombay High Court observed as follows :—

The successive charges created by the owner of an estate may be regarded as fractions of the ownership, which embraces the aggregate of advantages that can be drawn from it. Each charge in its turn constitutes a deduction from the original aggregate, and the nominal ownership may itself then be reduced to a small fraction of what it once was. Still, be it small or great, it is a possible object of sale or purchase, and there is no ground of reason for saying that an incumbrancer who is already owner of one fraction of the property may not buy this other fraction without forfeiting the former fraction in favour of other fractional owners in the remainder left after deduction of his prior share.—6 Bom. 404.

The plaintiff having consented to lend Rs. 10,000 to the defendant, latter deposited with him, on 2nd April, 1883, the title-deeds of a certain property. On receiving them the plaintiff told the defendant that he would take them to his attorney, have a deed drawn up, and then advance the money. The defendant applied to the plaintiff for the money before the deed was prepared, but the plaintiff refused, saying he would not advance the money until he was satisfied by his attorney, and the deed had been prepared. At the time the deeds were handed over to the plaintiff, (i.e., the 2nd April, 1885), there was no existing debt due by the defendant to the plaintiff. On the 6th April 1885, the mortgage-deed was executed, and on the same day the money was advanced by the plaintiff to the defendant. The plaintiff stated that he "had advanced the money on the security of the title deeds on the same day." He did not say how long before the execution of the deed the money had been paid, but the deed itself recited that the Rs. 10,000 were paid immediately before the execution of the mortgage. The mortgage-deed was not registered. The plaintiff stated that he knew that it required registration but that it was left unregistered at the request of the defendant, who did not wish to be "exposed in the eyes of the public."

The plaintiff sued for a declaration that he was entitled to an equitable mortgage upon the said property, and for the sale thereof, in default of the payment of the mortgage-debt. He contended that the loan had been made on the security of the title-deeds, which had been deposited on the 2nd April; that he had, no doubt, intended to obtain a legal mortgage, but that he had abandoned that intention by consenting to leave the mortgage-deed unregistered, and had on the 6th April elected to rely upon his equitable mortgage :—*Held*, that the plaintiff had no equitable mortgage. At the time when the deeds were deposited, there was no antecedent or existing debt, nor was any oral agreement made that the title-deeds should stand as a security for future advances, nor was any advance, in fact, made until the mortgage-deed was about to be executed. There could be no doubt, that if the defendant had not been ready to execute the deed, no advance



would have been made. The money was really advanced on the security of the mortgage deed, though, at the time the money was advanced, the plaintiff had the title-deeds in his possession.—10 Bom. 634.

It is not necessary to the validity of a mortgage by deposit of title-deeds under sec. 59 of the Transfer of Property Act (IV. of 1882), that the property to which the title-deeds relate should be situated within the limits of one of the towns where such mortgages are allowed. *Varden Seth Sam v. Luckpathy Royjee Lallah and Manekji Framji v. Rustomji Naserwanji Mistry*, referred to.—14 Al. 238.

*Rights and Liabilities of Mortgagor.*

**60.** At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver the mortgage-deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass, or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

**Notes.**

So inseparable, indeed, is the equity of redemption from a mortgage, that it cannot be disannexed even by an express agreement of the parties. *Story* § 1019—Also 7 M. H. C. R., 395.

According to the judgment of the Appellate Court below, a mortgagor, --- liberty by the terms of his mortgage to redeem at the end of its

second year, on payment of the whole of the principal and interest, was not entitled to a decree for redemption, in a suit brought after the close of the second year, on showing only that in the first half of the second year the principal money had been deposited in Court, and that for the interest, for both years, decrees had been obtained by the mortgagee against him, before his suit was instituted. The above not showing payment or tender of the interest, of which payment was secured by the mortgage, an appeal was dismissed.—16 Cal. 307.

Where a day is fixed for the payment of a debt and nothing more appears, the presumption is that the date is fixed for the convenience of the debtor, and that he may repay the debt at an earlier period. The same rule applies to a mortgage-debt, but where the continuance of the enjoyment of the mortgaged property for a prescribed period forms a material part of the contract, the mortgagee cannot be deprived of his right to enjoyment on the ground that the contract was one of mortgage.—2 Madr. 314.

A decree obtained by a mortgagor, which declared that the mortgagee should deliver up possession on payment of the sum found due to him, not having been executed for three years, a purchaser of the equity of redemption sued the mortgagee to redeem:—*Held*, that this suit was not barred by the former decree and that the plaintiff was entitled to redeem. *Sami v. Somasundram* (I. L. R., 6 Madr., 119) approved. *Gan Savant Bal Savant v. Narrayan Dhond Savant* (I. L. R., 7 Bom., 467) dissented from.—I. L. R., 8 Madr. 478.

In 1873 R mortgaged to S seven parcels of land (items 1—7) for Rs. 300. In 1880, M purchased R's rights in items 1 and 2. In 1881 R redeemed item 5 on payment of Rs. 30 and executed a second mortgage of the rest to S for Rs. 200:—*Held*, that M, was entitled to redeem items 1 and 2 on payment of a proportionate amount of the first mortgage debt.—9 Madr. 453.

The breach of a condition in a mortgage deed to the effect that on default of payment on a certain date, the mortgage shall be deemed an absolute sale, does not amount to an extinguishment of the right of redemption by act of the parties within the meaning of the proviso to sec. 60 of the Transfer of Property Act, 1882.—11 Madr. 409.

In 1884 A and B, being divided brothers, hypothecated to X and Y the house now in suit, which was A's family property, and a house belonging to B. In 1886 A hypothecated the house now in suit to the plaintiff. In 1888 B sold his house for Rs. 700 by a conveyance attested by X and Y who accepted Rs. 550 in discharge of a moiety of the debt secured by the hypothecation of 1884, the balance of Rs. 150 being retained by B. In this suit the plaintiff sought to recover the principal and interest due on his security of 1886, and he contended that X and Y who were defendants Nos. 4 and 5 were not justified in permitting B to retain Rs. 150 of the price and that that sum should accordingly be debited against them in the accounts:—*Held*, that under Transfer of Property Act, sec. 82, plaintiff was not entitled to compel defendants Nos. 4 and 5 to satisfy their debt against B's house so far as it extended.—14 Madr. 71.

In 1870 B mortgaged to N with possession a certain piece of land. On 17th June, 1871, M and T obtained a money decree against B. On 9th March, 1872, the defendants bought from B his equity of redemption. In July, 1872, M and T attached the land in execution of their decree. The defendants objected to the attachment under section 246 of the Civil Procedure Code, Act VIII of 1859, but on investigation of their claim an order



was made disallowing their claim on the 23rd December, 1872. In June, 1873, the defendants paid off the mortgage debt and were put into possession by the mortgagee. In October, 1873, M and T put up the land for sale in execution of their decree and the plaintiff became the purchaser. On seeking to obtain possession the plaintiff was resisted by the defendants whose claim was allowed by the Subordinate Judge after inquiry. The plaintiff, therefore, brought this suit under section 335 of the Civil Procedure Code Act XIV of 1882. The lower Courts rejected his claim. On appeal to the High Court :—*Held*, that as the defendants had brought no suit within a year from that date, they could not now contest the plaintiff's title to the property. The defendants however having, since the date of the said order, paid off the mortgage, *held* that it would be contrary to justice, equity and good conscience for the Court to assist the plaintiff in obtaining possession unless he paid the defendants the amount paid by them to the mortgagee to free the property from the incumbrance.—9 Bom. 35.

The plaintiff sued to redeem certain land, alleging that it had been mortgaged by his father to the defendant in 1854-55. The defendant denied the mortgage, and alleged that he purchased it under a deed of sale from the plaintiff's father in 1849, and had ever since been in his possession as owner. The deed of conveyance was not forthcoming, nor was the alleged mortgage deed. The Court of first instance rejected the plaintiff's claim on the ground that the mortgage was not proved. The lower Appellate Court reversed the decree of the Court of first instance. The defendant appealed :—*Held*, that the defendant's possession was *prima facie* evidence of a complete title, and that the plaintiff, who alleged that the defendant was merely a mortgagee, was bound to prove his own right as mortgagor clearly and indefeasibly. Mere statements that the property had been mortgaged, which failed to establish any particular mortgage, did not shift the burden of proof, or require the mortgagee to show what were the terms of such mortgage, or his right to retain possession under it.—9 Bom. 137.

The mortgagor of an estate gave to the mortgagee, subsequently to the date of the mortgage, two successive money bonds in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage, and that redemption of the mortgage should not be claimed until the bond had been satisfied. The assignee of the equity of redemption sued for possession of the estate on payment merely of the mortgage money :—*Held*, that the two subsequent bonds did not create a further charge on the mortgaged premises, although they would prevent the original mortgagor from redeeming without paying their amounts.—9 Bom. 233.

Where the plaintiff, a minor, sought to redeem a certain property from the defendant who had purchased the equity of redemption at an auction sale in execution of a decree obtained against the plaintiff's mother alone as representative of her deceased husband :—*Held*, that the plaintiff was entitled to redeem. The plaintiff having been ignored, the inheritance had not been substantially represented in the suit against his mother alone, and the plaintiff's right to the equity of redemption consequently remained unaffected by the sale to the defendant.—9 Bom. 429.

A condition in a mortgage, that if the mortgagor redeems the property the mortgage right should be extinguished, but that the property should for ever remain in the possession of the mortgagee on his paying a fixed rent, is a condition which cannot be enforced in a Court of Equity.—9 Bom. 524.

In 1805 a two-anna share in certain property held by co-sharers was mortgaged to the defendant. The mortgage was effected by the mortgagor as manager of all the co-sharers in union. In 1848 one of the co-sharers redeemed his share of two pies in the mortgaged property and a further share of two pies therein was redeemed by second co-sharer in 1867. The plaintiff was admittedly the owner of another two-pie share; but he now sued the defendant to redeem the whole of the property still unredeemed, *viz.*, a one-anna eight pies' share of the original mortgage. The defendant objected that the plaintiff could only redeem his own two-pie share, which had become separated from the rest. The plaintiff denied that the estate had been divided:—*Held*, that the plaintiff's claim being to redeem all that remained, of the estate in the mortgagee's possession, the suit could not be maintained, unless all the other persons interested in the equity of redemption were before the Court either as co-plaintiffs or as defendants. Without their presence the suit could not be properly disposed of, and the excuse, that the defendant did not take objection at the right time, had, under such circumstances, no validity. As owner of a two-pie share, which by consent of all interested had become an estate wholly separated from the other parts of the original aggregate, the plaintiff would have been bound to set forth the transactions on which his right rested.—9 Bom. 128.

On the 15th of July, 1870, certain lands were mortgaged by their owners (Shambhu and his sons) to one Harlal with possession under a registered mortgage. On the 11th of June, 1871 the same lands were mortgaged without possession to the defendant; on the 10th of June, 1873, a second mortgage, purporting to give possession, was executed to Harlal; on the 12th of June, 1873, a second mortgage, also purporting to give possession, was passed to the defendant; on the 15th of November, 1877, Harlal obtained a decree against the mortgagors upon his mortgage of 10th June, 1873, and sold the lands, which were purchased by the plaintiff. The plaintiff sought to obtain possession, but was obstructed by the defendant. He thereupon brought this suit. The defendant contended that he had not been a party to the suit by Harlal, and was entitled to possession, and offered to pay to the plaintiff the amount of his purchase money, or to vacate the lands on satisfaction of his own mortgage lien:—*Held*, that the question whether Harlal's mortgage of the 15th July, 1870, was to be regarded as merged in his second mortgage of 10th June, 1873, so as to deprive him of priority of title over the defendant, depended on the intention of the parties to the said mortgage, and there was nothing in the second mortgage deed to show an intention to forego the benefit of the security created by the prior mortgage deed of 15th July, 1870, which was neither given up to the mortgagor, nor cancelled at the time, but remained with Harlal until handed over to the plaintiff with the other title-deeds. Under these circumstances the decree passed on the 15th November, 1877, conferred an absolute title on the plaintiff, who purchased at the auction sale free from all incumbrances created by the mortgagor subsequent to the mortgage of 15th July, 1870. The defendant, however, not having been made a party to Harlal's suit to enforce his security, did not lose his right of redemption, which still remained to him. The plaintiff therefore, purchased the property subject to the defendant's right of redemption.

The High Court passed a decree ordering the defendant to deliver up possession to the plaintiff, but that he (the defendant) should be at liberty to redeem by payment to the plaintiff within six months of the amount which would be due on the mortgage of the 15th July, 1870, if the same

had remained unaffected by the mortgage of 10th June, 1873, or, in default, should remain for ever foreclosed.—10 Bom. 88.

In a suit by some of several co-mortgagors to redeem the entire property mortgaged, on the ground that the mortgage-debt had been satisfied out of the usufruct :—*Held* that the plaintiffs could only claim their own shares, and the Court of first instance should determine the extent of the shares after making the other co-mortgagors parties.—7 Al. 376.

A mortgage-deed dated the 15th March, 1883, stipulated that the mortgagor would “pay the interest every year, and the principal in ten years ;” that “the principal shall be paid at the promised time, and the interest every year,” and that upon failure by the mortgagor to pay the principal and interest “at the stipulated period,” the mortgagee should be at liberty to realize the debt from the mortgaged property, and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 15th July, 1884 :—*Held*, upon a construction of the mortgage deed, that the advance by the mortgagee to the mortgagor was for a period of ten years certain ; that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind ; and that while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired, to redeem the property. *Vadju v. Vadju* referred to.—8 Al. 95.

A mortgagor is not entitled to redeem any portion of the property pledged without the whole debt being paid off. A mortgage transaction is one and indivisible, and the mortgagee has a lien over the whole estate until the whole amount due to him has been paid.—*Macp.* 110-111. See also *I. L. R.*, 2 M. 223, 3 *Madr.* 230, 1 Al. 297, 2 Al. 565, 906.

**61.** A mortgagor seeking to redeem any one mortgage shall, in the absence of a contract to the contrary, be entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

*Illustration.*

A, the owner of farms Z and Y, mortgages Z to B for Rupees 1,000. A afterwards mortgages Y to B for Rupees 1,000, making no stipulation as to any additional charge on Z. A may institute a suit for the redemption of the mortgage on Z alone.

**62.** In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property—

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property—when such money is paid ;

(b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal

money,—when the term (if any) prescribed for the payment of the mortgage-money has expired, and the mortgagor pays or tenders to the mortgagee the principal money, or deposits it in Court as hereinafter provided.

**Note.**

A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession, contained the following conditions:—“Until the mortgage-money is paid, the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee, and shall not be deducted at the time of redemption. At the end of any year, the mortgagors may pay the mortgage-money and redeem the property. Until they pay the mortgage-money, neither they nor their heirs shall have any right in the property.” In 1884, a representative in title of one of the original mortgagors sued to redeem his share of the mortgaged property, upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to a balance of Rs. 45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent. per annum had been realized, and that the surplus claimed by the plaintiff was due to him. The lower appellate Court dismissed the suit, on the ground that under sec. 62 (b) of the Transfer of Property Act (IV of 1882), and with reference to the terms of the deed of mortgage, the plaintiff was not entitled to recover the property until he paid the mortgage-money:—*Held* that, although the word “interest” was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in the lieu of interest:—*Held* that the provisions of secs. 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor’s rights of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage-money with twelve per cent. interest had been realized by the mortgagee from the profits of the property.—I. L. R., 8 Al. 402.

**63.** Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate pos-

Accession to mortgaged property.  
Accession acquired in virtue of transferred ownership.

session or enjoyment is not possible, the accession must be delivered with the property, the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture, or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, at the same rate of interest.

In the case last mentioned, the profits, if any, arising from the accession, shall be credited to the mortgagor.

Where the mortgage is usufructuary, and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

**64.** Where the mortgaged property is a lease for a term of years, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

**65.** In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee—

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same ;

(b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto ;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property ;

(d) and, where the mortgaged property is a lease for a term of years, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee, have been paid, performed, and observed down to the commencement of the mortgage ; and that the mortgagor will, so long as the security exists, and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein, and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts ;

(e) and, where the mortgage is a second or subsequent incumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior incumbrance as and when it becomes due, and will, at the proper time, discharge the principal money due on such prior incumbrance.

Nothing in Clause (c), or in Clause (d), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage.

The benefit of the contracts mentioned in this section shall be annexed to, and shall go with, the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

#### Notes.

Where the subject of a mortgage is leasehold property, and the mortgagee is put into possession under circumstances which amount to an assignment or transfer of the leasehold interest, the mortgagee becomes liable, as a rule, to pay the rent; but where the mortgagee is in possession and his name is registered in the landlord's books as the tenant, there can be no doubt as to his being liable for the rent.—I. L. R., 10 Cal. 443.

The defendants, having already mortgaged certain land to another, executed a hypothecation bond comprising the same land in favor of the plaintiff to secure a debt due by them to the plaintiff and covenanted therein to pay to him daily the proceeds of certain sales of firewood, of which the plaintiff was to credit part towards the secured debt. The defendants having failed to pay the amount due on the first mortgage, the first mortgagee obtained a decree and brought the land to sale. The plaintiff now brought a suit in the Small Cause Court to recover the amount due on footing of his hypothecation bond:—*Held*, that the hypothecation bond contained no personal covenant by the obligors, but that on the construction of secs. 65 and 68 of the Transfer of Property Act the obligors had committed default so as to entitle the obligee to sue them personally under the former section.—13 Madr. 192.

Under the ordinary law of mortgage the mortgagor is bound, so long as the equity of redemption remains with him, to indemnify the estate against expenses incurred in protecting the title. So that where a mortgage bond contains stipulations under which the mortgagor engages to repay to the mortgagee any costs he may incur in suits brought against him by the mortgagor's co-sharers, and also any debts charged upon the mortgaged property which the mortgagee may pay, the stipulations do not create any fresh obligation, and require no additional stamp duty.—9 Bom. 435.

**66.** A mortgagor in possession of the mortgaged property is not liable to the mortgagee for waste by mortgagor in possession. allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.



*Explanation.*—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

*Rights and Liabilities of Mortgagee.*

**67.** In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold.

A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(a) to authorize a simple mortgagee as such to institute a suit for foreclosure, or a usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale; or

(b) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorize the mortgagee of a railway, canal, or other work, in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

**Notes.**

In a suit to recover money due on a mortgage, defendant paid the money into Court and a notice was issued to the mortgagee under sec. 83 of the Transfer of Property Act. The mortgagee filed his suit before notice was served on him, and it was not proved that the mortgagee was aware of the fact of the payment into Court when he filed his suit:—*Held*, that the plaintiff was not debarred by sec. 67 of the Transfer of Property Act from obtaining a decree, and that under the rules of Court the pleader's fee was properly assessed as in a contested suit and not as in a case where there is a confession of judgment.—I. L. R., 11 Madr. 371.

A usufructuary mortgagee is not entitled, in the absence of a contract to that effect, to sue for sale of the mortgage property :—*SEMBLE* : The construction placed on sec. 67 (a) of the Transfer of Property Act, 1882, in *Venkatasawmi v. Subramanya* (I. L. R., 11 Madr., 88) that a usufructuary mortgagee can sue either for foreclosure or for sale but not for one or other in the alternative is wrong.—12 Madr. 109.

The plaintiff, at the request of the mortgagors, paid off part of the debt due on a usufructuary mortgage to one of two mortgagees thereunder, and was placed by the mortgagors in possession under a usufructuary mortgage of that part of the mortgage premises which has been in the enjoyment of the mortgagee so paid off, who executed a release. The other mortgagee under the first mortgage obtained a decree for sale on the footing of that instrument, and the mortgage premises were sold “subject to the establishment” of the plaintiff’s claim : the decree-holder purchased and afterwards assigned his rights to two of the present defendants who dispossessed the plaintiff. The plaintiff now sued the mortgagors and mortgagees and the defendants above referred to :—*Held*, the plaintiff was not entitled to a decree for sale. *Semble* : the plaintiff might have sued to have the sale, which had taken place at the suit of the first usufructuary mortgagee, declared to be invalid as against him.—15 Madr. 174.

A mortgagee by conditional sale, under an instrument executed while Regulation XVII of 1816 was in force, and before the Transfer of Property Act, 1882, which repealed that Regulation, came into force, sued, after the repeal of that Regulation, for foreclosure of the mortgage, not having proceeded in accordance with the provisions of sec. 8 of that Regulation. *Held* (STUART, C. J., dissenting) that the procedure of that section was not saved by clause (c) of sec. 2 of the Transfer of Property Act, but the provisions of that Act were applicable to the suit.—6 Al. 262.

Upon the death of a sole mortgagee of zamindari property, his estate was divided among his heirs one of whom, a son, was entitled to fourteen out of thirty-two shares. The son executed a sale-deed whereby he conveyed the mortgagee’s rights under the mortgage to another person. In a suit for sale brought against the mortgagor by the representative of the purchaser, it was found that the plaintiff acquired, under the deed of sale, only the rights in the mortgage of the son of the mortgagee, though the deed purported to be an assignment of the whole mortgage. *Held* by the Full Bench that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against the whole property, the other parties interested not having been joined ; that moreover he was not entitled to succeed, even in an amended action, in claiming the sale of a portion of the property in respect of his own share, and that the suit was, therefore, not maintainable. *Bishan Dial v. Manni Ram, Bhora Roy v. Abilack Roy, and Bedar Bakht Muhammad Ali v. Khurram Bakht Yahya Ali Khan* referred to.—9 Al. 68.

Under sec. 67 (a) of the Transfer of Property Act (IV of 1882), a usufructuary mortgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage money. *Chowdhri Umrao Singh v. The Collector of Moradabad, Dulli v. Bahadur, Ganesh Koor v. Deedar Buksh, Venkatasawmi v. Subramanya and Jahabbu Ram v. Girdhari Singh*, referred to.—11 Al. 367.

Interest *post diem* on a mortgage-bond for a term certain and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of a contract. Such interest cannot be regarded as a mere continuance of the *addiem* interest due on the mort-



gage-bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge" upon the property, though nominally damages. In respect of *post diem* interest given by way of damages, no distinction is to be drawn between simple bonds and mortgage bonds. *Mansab Ali v. Gulab Chand* and *Bhagwant Singh v. Daryao Singh* followed; *Cook v. Fowler*; *Bishen Dayal v. Udit Narain*; and *Rajpati Singh v. Kesh Narain Singh* referred to.—13 Al. 330.

A mortgagor or mortgagee cannot claim to foreclose or to redeem for a part of the estate or the debt. *Norton* 473. Also I. L. R., 1 Al. 297, 4 Cal. 475.

See I. L. R., 14 Madr. 232, noted under sec. 58.

**68.** The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only:—

Right to sue for mortgage-money.

(a) where the mortgagor binds himself to repay the same:

(b) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor:

(c) where, the mortgagee being entitled to possession of the property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any other person.

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in Section sixty-six, the mortgagee may require the mortgagor to give him, within a reasonable time, another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money.

#### Notes.

A landlord, who has obtained a decree for arrears of rent of an under-tenure, is not restricted by the provisions of the Bengal Tenancy Act (Act VIII. of 1885) to executing such decree in the first instance by sale of the under-tenure, but is at liberty to execute it in the ordinary manner against the person or other property, whether moveable or immovable, of his judgment-debtor. The provisions of sec. 68 of the Transfer of Property Act are not amongst those made applicable by sec. 100 of that Act to a person having a charge within the meaning of the latter section. *Semble*.—The "charge" referred to in sec. 65 of the Bengal Tenancy Act (VIII. of 1885) is not such a "charge" as that defined by sec. 100 of the Transfer of Property Act. *Lalit Mohun Roy v. Bindodai Dabee*, I. L. R., 14 Cal., 14, explained.—15 Cal. 492.

The sale of mortgaged premises under the Land Acquisition Act is not a destruction of the security within the meaning of sec. 68 of the Transfer of Property Act and does not enable the mortgagee to sue the mortgagor personally.—13 Madr. 321.

In a suit against a mortgagor for the principal and interest due on a mortgage, it appeared that the payment of interest had fallen into arrears, and that the mortgage deed provided that in such event the mortgagee should be entitled to possession of the mortgage premises; the mortgagor falsely alleged that all the interest due had been tendered:—*Held*, that the mortgagee was entitled to sue as above.—15 Madr. 65.

Suit for a personal decree on a usufructuary mortgage which contained no express covenant to pay, but, provided that if the mortgagor repaid the secured debt before a certain date (now passed), he should be replaced in possession. The mortgage premises had been attached in execution of a decree obtained by a third party against the mortgagor, and a claim preferred by the plaintiff having been erroneously rejected and the premises sold, he was dispossessed. The mortgagee accordingly brought his suit as above:—*Held* that the plaintiff was not entitled to maintain the suit either under the terms of the mortgage or under Transfer of Property Act, sec. 68.—15 Madr. 304.

A usufructuary mortgagee, to whom possession of the mortgaged property had been delivered, sued the mortgagor for the mortgage-money on the ground that the mortgagor had sold a part of the mortgaged property, and the purchaser had deprived him of possession of such part. One of the conditions inserted in the deed of mortgage was that, if “on the part of the mortgagor, or other persons, any kind of dispute or any interference or obstruction took place in obtaining possession by the mortgagee of the mortgaged property,” the mortgagee should be entitled to sue for the mortgage-money. *Held* that such condition contemplated the case of the mortgagor, in the first instance, in breach of the conditions of the mortgage, failing to deliver possession to the mortgagee, or to secure his possession from any obstruction or disturbance by other persons, but not the case of the mortgagee being deprived of possession after it had been once obtained and secured, and therefore the mortgagee was not entitled by virtue of such condition to sue for the mortgage money. *Held*, further, that, the mortgagee’s case being that he had been deprived of possession of a part of the mortgaged property, he would be entitled to sue for the mortgage-money only if he had been deprived thereof by or in consequence of the wrongful act or default of the mortgagor, and not if he had been deprived thereof by or in consequence of the wrongful act or default of other persons; that the sale by the mortgagor was not a wrongful act, there being no condition against alienation, and the sale by a mortgagor of his equity of redemption not being rendered wrongful or unlawful by any rule of law, nor being in itself a wrongful act; that a wrongful act by the purchaser, though committed under color of the purchase, could not be said to have taken place “in consequence of the wrongful act or default of the mortgagor”; and that therefore the mortgagee had no cause of action.—6 Al. 298.

Where a decree was obtained by a landholder for cancelment of a deed whereby an occupancy-holding was mortgaged with possession, and the mortgagee consequently failed to obtain possession, and brought a suit against the mortgagor to recover the mortgage money—*held* that inasmuch as the mortgagor must have known that he was mortgaging an estate not legally transferable, while the mortgagee might have believed that the estate was transferable, the act of the former was a default depriving the latter of his security within the meaning of sec. 68 (b) of the Transfer of Property Act (IV of 1882), and the mortgagee was, therefore, entitled to

—10 Al. 47.

See I. L. R., 13 Madr. 192, noted under sec. 65 ; 15 Madr. 174, noted under sec. 67 ; 14 Al. 513, noted under sec. 90.

**69.** A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage money, the mortgaged property, or any part thereof, without the intervention of the Court, is valid in the following cases "and in no others"\* (namely)—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Buddhist "or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor-General in Council, in the local official Gazette ; "\*

(b) where the mortgagee is the Secretary of State for India in Council ;

(c) where the mortgaged property or any part thereof is situate within the towns of Calcutta, Madras, Bombay, Karachi, or Rangoon.

But no such power shall be exercised unless and until—

(1) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service ; or

(2) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised ; but any person damnified by an unauthorized, or improper, or irregular exercise of the power, shall have his remedy in damages against the person exercising the power.

The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances (if any), to which the sale is not made subject, or after payment into Court, under Section fifty-seven, of a sum to meet any prior

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\* The words quoted have been inserted by Act III. of 1885, sec. 5.

incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale ; and, secondly, in discharge of the mortgage-money and costs and other money (if any) due under the mortgage ; and the residue of the money so received shall be paid to the person entitled to the mortgaged property or authorized to give receipts for the proceeds of the sale thereof.

Nothing in the former part of this section applies to powers conferred before this Act comes into force.

The powers and provisions contained in Section six to nineteen (both inclusive) of the Trustees and Mortgagees' Powers Act, 1866, shall be deemed to apply to English mortgages wherever in British India the mortgaged property may be situate, when neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Buddhist, " or a member of any other race, sect, tribe, or class from time to time specified in this behalf by the Local Government, with the previous sanction of the Governor General in Council, in the local official Gazette."\*

#### Notes.

In a deed of mortgage of property, situate within the town of Madras, it was provided that a power of sale might be exercised after fifteen days' notice. The property was sold :—*Held* that, (sec. 69 of the Transfer of Property Act, 1882, requiring three months' notice before such a power of sale shall be exercised), the condition as to notice was invalid, but that the sale was nevertheless valid.—I. L. R., 11 Madr. 201.

A mortgagee purchasing the mortgaged property with the consent of the mortgagor, under the power of sale contained in the mortgage deed, acquires an unimpeachable title derived from the power of sale, which is altogether distinct from and overrides his title as a mere incumbrancer : the effect of such purchase being to vest the ownership of, and the beneficial title to, the property for the first time in himself, who had been previously a mere incumbrancer.

Obstruction to the obtaining possession by a mortgagee under his mortgage by persons who while claiming a lien on the property admitted the mortgagor's title to the property :—*Held*, not to be adverse possession as against the mortgagee's title as purchaser.—10 Bom. 49.

See I. L. R., 13 Al. 28, noted under sec. 40.

**70.** If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

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\* The words quoted have been inserted by Act III. of 1885, sec. 5.

*Illustrations.*

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

**71.** When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease.

**72.** When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary—

(a) for the due management of the property and the collection of the rents and profits thereof ;

(b) for its preservation from destruction, forfeiture, or sale ;

(c) for supporting the mortgagor's title to the property ;

(d) for making his own title thereto good against the mortgagor ; and,

(e) when the mortgaged property is a renewable leasehold, for the renewal of the lease ;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed at the rate of nine per cent. per annum.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property ; and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the principal money, with the same priority and with interest at the same rate. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

**Notes.**

Sec. 72 of the Transfer of Property Act only reproduces the rules of law which Courts of justice in India have uniformly adopted.—I. L. R., 10 Al. 611.

See I. L. R., 9 Bom. 435, noted under sec. 65.

**73.** Where mortgaged property is sold through failure to pay arrears of revenue or rent due in respect thereof, the mortgagee has a charge on the surplus (if any) of the proceeds, after payment thereout of the said arrears, for the amount remaining due on the mortgage, unless the sale has been occasioned by some default on his part.

Charge on proceeds of  
révenue-sale.

**Note.**

The mortgagee has a charge on the surplus proceeds of the revenue sale of the property mortgaged.—I. L. R., 6 Cal. 142. Also 15 Cal. 546.

**74.** Any second or other subsequent mortgagee may, at any time after the amount due on the next prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee, as such, to whom he has made such tender.

Right of subsequent  
mortgagee to pay of prior  
mortgagee.

**Notes.**

S mortgaged land to P. G subsequently obtained a decree, by consent, against S, creating a charge on the same, and other land, and registered the decree. A, in ignorance of G's decree, paid off P's mortgage, but took no assignment thereof, and took a mortgage, from S of all the land covered by G's decree. In a suit by G against S and A to enforce payment of his mortgage debt :—*Held*, that A, not having had notice of G's decree, was entitled to stand as first incumbrancer in respect of the money paid to discharge P's mortgage, and that, even if registration was legal notice, an intention to keep alive P's mortgage was to be presumed in favour of A, in accordance with the ruling of the Privy Council in *Gokul Dass Gopal Dass v. Rambux Seochand* (I. L. R., 11 I. A., 126).—I. L. R., 8 Madr. 246.

Unless there is a regular assignment by the mortgagee, a person advancing money to the owner on the property mortgaged, cannot obtain the rights of the mortgagee to whom the money is paid by reason of a portion of his money being applied by the owner towards the discharge of the original mortgage.—6 Bom. 64.

At a sale in execution of a decree, J purchased certain property which was at the time subject to two mortgages, the first under an unregistered deed in favour of M and dated in 1872, and the second under a registered deed in favour of L and dated in 1880. The registration of the latter both deeds was optional, the former under Act VIII of 1871, and the latter



under Act III. of 1877. J, subsequently satisfied the mortgage under the registered deed of 1880, which was delivered to him. M, then brought a suit to recover the money due to him under the mortgage deed of 1872 by sale of the mortgaged property:—*Held*, by *Oldfield, J.*, that applying the rule laid down by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas*, J having paid off the mortgage under the registered deed of 1880, should have the benefits of that mortgage, and was entitled to set up the deed which he held against the unregistered deed of 1872, against which, under sec. 50 of the Registration Act (III of 1877) it would take effect, as regards the property comprised in it. *Lakshman Dass v. Dip Chand* referred to. *Per Mahmood, J.*—That the word “unregistered” in sec. 50 of the Registration Act, must, in reference to the circumstances of the present case, be read as “not registered under Act VIII of 1871,” and that, so reading the section, the registered mortgage-deed of 1880 was entitled to priority over the unregistered mortgage-deed of 1872. *Lakshman Dass v. Dip Chand*, and *Sri Ram v. Bhagirath Lal* distinguished. Also *per Mahmood J.*—That the position of J, by reason of his having paid off the registered mortgage of 1880 could at best be that of an assignee of that mortgage having priority over the mortgage deed on which the plaintiff was suing; that such priority could not enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage of 1880; and that, as a consequence, the sale of the property in enforcement of the mortgage of 1872 should be allowed to take place, but subject to the rights of priority which J had acquired by reason of his having paid off the registered mortgage of 1880. *Sirbadh Rai v. Ragannath Prasad and Gokaldas Gopaldas v. Puranmal Premsukhdas* referred to.—7 Al. 577.

The purchaser of the equity of redemption of land which had been mortgaged in 1866 and 1874 to different persons, paid off the prior mortgage. The second mortgagee sued to bring the property to sale in satisfaction of his mortgage:—*Held* that the prior mortgage was not extinguished and that the purchaser of the equity of redemption had, by paying off that mortgage acquired an equitable right to its benefits, which they could use against the second mortgage. *Gokaldas Gopaldas v. Puranmal Premsukhdas* followed.

*Per Oldfield J.*, (*Mahmood, J.*, dissenting).—That the prior mortgage afforded a defence against the claims of the second mortgagee seeking to bring the property to sale. *Gokaldas Gopaldas v. Puranmal Premsukhdas* followed.

*Per Mahmood, J.*—That the ruling of the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas* did not go beyond laying down the proposition that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right possession of the mortgaged property the mortgage is not extinguished for all purposes, but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession.

Also *per Mahmood, J.*—That although the persons who had paid off the prior mortgage were entitled to claim its benefits, they could not be understood to have acquired rights greater than those which the prior mortgagee himself possessed; that as holders of the equity of redemption they could not resist the suit which aimed at enforcing a valid security, and, as persons entitled to the benefits of the prior mortgage, they were at best in the posi

tion of assignees of that mortgage; that the union of the two capacities could not confer upon them rights higher than those which the mortgage they had paid off created; that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security without paying off the prior mortgage so long as such enforcement does not clash with the rights secured by the prior mortgage; and that therefore the purchaser of the equity of redemption held that right subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the prior mortgage did not place the equity of redemption on a better footing, though it entitled them to the benefits of that mortgage secured to them in the same manner as to the original mortgage whose rights they had acquired by subrogation. *Gaya Prasad v. Salik Prasad, Ramu Naikan v. Subbaraya Mudali, and Mal Chand Kuber v. Lall Trikam* referred to.—7 Al. 568.

In 1874 a plot of land, No. 111 which, in 1866, had been mortgaged to L, was with other property mortgaged to R. In 1878 the equity of redemption in plot No. 111 was purchased by J, who paid off the mortgage of 1866. R brought a suit against J, to bring to sale the whole of the property included in the mortgage of 1874. The Court of first instance decreed the claim in part, exempting from the decree plot No. 111, on the ground that the defendant, by reason of having purchased the equity of redemption in that plot and having paid off the mortgage of 1866, stood in the position of a first mortgagee of that plot and his mortgage had priority over the plaintiff's mortgage of 1874. The Full Bench modified the decree of the Court of first instance by inserting after the words "land No. 111 be exempted from the hypothecation lien" the words "in that property the interest of the plaintiff as second mortgagee only to be sold."

*Per Oldfield, J.*—That the second mortgagee could not bring the land to sale so as to oust the first mortgagee, whose mortgage was usufructuary, and get rid of the first mortgage without satisfying it; but that he had a right to sell such interest as he possessed as second mortgagee.

*Per Straight, J.*—That the plaintiff was entitled to bring to sale the property charged to him under his mortgage of 1874, subject to the rights existing in favour of the first mortgagee of 1866: in other words, that a purchaser at a sale in execution of the decree would have no further right than a right to take the property subject to the right of the first mortgagee to possession of the property included in his instrument, and his other rights under that instrument, so long as it enured.—8 Al. 105.

**75.** Every second or other subsequent mortgagee has,

Rights of mesne mortgagee against prior and subsequent mortgagees.

so far as regards redemption, foreclosure, and sale of the mortgaged property, the same rights against the prior mortgagee

or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor.

**76.** When, during the continuance of the mortgage,

Liabilities of mortgagee in possession.

the mortgagee takes possession of the mortgaged property—

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own;



(b) he must use his best endeavours to collect the rents and profits thereof ;

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government-revenue, all other charges of a public nature accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold ;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money ;

(e) he must not commit any act which is destructive or permanently injurious to the property ;

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money ;

(g) he must keep clear, full, and accurate accounts of all sums received and spent by him as mortgagee, and at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported ;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage-money, and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money ; the surplus, (if any) shall be paid to the mortgagor ;

(i) when the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his gross receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court, as the case may be.

If the mortgagee fail to perform any of the duties imposed upon him by this section, he may, when <sup>Loss occasioned by his default.</sup> accounts are taken in pursuance of a decree made under this chapter, be debited with the loss (if any) occasioned by such failure.

#### Notes.

The mortgagee will, in equity, be allowed for all repairs necessary for the support of the property, but not for general improvements made without the acquiescence or consent of the mortgagor, which enhance the value of the estate, especially if they are of such a nature as may cripple the right or power of redemption. And, in no case will a Court of Equity permit a mortgagee to commit waste or do damage to the estate, as for example, by pulling down cottages. Story 1016 *bb*. See also I. L. R., 4 Bom. 584.

Nothing can ever deprive the mortgagor of his right to have the accounts of the mortgagee in possession taken, not even an admission in his plaint that something may possibly still be due on the mortgage. And the *onus probandi* does not lie upon the mortgagor; that is to say, he is not bound to prove, independently of the accounts filed by the mortgagee, that the mortgage-debt has been paid off. But if he fails eventually to prove that it has been satisfied, his suit will be dismissed with costs. And a condition in a mortgage deed that the mortgagor shall not claim an account from the mortgagee who has been in possession, does not in any decree bar the operation of the law, by which the lender is to account to the borrower for the proceeds during his possession. As a general rule, the mortgagee may be called on to account by the mortgagor at any time, on the mortgagor's allegation that the whole sum due with interest has been received by him. Macp. Also I. L. R., 6 Bom. 669.

Since the repeal of the usuary laws a mortgagor and mortgagee may make what contract they please with reference to the profits of the mortgaged estate, and the mortgagor may, by contract, deprive himself of the right to compel the mortgagee in possession to account for the profits. (Vide Act XXVIII of 1855). Judgment of C. H. C. in Appeal Nos. 184 and 185 of 1866. Vide Madras Jurist of 1867. Vol. II, p. 45.

By the terms of a usufructuary mortgage, it was provided that the annual profits of the mortgaged property should be taken to be a certain amount; that out of this amount the revenue should be paid annually by the mortgagee; that the balance should be taken by the mortgagee as representing interest on the principal amount of the mortgage-money; and that the mortgage should be redeemed on payment of the principal of the mortgage-money in a lump sum. It was further provided that the mortgagor should not be entitled to claim mesne profits nor the mortgagee to claim interest.

J, alleging that he had purchased the equity of redemption of the mortgaged property in 1869; that since the purchase the mortgagee had not paid any revenue and therefore he, J, had been compelled to pay it; and that consequently the mortgage-money had been paid out of the profits of the mortgaged property and a surplus was due, sued the original mortgagor and the mortgagee for possession by redemption of the mortgaged property and for surplus profits, or for possession of the mortgaged property on payment of any sum which might be found due. One of the defences to the suit was that the mortgage had already been redeemed in 1877 by the original mortgagor, and the suit was therefore not maintainable.

*Held*, (i) that, assuming that such redemption had taken place, that fact could not prejudice the plaintiff's rights arising out of the mortgage, whatever the effect of such redemption might be as between the original mortgagor and the mortgagee, and such redemption was therefore not a bar to the suit; (ii) that the plaintiff was entitled to take into account the amount of revenue which he had been compelled to pay by reason of the mortgagee's default; (iii) that in the accounting the plaintiff was entitled to avail himself of annual receipts; and (iv) that, the mortgagee having had notice of the plaintiff's purchase, any payments which he might have made to the original mortgagor on account of revenue after the purchase were improperly made, and could not be taken into account against the plaintiff.—I. L. R., 6 Al. 303.

See I. L. R., 10 Cal. 443, noted under sec. 65; 15 Madr. 290, noted under sec. 2.

**77.** Nothing in section 76, clauses (b), (d), (g), and (h),  
 Receipts in lieu of interest. applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

#### *Priority.*

**78.** Where, through the fraud, misrepresentation, or  
 Postponement of prior mortgagee. gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

#### **Notes.**

The mere possession of the title deeds by a second mortgagee though a purchaser for value without notice, will not give him priority. There must be some act or default of the first mortgagee to have this effect.—4 M. H. C. R., 369.

A prior encumbrancer will not be postponed to a subsequent encumbrancer, unless he has been guilty of gross negligence. A mortgaged land to B. B having bought certain land from C pledged his mortgage-deed to C to secure the unpaid purchase money. C gave the bond to A who was his brother-in-law. A representing to D that the mortgage was redeemed, sold the land to him giving him the bond as a title-deed. In a suit by B against D to recover the mortgage amount by sale of the land: *Held*, that D even although a *bona fide purchaser*, could not resist the claim.—I. L. R., 8 Madr. 200.

On the 20th of February 1888, defendant No. 1 executed a mortgage in favor of the plaintiff Company. Defendants Nos. 2 and 3 bound themselves as sureties for the due payment of the mortgage amount, on default by the mortgagor. This mortgage had not been registered at the date of the execution of the mortgages next referred to. On the 27th of April 1888, the Secretary of the plaintiff Company handed over to defendant No. 1 most of the title-deeds which had been delivered to the plaintiff Company on the execution of the mortgage, and defendants Nos. 1 and 3 undertook that they would raise a loan thereon and discharge the debt due to the

plaintiff, or return the title-deeds if they failed in raising the loan. On the 20th April 1888 defendant No. 1 deposited the title-deeds with defendant No. 4 and executed a mortgage to her for Rs. 4000; and on the 7th May 1888, he executed an instrument creating a further charge in her favor for Rs. 1,000. These two sums were applied by defendant No. 1 to his own use, and not in discharge of the prior mortgage. The mortgages to defendant No. 4 described the mortgage premises as being then free from incumbrances: *Held*, that the plaintiff Company had been guilty of gross negligence in letting the title-deeds out of their possession and that the mortgages of defendant No. 4 had accordingly priority over the mortgage to the plaintiff Company.—12 Madr. 424.

A mortgagee at the request of the mortgagors returned to them their certificate of title to the mortgage premises to enable them to raise money to pay off his mortgage. This mortgage was duly registered. The mortgagors, who remained in possession of the mortgage premises throughout, having shown the certificate to a third person whom they informed of the existence of the first mortgage, and borrowed Rs. 400 from him, subsequently informed him that the first mortgage was paid off, delivered the certificate to him, and executed to him a mortgage of the same premises to secure the sum of Rs. 400, and a further sum of Rs. 800: *Held*, that though the second mortgagee had been wanting in caution, yet since he had been thrown off his guard by the conduct of the first mortgagee, in returning to the mortgagors their certificate of title, the second mortgagee was entitled to priority in respect of his security over the first mortgagee.—12 Madr. 429.

In a suit for declaration of priorities of mortgages and for foreclosure, it appeared that the mortgage premises were mortgaged to defendant No. 2 in 1879 and to the plaintiff in 1883 and again in 1884, and were conveyed absolutely by the mortgagor to defendant No. 2 in 1886. The mortgagor executed a rent agreement to the plaintiff on the occasion of each of the mortgages of 1883 and 1884. The above mortgages were registered, but the plaintiff and defendant No. 2 had no actual notice at the date of their mortgage and conveyance, respectively, of the previous incumbrances. The plaintiff received the title-deeds to the estate from the mortgagor on the execution of the mortgage of 1883; defendant No. 2 alleged that he had held them under a prior incumbrance which was consolidated in the mortgage of 1879, and that previous to the execution of that mortgage the mortgagor had obtained them from him for the purpose of obtaining a Collector's certificate and had told him that the Collector had retained them, in order to account for their not being replaced in his custody:—*Held*, (apart from the question whether the mortgage of 1879 had been extinguished by the conveyance of 1886), that the conduct of defendant No. 2 in permitting the title-deeds to remain in the possession of the mortgagor amounted to gross negligence within the meaning of Transfer of Property Act, sec. 78, and that the registration of the mortgage to defendant No. 2 did not affect the plaintiff with constructive notice of its existence, and that accordingly the subsequent mortgages to the plaintiff were entitled to priority.—13 Madr. 883.

See I. L. R., 15 Madr. 268, noted under sec. 3.

**79.** If a mortgage, made to secure future advances, the performance of an engagement, or the balance of a running account, expresses the maximum to be secured thereby, a

to secure un-  
amount when  
is expressed.

subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

*Illustration.*

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rupees 10,000. A then mortgages Sultanpur to C, to secure Rupees 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Rupees 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rupees 10,000. B & Co. are entitled, to the extent of Rupees 10,000, to priority over C.

**80.** No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security. And, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Tacking abolished.

**Notes.**

If loans are made by way of further charge, and questions as to priority arise, the mortgage will, no doubt as to each particular sum, be considered to bear date only from the time when that sum was charged on the mortgaged lands, and will not, as to the subsequent advances, take the date of the original contract. Macp. 57.

The further charge ought to be made by a new deed applicable only to the sum to be charged : and when the original mortgage deed is thrown aside, and a fresh deed executed by which the property is mortgaged for the consolidated sum, there is danger of the original mortgage as well as the further charge being held to rank only from the date of the latter deed. Macp. 59.

See I. L. R., 3 Cal. 307. See I. L. R., 4 Al. 85.

*Marshalling and Contribution.*

**81.** If the owner of two properties mortgages them both to one person, and then mortgages one of the properties to another person who has not notice of the former mortgage, the second mortgagee is, in the absence of a contract to the contrary, entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee so far as such property will extend, but not so as to prejudice the rights of the first mortgagee or of any other person having acquired for valuable consideration an interest in either property.

Marshalling securities.

## Notes.

Where the owner of certain property mortgages it to A, and afterwards sells a portion of the mortgaged property to B, it is not incumbent on A in suing to enforce his mortgage to proceed first against that portion of the property which has not been sold by the mortgagor.—11 Cal. 258.

Suit by the adoptive son of the obligee (deceased) of a hypothecation bond to recover principal and interest due on the bond against the land comprised in the hypothecation. Defendant No. 1, the obligor of the bond, had executed it as manager of a joint Hindu family, of which defendant No. 2 was a member, and for the rightful purposes of the family. The family subsequently became divided, and the hypothecated property was divided between defendants Nos. 1 and 2. Defendant No. 1 afterwards hypothecated part of his share for a private debt to defendant No. 3, who having sued on his hypothecation and brought the land to sale in execution became the purchaser. The District Munsif passed a decree for the plaintiff, against which defendants Nos. 2 and 3 preferred separate appeals, the plaintiff being the sole respondent to each appeal. The District Judge on appeal passed a decree directing that the plaintiff should first proceed against all the property which was not subject to the hypothecation to defendant No. 3, including the share of defendant No. 2. Defendant No. 2 preferred a second appeal joining all the other parties: (1) *Held*, that the plaintiff was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit; (2) that as the plaintiff and defendant No. 3 were not creditors of the same person having demands against the property of that person, no case for marshalling arose, and consequently that the direction of the District Judge was wrong. *Per cur.*—Though both defendants Nos. 2 and 3 preferred separate appeals from the original decree, they only made the plaintiff respondent, and defendant No. 3 omitted to make the appellant before us (defendant No. 2) party to his appeal, but the relief prayed for in each appeal was that the original decree might be set aside so far as it was in plaintiff's favour and against each appellant.....Having regard to the relief claimed.....we see no reason to hold that the appellant before us was a necessary party to the appeal preferred by defendant No. 3.—12 Madr. 255.

The equities which apply to a puisne incumbrancer in the marshalling of securities apply also to a *bona fide* purchaser for value, without notice, of a portion of property the whole of which was subject to a prior incumbrance. *Tulsi Ram v. Munnoo Lal, Nowa, Koer, v. Abdul Rahim, Bishonath Mookerjee v. Kisto Mohun Mookerjee and Kheloosee Cherooria v. Banee Madhub Doss*, referred to.

The mortgagees of two properties, one of which had, subsequently to the mortgage, been purchased for value *bona fide* by one who had no notice of the incumbrance, brought a suit to enforce their lien against both the properties originally owned by the mortgagor, impleading as defendants both the mortgagor and the purchaser:—*Held* that, while there was no doubt that, if the purchaser was compelled to pay more than the share of the mortgage debt apportioned on the property purchased by him, he would be entitled to contribution, yet, in a suit so framed, and having regard the array of parties, such an apportionment could not be made at the stage of second appeal.—I. L. R., 6 Al. 711.

**82.** Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence

Contribution to mortgage-debt.



of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under Section eighty-one to the claim of the second mortgage.

**Note.**—See I. L. R., 14 Madr. 71, noted under sec. 60.

*Deposit in Court.*

**83.** At any time after the principal money has become payable, and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of complaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed if then in his possession or power, apply for and receive the money, and the mortgage-deed so deposited shall be delivered to the mortgagor or such other person as aforesaid.

**Notes.**

A sum of money having been deposited in Court under Transfer of Property Act, sec. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgage premises, which he consented to do. This agreement was not communicated to the Court and the depositor refused to carry it out when the mortgagee had withdrawn the money as above:—*Held*, that the mortgagee was entitled to a decree for specific performance of the agreement to convey.—I. L. R., 13 Madr. 316.

The deposit intended by Transfer of Property Act, sec. 83, must be made unconditionally. Accordingly when the mortgagor in making the de-

posit prays that the amount should be paid out to the mortgagee on his producing certain deeds the provisions of the section are not complied with.—14 Madr. 49.

In February, 1883, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August, 1882. On the 23rd August 1883, the decree-holder executed his decree by depositing the principal amount of the mortgage-money, and obtained possession of the property in substitution for the original mortgagee. In June, 1884, the mortgagor, proceeding under section 83 of the Transfer of Property Act, deposited in Court the sum of Rs. 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August, 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August, 1884:—*Held* that until the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August 1882, he had no interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883.

*Semble* that the proper person entitled to receive the interest for that period was the original conditional vendee, and the Court which passed the decree for pre-emption should have allowed him the amount of such interest in addition to the principal mortgage-money. *Ashik Ali v. Mathura Kandu* referred to.

*Held*, with reference to sec. 84 of the Transfer of Property Act (IV of 1882), that the Courts below were right in not allowing interest to the defendant after the 21st August, 1884, when the plaintiff, to his knowledge, deposited the whole money due on the mortgage.—8 Al. 502.

The plaintiffs were mortgagees in possession of certain shares in a village under a mortgage which, as to the principal amount advanced, was a simple mortgage, as to the interest, a usufructuary mortgage. The mortgagees, to save the property from sale, paid up certain arrears of Government revenue. Subsequently the defendant, who was the representative of the mortgagors, under sec. 83 of the Transfer of Property Act (XIV of 1882), paid the original sum due under the mortgage into Court. The mortgagees withdrew the money so paid in and deposited the mortgage-deed in Court. The mortgagees then, after relinquishing possession of the mortgaged property, sued to recover the money which they had paid as Government revenue by sale of the mortgaged property. *Held* that though the mortgagees might originally have treated the amount paid by them as Government revenue as part of the mortgage-money, they did not by such payment obtain a lien independently of their position as mortgagees, and when once they had abandoned their lien on the mortgaged property by accepting the money paid into Court by the mortgagors and by relinquishing possession of the mortgaged property, they could not afterwards revive it; and their suit, which was for realization of the Government revenue paid by them by sale of the mortgaged property, must fail. *Semble*, a mortgagee, who had given up his lien under circumstances similar to those above described, might bring a simple money suit to recover money paid by him to save the



property from sale in execution for arrears of Government revenue. *Kinu Ram Das v. Mozaffer Husain Shaha*, *Lachman Singh v. Salig Ram*, *Achut Ramchandra Pai v. Hari Kamti*, *Girdhar Lal v. Bhola Nath*, *Parsotam Das v. Jaijit Singh*, *Nikka Mal v. Sulaiman Shaikh Gardner*, *Kristo Mohinee Dossee v. Kaliprosono Ghose*, and *Nagenderchunder Ghose v. Sreemutty Kaminee Dossee*, referred to.—13 Al. 195.

See I. L. R., 11 Madr. 371, noted under sec. 67; 16 Cal. 307, noted under sec. 60.

**84.** When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section eighty-three the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender, or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

Cessation of interest.

Nothing in this section or in section eighty-three shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money.

**Note.**

See I. L. R., 8 Al. 502, noted under sec. 83; 11 Madr. 371, noted under sec. 67; 16 Cal. 307, noted under sec. 60.

*Suits for Foreclosure, Sale, or Redemption.*

**85.** Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest.

Parties to suits for foreclosure, sale, and redemption.

**Notes.**

On second appeal against a decree dismissing a suit which had been brought by a puisne mortgagee to redeem a prior incumbrance, it was ordered that the mortgagor be brought on to the record. On its appearing that it had not been intended that the plaintiff should take any interest under the mortgage sued on:—*Held*, that the second appeal should be dismissed.—I. L. R., 15 Madr. 54.

In a suit by a mortgagee against two of his three mortgagors, the defendants objected in their written statement that the suit was bad for non-joinder of the third mortgagor, and also alleged that subsequent encumbrances on the mortgage premises had been created with the concurrence of the plaintiff. It appeared that the third mortgagor, as a witness, renounced interest in the greater part of the mortgage premises. On second appeal:—*Held*, that the suit should be remanded to the Court of first instance for disposal after joinder of the third mortgagor and the subsequent encumbrancers.—15 Madr. 487.

Certain immoveable property was mortgaged in 1865 to H, in 1871 to G, and in 1873 again to H. In 1883 the property was purchased by M, the representative of G, in execution of a decree obtained in 1877 by G in a suit for sale brought by him upon the mortgage of 1871. To this suit and decree the mortgagee under the deeds of 1865 and 1873 was not a party. In 1885, M sued the representatives of H for redemption of the mortgage of 1865. One of the defendants pleaded that as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to that suit, and thus afforded "an opportunity of protecting his rights by payment of the mortgage-money." He did not in the Court below ask in express terms to be allowed to redeem the plaintiff's mortgage, but he did so in appeal to the High Court. *Held*, with reference to the terms of sec. 85 of the Transfer of Property Act, that inasmuch as the defendant was in possession of the mortgaged property at the time of the suit of 1877, and his mortgage was a registered instrument, it must be presumed that the plaintiff had notice of its existence and should therefore have made him a party; and that, under the circumstances he should be placed in the same position as he would have held if the decree of 1877 had never been passed. *Held* also that, although it would have been more regular had the defendant in the Court below asked in express terms to be allowed to redeem the plaintiff's mortgage and brought into Court what he alleged to be due thereunder, or expressed his willingness to pay such amount as might be found to be due on taking accounts, yet, the defendant having pleaded that he ought to have been afforded an opportunity of protecting his rights by payment of the prior mortgage-money, the Court should not be too technical in such a matter, where the defendant had the undoubted right now asserted by him, and where the result of not recognizing such right would be to extinguish his security. The Court therefore passed an order declaring the defendant entitled to retain possession of the property in suit, if within ninety days he paid into Court the amount of the plaintiff's mortgage-debt, with interest, otherwise the lower Court's decree for redemption on payment of the amount due on the mortgage of 1865 would stand.—I. L. R., 9 Al. 125.

See I. L. R., 13 Al. 432, noted under sec. 3.

#### *Foreclosure and Sale.*

**86.** In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree,

and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all

incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims; and shall, if necessary, put the defendant into possession of the property; but

that, if the payment is not made on or before the day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property.

#### Notes.

The provisions of sec. 8 of Regulation XVII of 1806 are not merely directory, but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object the protection of mortgagors from fraud. The prescribed procedure must be strictly followed. *Norender Narrain Singh v. Dwarka Lall Munder*, L. R., 5 I. A., 18; I. L. R., 3 Cal. 397, referred to and followed:—*Held*, that although the mortgagor the hearing of the foreclosure suit in the Court of first instance had not insisted on the insufficiency of the notification of the mortgagee's application to foreclose, but had relied on another defence, this could not be construed as a binding admission that notice had been duly given; that service of the copy petition for foreclosure, and of the parwana signed by the Judge, was essential; and that the mortgagor was not precluded from questioning the regularity of the proceedings in his subsequent appeal.—I. L. R., 11 Cal. 111.

Where a person mortgages his property by deed of conditional sale, and afterwards the right, title and interest of the mortgagor is sold in execution of a money decree previously obtained against him, the purchaser at such sale is entitled to due notice of foreclosure proceedings instituted subsequently to the sale, but before the confirmation thereof. *Bhyrub Chunder Bundopadhyaya v. Raudamini Dabee*, I. L. R., 2 Cal. 141, followed.—11 Cal. 341.

Mortgage made before the Act came into force and foreclosed under Reg. XVII. of 1806, may be decreed under sec. 86 of the Act, provided the procedure under the Act supplied, so as not to effect the rights saved by sec. 2 cl. (c.) of that Act.—11 Cal. 588.

The mortgagees of a certain tenure obtained, on 11th September 1884, under sec. 86 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under sec. 311 of the Civil Procedure Code to have the sale set aside for material irregularity:—*Held*, that under sec. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of section 311, "person whose property has been sold," and entitled them to make the application.—13 Cal. 346.

A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs. *Held* that the costs awarded could not be considered part of the money due upon the mortgage, and, as such, superseded by the order absolute and the mortgagee's possession

thereunder, and the application must, therefore, be allowed. *Rutnessur Sein v. Jusoda* referred to.—10 Al. 179.

**87.** If payment is made of such amount and of such Procedure in case of subsequent costs as are mentioned in payment of amount due. section ninety-four, the defendant shall (if necessary) be put into possession of the mortgaged property.

If such payment is not so made, the plaintiff may apply Order absolute for foreclosure. to the Court for an order that the defendant and all persons claiming through or under him be debarred absolutely of all right to redeem the mortgaged property, and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff :

Provided that the Court may, upon good cause shown, Power to enlarge time. and upon such terms (if any) as it thinks fit, from time to time postpone the day appointed for such payment.

On the passing of an order under the second paragraph of this section, the debt secured by the mortgage shall be deemed to be discharged.

In the Code of Civil Procedure, Schedule IV., No. 129, for the words "Final decree," the words "Decree absolute" shall be substituted.

#### Notes.

In a foreclosure action, the mortgagor can redeem at any time until the order absolute is made under sec. 87 of the Transfer of Property Act, 1882.—I. L. R., 16 Cal. 246.

Sec. 244 of the Civil Procedure Code contemplates that there must be some question in contraversion and conflict in execution which has been brought to a final determination and conclusion so as to be binding upon the parties to the proceedings, and which must relate in terms to the execution, discharge or satisfaction of the decree. A judgment-debtor under a decree for foreclosure made an application to the Court two days after the expiry of time prescribed by the decree for payment of the amount due thereunder, in which she alleged that, by reason of the two previous days having been holidays, she had been unable to pay the money before, and asked to be allowed to deposit the same. Upon this application the Court passed the following order:—"Permission granted. Applicant may deposit the money." The money was deposited accordingly. *Held* that the order was merely a ministerial act, and nothing more than a direction from the Judge to his subordinate official to receive the money, which, as it did not fall within either sec. 244 or sec. 588 of the Civil Procedure Code, was not appealable; and that the proper remedy of the decree-holder, assuming the deposit to have not been made in time, was to apply for an order absolute for foreclosure, which order would be subject to any steps the parties affected by it might take by way of appeal or otherwise.—9 Al. 500.

The order mentioned in sec. 87 of the Transfer of Property Act (IV of 1882) is an order in execution of the substantive foreclosure decree, and is appealable as a decree under sec. 244 read with sec. 2 of the Civil Procedure Code upon the stamp payable in respect of such orders. So held, by the Full Bench, *EDGE, C. J.*—doubting.—12 Al. 61.

An order under sec. 87 of Act IV of 1882 extending the time for payment of the mortgage money by a mortgagor is a decree within the meaning of secs. 2 and 244 of the Code of Civil Procedure, 1882, and therefore no application will lie under sec. 622 of that Code for revision of such order.—14 Al. 420.

See *I. L. R.*, 10 Al. 179, noted under sec. 86.

**88.** In a suit for sale, if the plaintiff succeeds, the Court shall pass a decree to the effect mentioned in the first and second paragraphs of section eighty-six, and also ordering that, in default of the defendant paying, as therein mentioned, the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is so found due to the plaintiff, and that the balance, (if any) be paid to the defendant or other persons entitled to receive the same.

In a suit for foreclosure, if the plaintiff succeeds, and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff, or of any person interested either in the mortgage-money or in the right of redemption, if it thinks fit, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

#### Notes.

The holder of a decree on a mortgage obtained an order under sec. 88 of the Transfer of Property Act for sale of the mortgaged property, and the proceeds of this, when sold, being insufficient to satisfy the decree, he applied for a decree under sec. 90 for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge refused the application on the ground that there was no such provision in the order for sale under sec. 88. *Held*, that the decree-holder was entitled to the decree asked for. The terms of sec. 90 contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties under a decree given under sec. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under sec. 88, and that that amount is legally recoverable from the judgment-debtor, he can ask for and obtain a decree under sec. 90 for realization of the balance from other properties of the debtor.—*I. L. R.*, 16 Cal. 423.

Where a suit to set aside a sale in execution of a decree was brought on the ground that by the fraud of the judgment-creditor the proclamation of sale had not been duly made, and the facts were that the sale was not an ordinary sale of attached property in execution of a decree, but a sale in execution of a mortgage decree which directed the sale of the mortgaged property in accordance with the provisions of secs. 88 and 89 of the Transfer of Property Act, but that there was no such decree in existence, as only a decree *nisi* and not a decree absolute directing the sale had been made; and it was contended that until a decree absolute was made for the sale, the right to redeem existed, and that the suit might be regarded as a suit to redeem; *Held*, that there was nothing in these facts to distinguish the case from the Full Bench case of *Mohendro Narain Chaturaj v. Gopal Mondul*, I. L. R., 17 Cal., 769, and that the suit was therefore not maintainable. An order directing a sale in such a case would be sufficient authority under sec. 89 of the Transfer of Property Act even if the order did not take the form of a decree such as is prescribed for a decree absolute in the case of a suit for foreclosure.—18 Cal. 139.

An application for execution of a decree for sale of mortgaged property under sec. 88 and which directed that if the decree were not satisfied within two months the property should be sold, ought not to be allowed before the expiration of the period therein provided.—7 Al. 194.

A decree in favour of a mortgagee for sale of the mortgaged property cannot be treated as one for money. According to the Transfer of Property Act, secs. 88, 89, and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance.—10 Al. 632.

The decree contemplated by sec. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree.—11 Al. 486.

The holder of a decree under sec. 88 of the Transfer of Property Act (IV of 1882) applied for execution to the Court charged with execution of the decree. *Held* that this was a good application under sec. 89 of the Act, and that it was not necessary that such application should be made to the Court which had passed the decree. An application for an order absolute for sale under sec. 89 of the Transfer of Property Act (IV of 1882) is a proceeding in execution and subject to the rules of procedure governing such matters.—13 Al. 278.

See I. L. R., 13 Al. 330, noted under sec. 67; 14 Al. 513, noted under sec. 90.

**89.** If, in any case under section eighty-eight, the defendant pays to the plaintiff or into Court on the day fixed as aforesaid the amount due under the mortgage, the cost (if any) awarded to him and such subsequent costs as are mentioned in section ninety-four, the defendant shall (if necessary) be put in possession of the mortgaged property; but, if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mort-

Procedure when defendant pays amount due.



gaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section eighty-eight, and thereupon the defendant's right to redeem and the security shall both be extinguished.

Order absolute for sale.

#### Note.

See I. L. R., 18 Cal. 139, 10 Al. 632, 11 Al. 486, 13 Al. 278, noted under sec. 88; 14 Al. 513, noted under sec. 90.

**90.** When the net proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum.

Recovery of balance due on mortgage.

#### Notes.

In a suit for enforcement of a mortgage security the plaintiff prayed for a decree both as against the mortgaged property, and also, in the event of the mortgaged property not realising sufficient to satisfy his claim, as against the other property and the persons of the defendants, and the decree which the plaintiff obtained was framed in accordance with the prayer in the plaint, that is to say, the decree expressly provided that, should the mortgaged property not realise sufficient to satisfy the amount decreed to the plaintiff, the other property of three, and the persons of two, of the judgment-debtors were to be liable. *Held* that such a decree could be executed against the persons and other property of the parties named therein, without its being necessary for the decree holder to obtain a separate decree under sec. 90 of the Transfer of Property Act (Act IV of 1882). *Miller v. Digambari Debya*; referred to.—I. L. R., 13 Al. 360.

The plaintiff obtained a decree on a hypothecation bond, the decree providing that the money secured by the bond was to be realised by sale of the hypothecated property, and, if that proved insufficient to satisfy the decree, by sale of other property of the judgment debtor. The hypothecated property was sold and the proceeds were not sufficient to satisfy the decree. The decree-holder thereupon applied for enforcement of that portion of the decree which related to the other property of the judgment-debtor. To this application it was objected that it was necessary to obtain a decree under sec. 90 of the Transfer of Property Act (IV of 1882). This objection was allowed and the decree-holder applied for and obtained a decree under the said section. The judgment-debtor then appealed against that decree on the ground, amongst others, that, looking to the terms of the original decree, the application under sec. 90 was superfluous. *Held* that the decree contemplated by sec. 90 of the Transfer of Property Act is, in fact, an order to be obtained in execution of a decree for sale; and though in the present instance the application for such a decree may have been superfluous, it may nevertheless be regarded as an application for execution of a decree by enforcement of a portion of it against property other than the mortgaged property. *Miller v. Digambari Debya*, distinguished; *Hafiz-ud-din Ahmad v. Damodar Das*, and *Raj Singh v. Parmanand*, referred to.—13 Al. 356.



Where there is nothing to show a contrary intention of the parties, every mortgage carries with it a personal liability to pay the money advanced; but a mortgagee must sue for his remedy against the property first. In so doing it is immaterial whether or not he prays in his plaint for relief over against non-hypothecated property. Unless in exceptional cases he can obtain such relief only under the provisions of sec. 90 of the Transfer of Property Act, and if such relief is refused the refusal will not bar a subsequent application under sec. 90. *Hafiz-ud-din Ahmad v. Damodar Das* approved, *Batak Nath v. Pitambar Das* distinguished, *Sutton v. Sutton*, *Raj Singh v. Parmanand*, *Miller v. Digambari Debya* and *Durga Dai v. Bhagwat Prasad* referred to.—Observations on the meaning and application of secs. 88, 89 and 90 of the Transfer of Property Act. Explanation of the term “legally recoverable” in sec. 90. *Sonatun Shah v. Ali Newaz Khan* discussed.—14 Al. 513.

See I. L. R., 10 Al. 632; 11 Al. 486 and 16 Cal. 423, noted under sec. 88.

### *Redemption.*

**91.** Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of the mortgaged property :—

Who may sue or redemption.

(a) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge upon, the property.

(b) any person having any interest in, or charge upon, the right to redeem the property;

(c) any surety for the payment of the mortgage-debt or any part thereof;

(d) the guardian of the property of a minor mortgagor on behalf of such minor;

(e) the committee or other legal curator of a lunatic or idiot mortgagor on behalf of such lunatic or idiot;

(f) the judgment-creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property;

(g) a creditor of the mortgagor who has, in a suit for the administration of his estate, obtained a decree for sale of the mortgaged property.

### **Notes.**

The right of redemption is inseparable from mortgage, and is so much an essential as not to be variable by agreement of parties. Vide 7 M. H. C. R., 395; Also—I. L. R., 5 Madr. 184.

Purchasers of the right, title, and interest, of a mortgagor in certain portions of the mortgaged property, sold in execution of a prior decree against the mortgagor, were added as co-defendants in a mortgagee's suit against the mortgagor for foreclosure on failure to redeem. As against these purchasers the suit was dismissed with costs, on the ground that their claims

to portions of the mortgaged property, under titles prior to, and independent of, the mortgagee's title, could not be decided therein. A decree was then made against the mortgagor, and on his subsequent failure to redeem or to pay the debt, his equity of redemption was sold, and was bought by the mortgagee. In a suit brought by the mortgagee against the representatives of one of the said purchasers, who refused to deliver possession of the portion:—*Held*, that (a), as this purchaser had disclaimed the right to redeem the portion, and had alleged a paramount title, causing the dismissal of the suit as against him, he, and those claiming under him were precluded from afterwards claiming to redeem; and (b), the proportion of mortgage charge for which he was liable could not be apportioned by the taking an account as between him and the mortgagee alone, in the absence of the purchasers of the other portions. *Nawab Azmut Ali Khan v. Jowahir Singh*, 13 Moore's I. A., 404, referred to. A decree which ordered that the defendants, without any account being taken at all, should retain possession of the portion purchased as above stated, clear of the proportion of mortgage debt chargeable thereon, on payment to the mortgagee of the sum for which he had bought the equity of redemption, was *held* to be incorrect, and was, accordingly, reversed.—12 Cal. 414.

A decree obtained by a mortgagor, which declared that the mortgagee should deliver up possession on payment of the sum found due to him, not having been executed for three years, a purchaser of the equity of redemption sued the mortgagee to redeem:—*Held*, that this suit was not barred by the former decree and that the plaintiff was entitled to redeem. *Sami v. Somasundram* (I. L. R., 6 Madr. 119) approved. *Gan Savant Bal Savant v. Narayan Dhond Savant* (I. L. R., 7 Bom. 467) dissented from.—8 Madr. 478.

A widow does not represent the estate so as to bind the son when the existence of the minor son is, from whatever cause, altogether ignored, and there is nothing on the face of the proceedings to show that she is sued as representing the minor son.

Accordingly where the plaintiff, a minor, sought to redeem a certain property from the defendant who had purchased the equity of redemption at an auction sale in execution of a decree obtained against the plaintiff's mother alone as representative of her deceased husband:—*Held*, that the plaintiff was entitled to redeem. The plaintiff having been ignored, the inheritance had not been substantially represented in the suit against his mother alone, and the plaintiff's right to the equity of redemption consequently remained unaffected by the sale to the defendant.—9 Bom. 429.

Upon a mortgage of land made little less than 60 years before the present suit a decree followed in 1825 to the effect that an account having been taken of what was due on the mortgage, the mortgagor might at any time make a tender of such mortgage money with interest up to date, and require that the land should be restored.

The plaintiff, representing the interest of the original mortgagor, sued for redemption of the mortgage, treating the above decree as regulating the rights of the parties from the time when it was made:—*Held*, that the right of the plaintiff was a right to execute the above decree, subject to the law of limitation, and not a right to obtain a decree for redemption and possession; the law also providing that questions between the parties to a suit relating to execution of decree must be determined by the order of the Court executing it:—*Held*, also, that the plaintiff not having sought by his plaint to redeem the mortgage, or alleged that there had been

acknowledgment, could not in the present appeal fall back on a right to redeem such mortgage, although the latter might be within limitation, as that would be to make a case different from the one tried and decided in the Courts below. Accordingly, the suit had been properly dismissed.—10 Bom. 461.

A deed of mortgage was executed by P, T and S for Rs. 4,000. A, the purchaser of the share of S, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees who had purchased the shares of P and T the other mortgagors.

*Held*, by the Full Bench with reference to section 7, art. IX of the Court-Fees Act (VII of 1870), that the defendants-mortgagees having brought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt, and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly as fiscal enactments should, as far as possible, be construed in favour of the subject. *Balkrishna Dhondo v. Nagvekar* referred to.—8 Al. 438.

See I. L. R., 15 Madr. 54, noted under sec. 85.

**92.** In a suit for redemption, if the plaintiff succeeds,  
Decree in redemption-suit. the Court shall pass a decree ordering—

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit (if any) awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree ;

that, upon the plaintiff paying to the defendant or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall re-transfer it to the plaintiff free from the mortgage, and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property ; and

that, if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.

#### Notes.

In a suit to redeem a kanom a redemption decree was passed which provided that the kanom amount and the value of improvements be paid

in three months. The decree amount was not paid within that period, but the decree-holder applied to execute the decree at a later date:—*Held*, that the decree-holder was not then entitled to have the decree executed. *Poresh Nath Mojumdar v. Ramjodu Mojumdar* (I. L. R., 16 Cal., 246) dissented from.—I. L. R., 13 Madr. 267.

A mortgagor obtained a decree for redemption of his mortgage “within six months from the date of this decree.” The mortgagee appealed, but the Appellate Court confirmed the decree. The mortgagor sought to redeem within six months from the date of the appellate decree:—*Held*, the Court to which the application of the mortgagor was made should, before passing orders on the application, have given the plaintiff time to apply to the District Court to amend the decree under Transfer of Property Act, sec. 92.—15 Madr. 170.

**93.** If payment is made of such amount and of such subsequent costs as are mentioned in section ninety-four, the plaintiff shall, if necessary, be put into possession of the mortgaged property.

If such payment is not so made, the defendant may (unless the mortgage is simple or usufructuary) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem, or (unless the mortgage is by conditional sale) for an order that the mortgaged property be sold.

If he applies for the former order, the Court shall pass an order that the plaintiff and all persons claiming through or under him be absolutely debarred of all right to redeem the mortgaged property, and may, if necessary, deliver possession of the property to the defendant.

If he applies for the latter order, the Court shall pass an order that such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same.

On the passing of any order under this section, the plaintiff's right to redeem and the security shall, as regards the property affected by the order, both be extinguished:

Provided that the Court may, upon good cause shown, and upon such terms, (if any) as it thinks fit, from time to time postpone the day fixed under section ninety-two for payment to the defendant.

Power to enlarge time.

**Notes.**

In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage-debt had now been satisfied from the usufruct. *Held*, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct. Having regard to sec. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage-debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property. The decision in *Sheikh Golan Hossein v. Musammatt Alla Rukhee Beebee* treated as not binding since the passing of the Transfer of Property Act. *Chaita v. Purun Sookh* and *Anrudh Singh v. Sheo Prasad*, referred to. Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem,—*held* that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by sec. 115 of the Evidence Act (I of 1872) or by any principle of equitable estoppel from afterwards suing on his own account for redemption.—I. L. R., 11 Al. 386.

See I. L. R., 13 Madr. 267 and 15 Madr. 170, noted under sec. 92.

**94.** In finally adjusting the amount to be paid to a mortgagee in case of a redemption or a sale by the Court under this chapter, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage-money such costs of suit as have been properly incurred by him since the decree for foreclosure, redemption, or sale up to the time of actual payment.

**Note.**—See I. L. R., 10 Al. 179, noted under sec. 86.

**95.** Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors

Costs of mortgagee subsequent to decree.

Charge of one of several co-mortgagors who redeems.

in the property for his proportion of the expenses properly incurred in so redeeming, and obtaining possession.

#### Notes.

In a suit by some of several co-mortgagors to redeem the entire property mortgaged, on the ground that the mortgage-debt had been satisfied out of the usufruct:—*Held* that the plaintiffs could only claim their own shares, and the Court of first instance should determine the extent of the shares after making the other co-mortgagors parties.—I. L. R., 7 Al. 376.

K and J jointly mortgaged 36 sihmas or shares of an estate to C giving him possession C transferred his rights as mortgagee to T and M. In execution of a decree for money against K held by M. K's rights and interests in the mortgaged property were sold, and were purchased by P, whose heirs paid the entire mortgage-debt, R, an heir of J, sued the heirs of P, to recover from them possession of J's sihmas in the mortgaged property, on payment of a proportionate amount of the mortgage-money paid by P. The plaintiff alleged that the mortgage, to C had been made forty years before suit. The defendants contended that a much longer period had expired since C the date of the mortgage, that forty-one years had elapsed since C transferred his rights as mortgagee, that they had redeemed the property twenty-one years ago and had been since its redemption in proprietary and adverse possession of the sihmas in suit, and that the suit was barred by limitation. Neither party was aware of the date of the mortgage, and neither adduced any proof on the point:—*Held* applying the equitable principle adopted in secs. 95 & 100 of the Transfer of Property Act (IV of 1882) that the owner of a portion of a mortgaged estate, which has been redeemed by his co-mortgagor, has the right to redeem such portion from his co-mortgagor, and a suit brought for that purpose would be in the nature of a suit for redemption, and would naturally fall within the definition of No. 148, sch. ii. of the Limitation Act (XV of 1877), and it was not possible for one of two mortgagors, redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem:—*Held*, therefore, that No. 148, and No. 134, of sch ii. of the Limitation Act was applicable to the suit.

Umrnissa v. Muhammad Yar Khan distinguished. Panchan Singh v. Ali Ahmad referred to:—*Held*, also that the defendants being admittedly in possession, though the existence of a mortgage as the origin of their possession was conceded by them, it lay upon the plaintiff to give *prima facie* proof of the subsistence of that mortgage at the date of suit, but that assuming that notice was given to the defendants by the plaintiff to produce the mortgage-deed, and that they failed to do so, very slight evidence would have been sufficient to satisfy the obligation which lay on the plaintiff. Aishan Dutt Ram v. Narendar Bahadoor Singh referred to —8 Al. 295.

#### *Sale of Property subject to prior Mortgage.*

**96.** If any property the sale of which is directed under

Sale of property subject to prior mortgage. this chapter is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same



interest in the proceeds of the sale as he had in the property sold.

**97.** Such proceeds shall be brought into Court and applied as follows :—  
Application of proceeds.

first, in payment of all expenses incident to the sale or property incurred in any attempted sale ;

secondly, if the property has been sold free from any prior mortgage, in payment of whatever is due on account of such mortgage ;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or, if there be more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

Nothing in this section or in section ninety-six shall be deemed to affect the powers conferred by section fifty-seven.

#### *Anomalous Mortgages.*

**98.** In the case of a mortgage, not being a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, or an English mortgage, or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Mortgage not described in section 58, clauses (b), (c), (d), and (e).

#### **Note.**

The obligor of a bond acknowledged therein that he had borrowed Rs. 153 from the obligee at the rate of Rs. 1-8 per cent. per mensem, and promised to pay the principal with interest at the agreed rate upon a date named. The bond continued thus :—"To secure this money, I pledge, voluntarily and willingly, my wealth and property in favour of the said banker. Whatever property, etc., belonging to me be found by the said banker, that all should be available to the said banker. If, without discharging the debt due to this banker, I should sell, mortgage, or dispose of the property to another banker, such transfer shall be void. For this reason, I have of my free will and consent executed this hypothecation-bond that it may be of use when needed." The amount secured by the bond became due on the 6th May, 1879. The bond was registered under



the Registration Act as a document affecting immoveable property, and the obligor was a party to such registration. On the 9th May, 1885, the obligee sued the heir of the obligor to recover the principal and interest due upon the bond by enforcement of lien against and sale of immoveable property belonging to the defendant. *Held* that the bond showed that the intention of the parties was to create by it a charge upon all the property of the obligor for the payment to the plaintiff of the principal monies borrowed, together with interest at the agreed rate. *Najibulla Mulla v. Nusir Mistri* referred to. *Held* also that the words used in the bond as indicating the property which was intended to be subject to the charge were sufficiently specific and certain to include, and were intended to include, all the property of the obligor; that, this being so, the maxim "*certum est quod certum reddi potest*" applied; that the bond created a charge upon the immoveable property of the obligor in respect of the principal and interest in question; that such principal and interest were monies charged upon immoveable property within the meaning of sch. ii, No. 132 of the Limitation Act (XV of 1877); and that, so far as the claim was to enforce payment of such principal and interest by recourse to the immoveable property of the obligor, the suit was brought within time. *Ram Din v. Kalka Prasad, Gauri Shankar v. Surju, and Tadman v. D'Epineuil* referred to.—I. L. R., 9 Al. 158.

*Attachment of Mortgaged Property.*

**99.** Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section sixty-seven, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43.

**Notes.**

The managing member of a joint Hindu family executed in 1878 a mortgage on certain lands, the property of the family, to secure a debt incurred by him for family purposes, and in 1881 he together with his brother executed to the mortgagee a money bond for the interest then due on the mortgage. In 1882 the mortgagee brought a suit on the money bond and having obtained a personal decree against the two brothers merely, brought to sale in execution part of the mortgaged property which was purchased by a third person:—*Held*, that the sale did not convey the interest of another undivided brother who was not a party to the decree:—*Held, further per Kernan, J.*, that the sale in execution was invalid under Transfer of Property Act, sec. 99.—I. L. R., 12 Madr. 325.

A usufructuary mortgagee left the mortgage premises in the possession of the mortgagor under a rent agreement in 1878. The rent having fallen into arrear, the mortgagee sued the mortgagor in October 1882 and obtained a decree for the arrear which provided for its payment by the mortgagor "on the responsibility of the defendant's mulgeni right" in the mortgage premises. The decree-holder attached the mortgage premises in execution, and having brought them to sale and purchased them himself, he now sued for possession:—*Held*, that the sale was invalid under Transfer of Property Act, sec. 99.—14 Madr. 74.

See I. L. R., 10 Madr. 129, noted under sec. 2 ; 12 Al. 64, noted under Art. 179 of Act XV of 1877 (Limitation Act.)

*Charges.*

**100.** Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property ; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.

**Notes.**

Under sec. 100 of the Transfer of Property Act, for a document to create a charge on immoveable property, it must be a document that creates such charge immediately on its execution, and not operate only as a charge at some future time, such as in the event of non-payment of the money secured by it, the latter being the possibility of a charge ultimately arising on the land, and not "a charge" within the meaning of that section. A lent B Rs. 99, and B executed a document on the 24th July, 1881, whereby he agreed to repay the amount with interest in the month of Baisakh, 1289, F. S. (April, 1882), and further agreed that, if he did not pay the money as stipulated, he should sell his right to certain land and that A should take possession thereof, and that after A took possession of the land no interest should be paid by him (B), and that A should pay the rent of the landlord out of the profits of the land without any objection. A instituted a suit on the 3rd August, 1885, to recover the Rs. 99. *Held*, that the document did not amount to a mortgage, nor did it create a charge under sec. 100 of the Transfer of Property Act, and that the suit was barred by limitation, three years being the period applicable.—I. L. R., 14 Cal. 687.

A co-sharer in a mahal, who was also the lambardar, paid arrears of Government revenue for the years 1882, 1883, and part of 1884, in respect of certain lands in the mahal which were the exclusive property of another co-sharer. These lands were subject to simple mortgages executed in 1873, upon which decrees were obtained in 1884, and had been sold in execution of these decrees in 1887. The co-sharer-lambardar having obtained a decree in a Court of Revenue against the mortgagors under sec. 93 (g) of the N.-W. P. Rent Act (XII of 1881) for recovery of the arrears of revenue paid by him, sought to execute that decree under sec. 177 of the Act by sale of the lands which had been sold in 1887 ; and thereupon the auction-purchaser at that sale objected under sec. 178, and the objection having been overruled, brought a suit as authorised by sec. 181 in a Civil Court to establish his title to the lands and to have them protected from sale in exe-

cution of the Court of Revenue decree. This suit was decreed, and the decree, not having been appealed against, became final. Subsequently, the co-sharer lambardar brought a suit in the Civil Court in which he claimed a decree for enforcement of lien by sale of the land for the amount of the Court of Revenue decree, and for a declaration that the said lien "which is on account of Government," be declared preferential to the mortgages of 1873, the decrees thereon of 1884, and the sales under those decrees of 1887. He claimed this lien not only in respect of the arrears of Government revenue paid, but also in respect of future interest. *Held* by the full Bench (*Mahmood, J.*, dissenting:—(i) That the Legislature had not given or recognized in the North-Western Provinces any such right of charge or lien in favour of a person paying Government revenue as was claimed here, or provided any means by which such a charge could be enforced, and that any such charge would be at variance with the policy and intention of the Government as disclosed in its legislative enactments. (ii) That no Civil Court had jurisdiction to entertain the suit, and no Court of Revenue had jurisdiction to make a decree for sale of the immoveable property or a decree in execution of which the immovable property could be sold to the prejudice of incumbrances to which it was subject. (iii) That it was not the intention of the Legislature that a civil Court should have jurisdiction to invest, by declaration or otherwise, a decree of a Court of Revenue with the attributes of a decree for sale such as could be passed by a civil Court in a suit for sale under the Transfer of Property Act, 1882. (iv) That there is no general principle of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate, obtains a charge on the estate, and, therefore in the absence of a statutory enactment, a co-sharer who paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. *Kinu Ram Das v. Mozaffer Hosain Shaha* (I. L. R., 14 Cal. 809), approved. (v) That the principle of Maritime Civil Salvage had no application to the case, and that no analogy could exist between the case of a salvor in Maritime Civil Salvage and the case of a co-sharer in a mahal to whom sec. 146 or sec. 148 of the North-Western Provinces Land Revenue Act (XIX of 1873) applied. *Leslie v. French* (L. R., 23 Ch. D. 552), and *Falcke v. Scottish Imperial Insurance Company* (L. R. 34 Ch. D. 34), referred to.—14 Al. 273.

See I. L. R., 10 Madr. 509, noted under sec. 58; 15 Cal. 492, noted under sec. 68; 13 Al. 28, noted under sec. 40.

**101.** Where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit.

#### Notes. .

If an incumbrancer buying, intends to retain the benefit of his charge, he must be allowed to retain it. Generally he will intend to retain it, and slight evidence will suffice to establish this. The fact that the mortgage deed remains with the mortgagee who purchases is evidence that he intends to retain the benefit of his mortgage.—I. L. R., 6 Bom. 404, and 561.

See also 7 M. H. C. R., 229 ; I. L. R., 2 Al. 826 , 3 Al. 682 , 4 Al. 196 , 8 Cal. 530 and 13 Madr. 383, noted under sec. 78 ; 15 Madr. 268, noted under sec. 3.

*Notice and Tender.*

**102.** Where the person on or to whom any notice or Service or tender on or to agent. tender is to be served or made under this chapter does not reside in the district in which the mortgaged property or some part thereof is situate, service or tender on or to an agent holding a general power-of-attorney from such person or otherwise duly authorized to accept such service or tender shall be deemed sufficient.

Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown to the person required to serve the notice, the latter person may apply to any Court in which a suit might be brought for redemption of the mortgaged property, and such Court shall direct in what manner such notice shall be served, and any notice served in compliance with such direction shall be deemed sufficient.

Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown to the person desiring to make the tender, the latter person may deposit in such Court as last aforesaid the amount sought to be tendered, and such deposit shall have the effect of a tender of such amount.

**103.** Where, under the provisions of this chapter, a Notice, &c., to or by person incompetent to contract. notice is to be served on or by, or a tender or deposit made or accepted or taken out of Court by, any person incompetent to contract, such notice may be served, or tender or deposit made, accepted, or taken by the legal curator of the property of such person ; but where there is no such curator, and it is requisite or desirable in the interests of such person that a notice should be served or a tender or deposit made under the provisions of this chapter, application may be made to any Court in which a suit might be brought for the redemption of the mortgage to appoint a guardian *ad litem* for the purpose of serving or receiving service of such notice or making or accepting such tender, or making or taking out of Court such deposit, and for the performance of all consequential acts which could or ought to be done by such person if he were competent to contract ; and the provisions of Chapter XXXI

of the Code of Civil Procedure shall, so far as may be, apply to such application, and to the parties thereto, and to the guardian appointed thereunder.

**104.** The High Court may, from time to time, make rules consistent with this Act for carrying out in itself, and in the Court of Civil Judicature, subject to its superintendence, the provisions contained in this chapter.

Power to make rules.

## CHAPTER V.

### OF LEASES OF IMMOVEABLE PROPERTY.

**105.** A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service, or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lease defined.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service, or other thing to be so rendered, is called the rent.

Lessor, lessee, premium, and rent defined.

In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable; on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Duration of certain leases in absence of written contract or local usage.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property.

## Notes.

A zamindari raiyat mortgaged the land comprised in his holding, and the mortgagee, having sued and obtained a decree on his mortgage, attached the mortgagor's interest in the land and purchased it at the court-sale held in execution of his decree. The zamindar, who had intervened unsuccessfully in execution, now sued to set aside the sale and to eject the decree-holder and the judgment-debtor from the land. Neither party adduced evidence:—*Held*, that as the burden of proof lay on the plaintiff, and had not been discharged, the suit must be dismissed.—I. L. R., 13 Madr. 60.

On the 11th December, 1882, A, who had, on the 1st July, 1882, let rooms in a dwelling house to B, sent a letter to the tenant in the following terms:—"If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate." On the 1st February, 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter:—*Held*, by the full Bench, with reference to the terms of sec. 106, that the letter was not such a notice to quit as the law required inasmuch as it was not a notice of the lessor's intention to terminate the contract at the end of a month of the tenancy. *Per Straight J.*—*Quære*, whether the letter was a notice to quit at all. Also *per Straight, J.*—A notice to quit must be certain, at all events in respect of the date of the determination of the tenancy: in other words, there must be a clear and explicit intimation to the tenants as to the date after which he will, if he remains in occupation of the premises, become a trespasser. *Ahearn v. Bellman* distinguished. The judgment of *Mahmood, J.*, reversed, and that of *Oldfield J.* affirmed.—7 Al. 899.

On the 11th December, 1882, A, who had on the 1st July 1882, let rooms in a dwelling-house to B, sent a letter to the tenant in the following terms:—"If the rooms you occupy in the house No. 5 Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment as well as for recovery of rent due at the enhanced rate." On the 1st February, 1883, the lessor instituted a suit against the tenant for ejectment with reference to the above letter:—*Held* by *Oldfield, J.* (*Mahmood, J.*, dissenting):—That, with reference to the terms of sec. 106 of the Transfer of Property Act, the letter was not such a notice to quit as the law required, inasmuch as the notice did not expire with the end of a month of the tenancy; and that this defect was not cured by the circumstance that the lessor waited until the end of the month to enforce his right to eject by suit:—*Held*, by (*Mahmood, J.*, *Oldfield, J.*, dissented):—That the letter dated the 11th December, 1882, was a valid notice to quit under sec. 106 and 111 of the Transfer of Property Act, and sufficient to determine the tenancy, inasmuch as it gave the tenant more than fifteen days notice, and its terms were such that he could with perfect safety have acted upon it by quitting the premises at the proper time, namely, by the end of the month, which he must be presumed to have known was the right time to leave, without any risk of incurring liability to payment of further rent, the landlord having clearly indicated his intention to terminate the tenancy, and the notice being binding upon him; that the additional time given by the notice must be taken to have been given for the convenience of the tenant, and not with the object of continuing the tenancy; and that the suit for ejectment, not having been brought till long afterwards, was maintainable. *Doe v. Smith*, *Ahearn v. Bellman*, *Nocoordass Mullock v. Jewrōj Baboo*, and *Jagut Chander Roy v. Rup, Chand Chango* referred to.



Also *Per Mahmood, J.*—The words “fifteen days” in sec. 106 of the Transfer of Property Act imply a fixation of the shortest period of notice allowed by the section ; and the terms “expiring” means that the terms of the notice must be such as to make it capable of expiring according to law at the right time, so as to sender it *safe* for the tenant to quit coincidentally with the end of a month of the tenancy, without incurring any liability to payment of rent for any subsequent period.—7 Al. 596.

**107.** A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

Leases how made.

All other leases of immoveable property may be made either by an instrument or by oral agreement.

**108.** In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased :—

Rights and liabilities of lessor and lessee.

*A.—Rights and Liabilities of the Lessor.*

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, or of which the former is and the latter is not aware, and which the latter could not with ordinary care discover :

(b) the lessor is bound on the lessee's request to put him in possession of the property :

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease, and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to, and go with, the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

*B.—Rights and Liabilities of the Lessee.*

(d) If, during the continuance of the lease, any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease :

(e) if, by fire, tempest, or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and



permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void :

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision :

(*f*) if the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor :

(*g*) if the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor :

(*h*) the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth ; provided he leaves the property in the state in which he received it :

(*i*) when a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them :

(*j*) the lessee may transfer absolutely, or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease :

nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer, or lessee :

(*k*) the lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increases the value of such interest :

(*l*) the lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf :

the lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof, and give or leave notice of any defect in such condition ; and when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left :

(*n*) if the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor :

(*o*) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own ; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell timber, pull down or damage buildings, work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto :

(*p*) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes :

(*q*) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

**Note.**—See I. L. R., 13 Madr. 60, noted under sec. 106.

**109.** If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it ; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed

Rights of lessor's transferee.

upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him :

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee, and the lessee, may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

**110.** Where the time limited by a lease of immoveable property is expressed as commencing Exclusion of day on which term commences. from a particular day, in computing that time such day shall be excluded. Where no day of commencement is named, the time so limited begins from the making of the lease.

Where the time so limited is a year or a number of years, Duration of lease for a year. in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable Option to determine lease. before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option.

**111.** A lease of immoveable property determines—  
Determination of lease.

(a) by efflux of the time limited thereby :

(b) where such time is limited conditionally on the happening of some event—by the happening of such event :

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event :

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :

(e) by express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :

(f) by implied surrender :

(g) by forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease :

(h) on the expiration of a notice to determine the lease, or to quit or of intention to quit, the property leased, duly given by one party to the other.

*Illustration to Clause (f).*

A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

**112.** A forfeiture under section one hundred and eleven, Clause (g), is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

*Waiver of forfeiture.*

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver.

**113.** A notice given under section one hundred and eleven, Clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting.

*Waiver of notice to quit.*

*Illustrations.*

(a.) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b.) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

**114.** Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.

**115.** The surrender, express or implied, of a lease of immoveable property does not prejudice an underlease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor.

The forfeiture of such a lease annuls all such under-leases, except where such forfeiture has been procured by the lessor in fraud of the under-lessees, or relief against the forfeiture is granted under section one hundred and fourteen.

**116.** If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in section one hundred and six.

*Illustrations.*

(a.) A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house, and pays the rent to A. C's lease is renewed from month to month.

(b.) A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

**117.** None of the provisions of this chapter apply to leases for agricultural purposes, except in so far as the Local Government, with.

the previous sanction of the Governor-General in Council, may, by notification published in the local official Gazette, declare all or any of such provisions to be so applicable, together with, or subject to, those of the local law (if any) for the time being in force.

Such notification shall not take effect until the expiry of six months from the date of its publication.

## CHAPTER VI.

### OF EXCHANGES.

**118.** When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange."

"Exchange" defined.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

**119.** In the absence of a contract to the contrary, the party deprived of the thing or part thereof he has received in exchange, by reason of any defect in the title of the other party, is entitled at his option to compensation or to the return of the thing transferred by him.

Right of party deprived of thing received in exchange.

**120.** Save as otherwise provided in this chapter, each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Rights and liabilities of parties.

**121.** On an exchange of money, each party thereby warrants the genuineness of the money given by him.

Exchange of money.

## CHAPTER VII.

### OF GIFTS.

**122.** "Gift" is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

"Gift" defined.

Such acceptance must be made during the life time of the donor and while he is still capable of giving.

Acceptance when to be made.

If the donee dies before acceptance, the gift is void.

**123.** For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

Transfer how effected.

For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

#### Notes.

Assuming that delivery of possession was essential under the Hindu law to complete a gift of immoveable property, that law has been abrogated by sec. 123 of the Transfer of Property Act. The first para. of that section means that a gift of immoveable property can be effected by the execution of a registered instrument only, nothing more being necessary. *Sembla.*—The same is the case under that section with regard to moveable property, provided that a registered deed (and not the alternative mode of delivery) be adopted as the mode of transfer.—I. L. R., 14 Cal. 446.

K, a servant in the employment of the East India Railway Company, was recommended, by the Traffic Manager, a bonus in consideration of long and good services. This recommendation was sanctioned, and the amount of the bonus was received by the District Paymaster. Before payment to K, the money was attached in execution of a decree obtained against him by J. *Held* that inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the 1st July, 1882, and was not evidenced by a registered instrument, it could only be effected by actual delivery; that as there had been no such delivery as completed the transfer (sec. 123 of the Transfer of Property Act, and sec. 90 of the Contract Act), the money was not at K's disposal, and he could not have enforced payment; and that the money was therefore not liable to attachment in execution of a decree against him.—6 Al. 634.

**124.** A gift comprising both existing and future property is void as to the

Gift of existing and future property.

**125.** A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.

Gift to several, of whom not accept.

**126.** The donor and donee may agree that, on the happening of any specified event which does not depend on the will of the donor, a gift

Gift may be dis- or revoked.



shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part at the mere will of the donor is void wholly or in part, as the case may be.

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice.

*Illustrations.*

(a.) A gives a field to B, reserving to himself, with B's assent, the right to take back the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b.) A gives a lakh of rupees to B, reserving to himself, with B's assent, the right to take back at pleasure Rupees 10,000, out of the lakh. The gift holds good as to Rupees 90,000, but is void as to Rupees 10,000, which continue to belong to A.

**127.** Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are, not bur-

Onerous gifts.

dened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract, and accepting property burdened by any obligation, is not bound by his acceptance. But if, after becoming competent to contract, and being aware of the obligation, he retains the property given, he becomes so bound.

Onerous gift to disqualified person.

*Illustrations.*

(a.) A has shares in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b.) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

**128.** Subject to the provisions of section one hundred and twenty-seven, where a gift consists of the donor's whole property, the donee is

Universal donee.

personally liable for all the debts due by the donor at the time of the gift to the extent of the property comprised therein.

**129.** Nothing in this chapter relates to gifts of moveable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by section one hundred and twenty-three, any rule of Hindu or Buddhist law.

*Saving of donations mortis causa and Muhammadan law.*

#### Notes.

The Hindu law makes no distinction in favour of gifts in contemplation of death, as respects the legal requisities to constitute a perfect disposition by gift. Those requisites are,—a giving, either orally or by writing, with the intention to pass the property in the thing given, accompanied by its actual delivery and acceptance in the donor's life-time.—6 M. H. C. R., 276.

By Hindu Law, a man may make a gift of any of his property binding as against himself.

Where a Hindu made a gift to a person, whom he said he had taken as his *manasaputra* :—*Held*, that he could not set aside on the ground that he erred in supposing that the donee could perform his funeral rites.—1 M. H. C. R., 393.

Plaintiff sued to enforce a gift to him of immoveable property by a woman living under his guardianship as against her husband :—*Held*, that such taking of the woman's property by her kinsman is wholly repugnant to Hindu Law.—2 M. H. C. R., 360.

A voluntary Transfer of Property by way of gift, if made *bona fide* and not with the intention of defrauding creditors, is valid as against creditors.—4 M. H. C. R., 84.

According to Hindu Law, a restriction against alienation in a gift of land to Brahmins is inoperative as being a condition repugnant to the nature of the grant.—I. L. R., 4 Madr. 200.

A man cannot by gift *inter vivos* or by will give property absolutely to another, and yet control his mode of enjoyment in respect of portion or otherwise.—6 Cal. 105.

A complete and unconditional transfer of property in free gift under a written instrument cannot be revoked by any subsequent act of the grantor. *Sabapathy v. Palaniyandi*. Vide Sudr. Decisions of 1858 page 61.

## CHAPTER VIII.

### OF TRANSFERS OF ACTIONABLE CLAIMS.

**130.** A claim which the Civil Courts recognize as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary.

*Actionable claim.*



*Illustration.*

A owes money to B, who transfers the debt to C. B then demands the debt from A, who, having no notice of the transfer, pays B. The payment is valid, and C cannot sue A for the debt.

**Notes.**

The transfer is not binding on the debtor unless he is given to understand of the transfer. No notice need be given to the debtor if he is otherwise aware of the transfer.

The assignee of a chose in action may sue in his own name, whether or not the debtor assents to the transfer.—1 M. H. C. R., 150.

A decree is not a "debt" within the meaning of that word as used in section 131 of the Transfer of Property Act. A "debt" under that section means an actionable claim, and not a claim which has already passed into a decree.—I. L. R., 12 Cal. 610.

The provisions of the Act apply to the assignment of a mortgage after that Act came into force, although the mortgage may have been made before the commencement of that Act. An assignment is perfectly valid though the notice referred to in section 131 of the Transfer of Property Act has not been given, though the title of the assignee as against third parties is not complete until such notice has been given; the object of such notice being the protection of the assignee. Section 131 of the Transfer of Property Act makes no alteration in the law as it obtained in England previous to the passing of that Act and as laid down in the cases cited in the note to *Ryall v. Rowles*, 2 W. and T. L. C., 777, the first portion of the section merely fixing the time when the section comes into operation, and the latter providing for the protection of the debtor if he deals with the debt before that time. Where therefore as assignee of a mortgagee brought a suit on the mortgage against the mortgagor and the mortgagee, and no notice of the assignment had been given to the mortgagor under section 131 of the Transfer of Property Act:—*Held*, that the Court was wrong in dismissing the suit merely on the ground that no notice was served, as after the suit was instituted the mortgagor became aware of the assignment, and the transfer accordingly came into operation on the date when he thus became aware of it.—12 Cal. 505.

Subsequent to the execution and registration of a bond, a *jamog* was made orally between the creditor, and the debtor by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, and the tenants (who were parties to the arrangement) agreed to pay the rents to the creditor. No mutation of names in favour of the creditor was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and interest agreed to be paid under the bond, alleging that he had never received any rents under the *jamog*. *Held* that whether or not the plaintiff could maintain a suit on the *jamog* against the tenants for the rent assigned to him in the Revenue Court, he could do so in the Civil Court, and the fact that the *jamog* was not in writing did not affect the question. *Ganga Prasad v. Chandrawati* referred to. *Held* also that the *jamog* was not a subsequent oral agreements rescinding or modifying a contract which was registered according to the law for the time being in force, within sec. 92, proviso (4) of Act I of 1872 (Evidence Act). *Held* that the effect of the *jamog* or novation was that the plaintiff's right to recover interest from the defendant was

gone, and the plaintiff was therefore not entitled to maintain his suit against the defendant in respect of the interest which was payable under the bond.—9 Al. 249.

A sued for principal and interest due on a mortgage assigned to him for value by the mortgagee. No notice of the assignment was given to the mortgagors before the plaintiff's demand. The sum sued for exceeded the amount paid by the plaintiff for the assignment and reasonable interest on it; but such amount was not paid or tendered to the plaintiff:—*Held*, that the plaintiff was entitled to a decree for the whole amount due on the assigned mortgage.—10 Madr. 289.

**132.** Every such notice must be in writing signed by the person making the transfer, or by his agent duly authorized in this behalf.

Notice to be in writing signed.

**133.** On receiving such notice, the debtor or person in whom the property is vested shall give effect to the transfer, unless where the debtor resides, or the property is situate, in a foreign country, and the title of the person in whose favour the transfer is made is not complete according to the law of such country.

Debtor to give effect to transfer.

**134.** Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Warranty of solvency of debtor.

**135.** Where an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale, with interest on the price from the day that the buyer paid it.

Discharge of person against whom claim is sold.

Nothing in the former part of this section applies—

(a) where the sale is made to the co-heir, to, or co-proprietor of, the claim sold;

(b) where it is made to a creditor in payment of what is due to him;

(c) where it is made to the possessor of a property subject to the actionable claim;

(d) where the judgment of a competent Court has been delivered affirming the claim, or where the claim has been made clear by evidence, and is ready for judgment.

#### Notes.

The co-sharers of a Hindu family, one of whom was a minor, owned certain immoveable property in Munshigunge near Dacca. In 1873 a per-

petual lease of this property, executed by all the co-sharers except the minor, was granted to certain persons hereinafter called the lessees. On the minor's behalf the lease was executed by his elder brother as guardian of the minor. In May 1882, the minor, who had previously attained his majority, sued the lessees and his co-sharers for a declaration of his right to and for possession of his share in the said property, alleging that the perpetual lease was not binding on him. On the day after the institution of the suit the plaintiff sold all his interest therein to A for Rs. 600:—*Held*, that A's purchase was an actionable claim within the meaning of section 135.—I. L. R., 12 Cal. 470.

It is not the object of section 135 absolutely to prevent a transferee, who has purchased a claim at a smaller value, from recovering the full amount of the debt due from the debtor.—13 Cal. 145.

Section 135 of the Transfer of Property Act does not protect a defendant from payment of the full amount payable under a claim transferred for a sum less than that recoverable under the claim, where the money is recovered by suit after a contest as to the liability of the defendant.—*Grish Chandra v. Kashisauri Debi*, I. L. R., 13 Cal. 145, followed.—15 Cal. 436.

The first paragraph of section 135 of the Transfer of Property Act has no application to a case in which the debtors deny the existence of the claim altogether, and where the purchaser of the claim has to obtain judgment affirming the claim before any satisfaction is made or tendered. Clause (d) of that section is not limited to cases where the judgment of a Court affirming the claim has been delivered, or where the claim is made clear by evidence, *before* the sale of the claim. *Girish Chandra v. Kasiswari Debi*, I. L. R., 13 Cal., 145; *Khosdeb Biswas v. Satis Mondul*, I. L. R., 15 Cal., 436; and *Subbammal v. Venkatarama*, I. L. R., 10 Mad., 289, followed. *Jani Begum v. Jahangir Khan*, I. L. R., 9 Al., 476, dissented from.—18 Cal. 510.

In a suit against a debtor an assignee for value of the debt is precluded by Transfer of Property Act, sec. 135, from recovering more than the price paid by him for the assignment with interest thereon and the incidental expenses of the sale. *Jani Begam v. Jahangir Khan* (I. L. R., 9 Al. 476) approved.—13 Madr. 225.

In a suit upon a hypothecation bond brought by an assignee for value from the obligee, it appeared that the obligee had previously to the assignment obtained a decree by consent against the obligors for an instalment of the money due upon it, and had also made good his claim to the land comprised in it as against an attaching creditor of the obligors:—*Held*, that there had been no adjudication on the claim to exclude the rule in Transfer of Property Act, sec. 135, and accordingly the plaintiff was entitled to recover only the sum paid by him for the assignment with interest from the date of payment to the date of the decree.—13 Madr. 516.

A obtained a money decree against B and attached certain land in execution. C intervened in execution successfully. A then brought a suit to establish that the land was liable to be sold in execution, and obtained a decree. Meanwhile the land was taken up by Government under the Land Acquisition Act, and the compensation money was paid to C. A attached this sum as a debt due to B and sold it in execution, and it was purchased by the plaintiff. The plaintiff now sued C to recover the amount

of the debt:—*Held*, that the suit was governed by Limitation Act, sched. II, art. 120, and not by act. 62, and that the plaintiff was entitled to recover without regard to the terms of Transfer of Property Act, sec. 135 — 15 Madr. 382.

Sec. 135 (*d*) of the Transfer of Property Act (IV of 1882) means that if a creditor or party having an actionable claim against another, has put it into Court and has proceeded to proof of it to the point at which judgment has been delivered affirming it, or the liability of the defendant has been so clearly established that judgment must be delivered against him, the mischief or danger of any trafficking or speculation in litigation disappears, and the defendant can suffer no prejudice by any arrangement between the plaintiff and a third person as to who is to enjoy the fruits of the decree, nor is there any probability that the process of the Court will be misused. On the other hand, if one who has an actionable claim against another chooses to sell it for less than its actual value, the person who buys embarks more or less in a speculation which can be defeated by payment to him of the price paid for it with interest and incidental expenses. The debtor's right to discharge himself by such payment is not forfeited by his putting the assignee to proof of his case in Court, nor did the Legislature intend that the position of the assignee should be better after suit and decree than before. *Grish Chandra v. Kashisanri Debi* dissented from. *Chedambara Chetty v. Renga K. M. V. Puchaiya Naicker and Ram Coomar Coondoo v. Chunder Canto Mookerjee* referred to. The assignee, under an instrument dated the 18th December, 1885, and in consideration of Rs. 5,000, of a share of Rs. 10,000 out of Rs. 20,000 claimed by his assignors as unpaid dower-debt, joined with the assignors in instituting a suit for recovery of the dower-debt, on the 22nd December of the same year. *Held* that the assignee's proceedings were of the nature contemplated by sec. 135 of the Transfer of Property Act (IV of 1882), and that he was not entitled to a decree for anything in excess of Rs. 5,000, the price paid by him for the Rs. 10,000 share of the debt.—9 Al. 476.

A mortgagee by conditional sale having obtained an order for foreclosure under Regulation XVII of 1806, his heirs, who were out of possession, executed a deed of assignment to a third person, transferring to him the rights acquired by the mortgagee under that order. At the time of the execution of the deed no steps had been taken by the mortgagee or his heirs to bring a suit for declaration of their title and for possession of the property. A suit for that purpose was brought by the assignee, the defendants being the conditional vendors and also the assignors under the deed above mentioned. The latter made no defence, but admitted the justice of the claim, and a decree was passed in favour of the plaintiff against them as well as against the other defendants. *Held* that the answering defendants, the conditional vendors, could not take advantage of the terms of the assignment for the purpose of defeating the claim, on the ground that the assignment was an unconscionable bargain, so unfair that the Court should not enforce it. If a person who has an actionable claim against another chooses to sell it cheap, that is no reason why that other is to stand cleared and discharged of his liability to the assignor. *Held* also that the answering defendants were entitled to the benefit contained in the first paragraph of sec. 135 of the Transfer of Property Act (IV of 1882), and would be entitled to take the bargain off the plaintiff's hands by paying to him the price and incidental expenses of the sale with the interest on that price



from the day that the plaintiff paid it to the date of its repayment to him. *Jani Begam v. Jahangir Khan*, followed. *Grish Chandra v. Kashisauri Debi* and *Khoshdeb Biswas v. Satar Mondol*, dissented from.—13 Al. 102.

See I. L. R., 13 Cal. 297, noted under sec. 52; 10 Madr. 289, noted under sec. 131.

**136.** No Judge, pleader, mukhtar, clerk, bailiff, or other officer connected with Courts of justice, can buy any actionable claim falling under the jurisdiction of the Court in which he exercises his functions.

Incapacity of officers connected with Courts of justice.

**Note.**

The owner of certain land in consideration of a sum of money, transferred to the plaintiff, a pleader, the right to elephants caught in pits in the owner's land, and the right to sue for the recovery of such elephants from any person in possession of them. The plaintiff sued the defendants to recover possession of an elephant which had been trapped and was in defendant's possession at the time of the transfer to plaintiff. The suit was dismissed on the ground that the plaintiff had bought an actionable claim within the meaning of sec. 136 of the Transfer of Property Act, 1882:—*Held*, that the section was not applicable.—I. L. R., 11 Madr. 445.

**137.** The person to whom a debt or charge is transferred shall take it subject to all the liabilities to which the transferor was subject in respect thereof at the date of the transfer.

Liability of transferee of debt.

*Illustration.*

A debenture is issued in fraud of a public company to A. A sells and transfers the debenture to B, who has no notice of the fraud. The debenture is invalid in the hands of B.

**138.** When a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if recovered by either the transferor or transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue (if any) belongs to the transferor.

Mortgaged debt.

Saving of negotiable instruments.

**139.** Nothing in this chapter applies to negotiable instruments.

**Note.**—See Negotiable Instruments Act (XXVI. of 1881.)

**THE SCHEDULE.****(a.) STATUTES.**

Year and Chapter.	Subject.	Extent of repeal.
27 Hen. VII., c. 10.	Uses.	The whole.
13 Eliz., c. 5....	Fraudulent conveyances.	The whole.
27 Eliz., c. 4. ...	Fraudulent conveyances.	The whole.
4 Wm. & Mary, c. 16.	Clandestine mortgages.	The whole.

**.) ACTS OF THE GOVERNOR-GENERAL IN COUNCIL**

Number and year.	Subject.	Extent of repeal.
IX. of 1842	Lcase and release.	The whole.
XXXI. of 1854.	Modes of conveying land	Section 17.
XI. of 1855.	Mesne-profits and improvements.	Section I; in the title the words "to mesne profits and," and in the preamble "to limit the liability for mesne profits and."
XXVII. of 1866.	Indian Trustees Act.	Section 31.
IV. of 1872.	Panjab Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XX. of 1875.	Central Provinces Laws Act.	So far as it relates to Bengal Regulations I of 1798 and XVII of 1806.
XVIII. of 1876.	Oudh Laws Act.	So far as it relates to Bengal Regulation XVII. of 1806.
I. of 1877.	Specific Relief.	In Sections 35 and 36, the words "in writing."

TRANSFER OF PROPERTY.  
**THE SCHEDULE.**—(*continued.*)  
 REGULATIONS.

Number and year.	Subject.	Extent of repeal.
Bengal Regulation I of 1798.	Conditional sales.	The whole Regulation.
Bengal Regulation XVII. of 1806.	Redemption.	The whole Regulation.
Bombay Regulation V of 1827.	Acknowledgment of debts : Interest : Mortgagees in possession.	Section 15.

# EASEMENTS.

## ACT No. V. OF 1882.\*

RECEIVED THE G.-G.'S ASSENT ON THE 17TH FEBRUARY 1882.

*An Act to define and amend the law relating to Easements and Licenses.*

WHEREAS it is expedient to define and amend the law relating to Easements and Licenses ; It is hereby enacted as follows :—

Preamble.

### PRELIMINARY.

1. This Act may be called "The Indian Easements Act, 1882 :"

Short title.

It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg ;

Local extent.

and it shall come into force on the first day of July 1882.

Commencement.

### Note.

1882, to a suit commenced before Act VIII of tenant cannot as against his landlord acquire by prescription an easement of way in favour of the land occupied by him as tenant over other land belonging to his landlord. So held by the Full Bench. *Gayford v. Moffatt* (1) referred to.—I. L. R., 14 Al. 185.

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed ; or to derogate from—

Savings.

(a) any right of the Government to regulate the collection, retention, and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained, or distributed in or by any channel or other work constructed at the public expense for irrigation ;

(b) any customary or other right (not being a license) in or over immoveable property which the Government, the public, or any person may possess irrespective of other immoveable property ; or

of 1891, the Indian Easements Act has been extended to the territories administered by the Governor of Bombay in Council and the Chief Commissioners of the North-Western

(c) any right acquired, or arising out of a relation created, before this Act comes into force.

#### Notes.

The Indian Government has, on many occasions, granted to individuals the exclusive right of fishery in certain navigable rivers.—15 W. R., 212. Also I. L. R., 11 Cal. 438.

Such grants however ought not to infringe the rights of the public.—I. L. R., 2, Bom. 19.

In a most learned and admirable judgment, respecting the rights of the Government and the public to fish in navigable rivers and the sea, WESTROPP, C. J., said,—“Assuming, as I think we may, that the proposition—that the beds of tidal rivers in British India are, like those of such rivers in Great Britain, *prima facie*, to be regarded as vested in the Crown—is established, the transition thence to the proposition—that the subjacent soil of the British Indian seas, within the territorial limit of three geographical miles from low-water-mark is also vested in the Crown—is (if the like proposition as to the territorial waters of Great Britain be true) not difficult, for a navigable river in such part of it as the tide flows and ebbs, is an arm of the sea.”—I. L. R., 2 Bom. 43.

**3.** Sections 26 and 27 of the Indian Limitation Act, 1877, and the definition of “easement,” contained in that Act, are repealed in the territories to which this Act extends. All references in any Act or Regulation to the said sections, or to sections 27 and 28 of Act No. IX. of 1871, shall, in such territories, be read as made to sections fifteen and sixteen of this Act.

Repeal of Act XV. of 1877, sections 26 and 27.

#### Note.

The acquisition of *profits a prendre* were brought by Act XV of 1877 within the prescriptive rules for the acquisition of easements enacted by Act IX of 1871.

Speaking of the Limitation Act, Sir RICHARD GARTH said, “easements may still be claimed in this country by prescription; and when they are so claimed, the principles which apply to their acquisition in England will be equally applicable in this country.”—I. L. R., 10 Cal. 214, 218.

## CHAPTER I.

### OF EASEMENTS GENERALLY.

**4.** An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done in, or upon, or in respect of, certain other land not his own.

“Easement” defined.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof

Dominant and servient  
s and owners.

the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

*Explanation.*—In the first and second clauses of this section, the expression “land” includes also things permanently attached to the earth; the expression “beneficial enjoyment” includes also possible convenience, remote advantage, and even a mere amenity; and the expression “to do something” includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon.

*Illustrations.*

(a) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b.) A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.

(c.) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(d.) A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers, and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(e.) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.

(f.) A is bound to cleanse a water course running through his land, and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

**Notes.**

It has been more than once decided in the High Court at Calcutta, that the illustrations appended to a section of an Act of the Legislature, ought never to be allowed to control the plain meaning of the section itself; and especially they ought not to do so, when the effect would be to curtail a right which the section, in its ordinary sense, would confer.—I. L. R., 7 Cal. 132.

The right to water flowing to a man's land through an artificial water-course constructed on a neighbour's land, is not a natural, but a conventional, right resting on some grant or arrangement, proved or presumed, from or with the owners of the land over which the water is brought, or on some other legal origin. Such right may be presumed from the time, manner and circumstances, under which the easement has been enjoyed.—I. L. R., 4 Cal. 633, 637.

The right to establish a market or hold a *haat* on land, is, in India, when exercised on one's own land, an ordinary right of property, and acquired as such. It is not, as in England, a franchise requiring a grant from the Crown.—N.-W. P. (H. C. R.) 104; I. L. R., 5 Cal. 7; 4 Cal. 309.

Similarly, a right to a ferry, taking tolls, and excluding other ferries, may be established in India by mere user of twenty years: *per* GARTH, C. J. and WHITE, J.; but MILLER J., dissented, thinking that no user could establish an indefeasible right of ferry.—I. L. R., 6 Cal. 608.

See I. L. R., 6 Madr. 112; 7 W. R., 498.

Continuous and discontinuous, apparent and non-apparent, easements.

**5.** Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such sign.

#### *Illustrations.*

(a.) A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.

(b.) A right of way annexed to A's house over B's land. This is a discontinuous easement.

(c.) Rights annexed to A's land to lead water thither across B's land by an aqueduct, and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(d.) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

**6.** An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercise-able only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

#### **Notes.**

A right of easement may be acquired in the surplus water of a tank flowing through a defined channel whether natural or artificial.—I. L. R., 7 Madr. 530.

The owners of a tank fed by natural streams, which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or inter-



fering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided:—*Held*, (1) The Easement Act only declared the existing law as to easements over water; (2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise is not a subject of easement by prescription, though it may be the subject of an express grant or contract; (3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel; (4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by inferior riparian owners in exercise either of their natural right or their right of easement if any; (5) It was therefore necessary to ascertain where the streams rose, and the course, source and length of their tributaries.—I. L. R., 11 Mad. 16.

**7. Easements are restrictions of**  
 one or other of the following rights  
 (namely):—

(a) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.

Exclusive right to enjoy.

The right of every owner of immoveable property to advantages (subject to any law for the time being arising from situation. in force) to enjoy without disturbance by another the natural advantages arising from its situation.

*Illustrations of the Rights above referred to.*

(a.) The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.

(b.) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(c.) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(d.) The right of every owner of land to so much light and air as pass vertically thereto.

(e.) The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

*Explanation.*—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the “subjacent and adjacent soil” mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(f.) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over, or through his land,

shall not, before so passing or percolating, be unreasonably polluted by other persons.

(g.) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel, and all water on its surface which does not pass in a defined channel.

(h.) The right of every owner of land that the water of every natural stream which passes by, through, or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force, of temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i.) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(j.) The right of every owner of land abutting on a natural stream, lake, or pond to use and consume its water for drinking, household purposes, and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.

*Explanation.*—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in, natural and known course.

*Note.*—See I. L. R., 7 Madr. 530 & 11 Madr. 16, noted under sec. 6.

## CHAPTER II.

### THE IMPOSITION, ACQUISITION, AND TRANSFER OF EASEMENTS.

8. An easement may be imposed by any one in the  
 Who may impose ease- circumstances, and to the extent, in and  
 ments. to which he may transfer his interest in  
 the heritage on which the liability is to be imposed.

#### *Illustrations.*

(a.) A is tenant of B's land under a lease for an unexpired term of twenty-years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(b.) A is tenant for his life of certain land with remainder to B absolutely. A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life-interest.

(c.) A, B, and C are co-owners of certain land. A cannot, without the consent of B and C, impose an easement on the land or on any part thereof.

(d.) A and B are lessees of the same lessor, A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.

**Notes.**

**FIELD** and **BOSE**, JJ., held that the mode of acquiring an easement provided by the Limitation Act, sec. 26, is not the only way in which an easement may be acquired ; but that it may also be acquired by implied grant : for example a way of necessity or one necessary at the time and absolute and continuous.—I. L. R., 8 Cal. 957.

**MELVILLE** and **KEMBALL**, JJ., held that immemorial user must be referred to a legal origin,—that is, either to a lost grant, or to an agreement between the predecessors in title of the parties ; and that the plaintiff, having a title by immemorial user, did not require the aid of the Limitation I. L. R., Act, 1887.—I. L. R., 6 Bom. 23.

**9.** Subject to the provisions of section eight, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Servient owners.

*Illustrations.*

(a.) A has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream. B may grant to C the right to divert the water of the stream from noon to sunset : provided that A's supply is not thereby diminished.

(b.) A has, in respect of his house, a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way : provided that A's right of way is not thereby obstructed.

**10.** Subject to the provisions of section eight, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Lessor and mortgagor.

*Explanation.*—A security is insufficient within the meaning of the section unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

**11.** No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

Lessee.

**12.** An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.,

Who may acquire easements.

One of two or more co-owners of immoveable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease.

**13.** Where one person transfers or bequeaths immoveable property to another,—

Easements of necessity and quasi easements.

(a) if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous, and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous, and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,—

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(f) if such an easement is apparent and continuous, and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different

intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this section, clauses (a), (c), and (e), are called easements of necessity.

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

*Illustrations.*

(a.) A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only, over A's adjoining land to the field sold.

(b.) A, the owner of two fields, sells one to B, and retains the other. The field retained was at the date of the sale used for agricultural purposes only, and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.

(c.) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(d.) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.

(e.) A is the owner of a house and adjoining land. The house has windows over-looking the land. A simultaneously sells the house to B, and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such light.

(f.) A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.

(g.) A, the owner of a house, sells B a factory built on adjoining land. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.

(h.) A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.

(i.) A, the owner of two adjoining buildings, sells one to B, retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(j.) A, the owner of two adjoining buildings, sells one to B, and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(k.) A grants lands to B for the purpose of building a house thereon. B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.

(l.) Under the Land Acquisition Act, 1870, a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(m.) Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(n.) A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.

**14.\*** When *a* right to a way of necessity is created under Direction of way of section thirteen, the transferor, the legal necessity. representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

**15.** Where the access and use of light or air to and for Acquisition by prescrip- any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, support, or other easement, shall be absolute.

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\* In sec. 14 the italicized article *a* has been inserted by Act XII. of 1891.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

*Explanation I.*—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

*Explanation II.*—Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

*Explanation III.*—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

*Explanation IV.*—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to Government, this section shall be read as if, for the words “twenty years,” the words “sixty years” were substituted.

*Illustrations.*

(a.) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January 1862, to 1st January 1882. The plaintiff is entitled to judgment.

(b.) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof, and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed “as an easement” for twenty years.

(c.) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right, and asked his leave to enjoy the right. The suit



shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

#### Notes.

In prescription at the common law, unity of ownership would extinguish the easement already acquired, unity of possession would only prevent the acquisition or suspend the right already acquired. In computing the period of twenty years a period during which the servient owner is disabled is not excluded.—I. L. R., 10 Cal. 214.

The plaintiff and defendant were proprietors of land and gardens upon opposite sides of a tidal creek which were protected by walls. The wall on the defendant's side becoming dilapidated, he constructed a fresh one altering its directions and encroaching five feet upon the bed of the stream. In a suit "for possession of the said land by demolishing the said wall," the plaintiff alleged that he was entitled to the soil upon which it was built, that the navigation was obstructed, and that there was a danger of his screw house falling down. It appeared, however, that the Government, and not the plaintiff, was owner of the soil, and that the plaintiff neither claimed, nor proved, a title to an easement to the flow of the water as it had been accustomed to flow, nor that the flow was seriously or sensibly diverted, so as to be an injury to his rights. The Privy Council reversed the decree of the High Court, and held that the plaintiff had failed to show either damage or injury.—L. R., 6 Indian App. Cas. 190.

See I. L. R., 7 Cal. 132; 1 Madr. 339; 7 Bom. 522; 1 Bom. 148.

**16.** Provided that, when any land upon, over, or from which any easement has been enjoyed or derived, has been held under or by virtue of any interest for life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

#### Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

**17.** Easements acquired under section fifteen are said to be acquired by prescription, and are called prescriptive rights.

None of the following rights can be so acquired:—

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;

(b) a right to the free passage of light or air to an open space of ground ;

(c) a right to surface-water not flowing in a stream, and not permanently collected in a pool, tank, or otherwise ;

(d) a right to underground water not passing in a defined channel.

**Note.**—See I. L. R., 11 Madr. 16, noted under sec. 6.

**18.** An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Customary easements.

*Illustrations.*

(a.) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.

**19.** Where the dominant heritage is transferred or devolves by act of parties, or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Transfer of dominant heritage passes easement.

*Illustration.*

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

### CHAPTER III.

#### THE INCIDENTS OF EASEMENTS.

**20.** The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree (if any) by which the easement referred to was imposed.

Rules controlled by contract or title.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Incidents of customary easements.

**21.** An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Bar to use unconnected enjoyment.

*Illustrations.*

(a.) A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(b.) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors, and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

**22.** The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and when the exercise of an easement can, without detriment to the dominant owner, be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Exercise of easement.

Confinement of exercise of easement.

*Illustrations.*

(a.) A has a right of way over B's field. A must enter the way at either end, and not at any intermediate point.

(b.) A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.

**Note.**—See I. L. R., 1 Cal. 427; 4 W. R., 49.

**23.** Subject to the provisions of section twenty-two, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Right to alter mode of enjoyment.

*Exception.*—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

*Illustrations.*

(a.) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.

(b.) A has a right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.

(c.) A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature of the pollution.

(d.) A, a riparian owner, acquires, as against the lower riparian owners, a prescriptive right to pollute a stream by throwing saw-dust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

**24.** The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

*Illustrations.*

(a.) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(b.) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.

(c.) A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.

(d.) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(e.) A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.

(f.) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(g.) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.

**Notes.**

The plaintiff having in a previous suit obtained a decree declaring his right of having the roof of his house projecting over the defendants' land, and discharging water thereon, now sued for a declaration of his right to go upon the defendants' land for the purpose of repairing the roof:—*Held*, that the plaintiff was entitled to the right claimed as being accessory to the easement already established, but that it should be exercised only once a year and after notice to the defendants.—I. L. R., 15 Madr. 286.

**25.** The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

*Liability for expenses necessary for preservation of easement.*

**26.** Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

*Liability for damage from want of repair.*

**27.** The servient owner is not bound to do anything for the benefit of the dominant heritage, and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement; but he must not do any act tending to restrict the easement or to render its exercise less convenient.

*Servient owner not bound to do anything.*

*Illustrations.*

(a) A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound as servient owner to clear the watercourse or scour the sewer.

(b.) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(c.) A, in respect of his house, is entitled to an easement of support, from B's wall. B is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(d.) A, in respect of his mill, is entitled to a watercourse through B's land. B must not drive stakes so as to obstruct the watercourse.

(e.) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

**28.** With respect to the extent of easements and the mode of their enjoyment the following provisions shall take effect:—

*Extent of easements.*

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

*Easement of necessity.*

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.

*Other easements.*

In the absence of evidence as to such intention and purpose—

(a) a right of way of any one kind does not include a right of way of any other kind :

Right of way.

(b) the extent of a right to the passage of light or air to a certain window, door, or other opening imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made :

Right to light or air acquired by grant.

(c) the extent of a prescriptive right to the passage of light or air to a certain window, door, or other opening, is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used :

Prescriptive right to light or air.

(d) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose : and

Prescriptive right to pollute air and water.

(e) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

Other prescriptive rights.

**29.** The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Increase of easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

#### *Illustrations.*

(a.) A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.

(b.) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works, and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(c.) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field, and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

**30.** Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: provided that such annexation is consistent with the terms of the instrument, decree, or revenue proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

*Illustrations.*

(a.) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(b.) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(c.) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

**31.** In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage; provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

*Illustration.*

A, having a right to the free passage over B's land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.

## CHAPTER IV.

### THE DISTURBANCE OF EASEMENTS.

**32.** The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

*Illustration.*

A, as owner of a house, has a right of way over B's land. C unlawfully enters on B's land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.



**33.** The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto; provided that the disturbance has actually caused substantial damage to the plaintiff.

*Explanation I.*—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section thirty-four.

*Explanation II.*—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

*Explanation III.*—Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

*Illustrations.*

(a.) A places a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(b.) A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.

**34.** The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

When cause of action arises for removal of support.

**35.** Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement—

Injunction to restrain disturbance.

(a) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter:

(b) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.

**36.** Notwithstanding the provisions of section twenty-four, the dominant owner cannot himself abate a wrongful obstruction of an easement.

*Abatement of obstruction of easement.*

## CHAPTER V.

### THE EXTINCTION, SUSPENSION, AND REVIVAL OF EASEMENTS.

**37.** When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

*Extinction by dissolution of right of servient owner.*

*Exception.*—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section ten.

#### *Illustrations.*

(a.) A transfers Sultanpur to B on condition that he does not marry C. B imposes an easement on Sultanpur. Then B marries C. B's interest in Sultanpur ends, and with it the easement is extinguished.

(b.) A, in 1860, let Sultanpur to B for thirty years from the date of the lease. B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. B's interest in Sultanpur then ends, and with it C's easement.

(c.) A and B, tenants of C, have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty-years. Then A's rent falls into arrear, and his interest is sold. B's easement is extinguished.

(d.) A mortgages Sultanpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section 10. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

#### **Note.**

A sale of the servient heritage, free from incumbrances for arrears of rent or revenue, does not, it is taken, extinguish a prescriptive easement. But an acquisition of land under the Land Acquisition Act free from incumbrances, extinguishes such incorporeal rights.—14 W. R. Cr. 72.

**38.** An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner.

*Extinction by release.*

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

*Explanation I.*—An easement is impliedly released—

(a) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority ;

(b) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

*Explanation II.*—Mere non-user of an easement is not an implied release within the meaning of this section.

*Illustrations.*

(a.) A, B, and C, are co-owners of a house to which an easement is annexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representative.

(b.) A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

(c.) A, having the right to discharge his eaves-droppings into B's yard, expressly authorizes B to build over this yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished to the extent of the interference.

(d.) A having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently.

The easement is impliedly released.

(e.) A, having a projecting roof by means of which he enjoys an easement to discharge eaves-droppings on B's land, permanently alters the roof, so as to direct the rain-water into a different channel, and discharge it on C's land. The easement is impliedly released.

**39.** An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

Extinction by revocation.

**40.** An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.

g of dissolving condition.

Extinction on termination  
of necessity.

**41.** An easement of necessity is extinguished when the necessity comes to an end.

*Illustration.*

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished.

**Notes.**

The Statute contains no special rule respecting the extinction of an easement acquired by or against Government.

This provision goes beyond an opinion expressed in *Sham Churn's case*, that abandonment, to be effectual, required an act of the servient owner done on the faith thereof.—I. L. R., 1 Cal. 426.

See 5 B. L. R., App. 66.

**42.** An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

**43.** Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased, and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless—

Extinction by permanent  
change in dominant heri-  
tage.

(a) it was intended for the beneficial enjoyment of the dominant heritage to whatever extent the easement should be used ; or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it ; or

(c) the easement is an easement of necessity.

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

**Note.**—See I. L. R., 7 Cal. 453.

**44.** An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement:

Extinction on permanent  
alteration of servient heri-  
tage by superior force.

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage, and the provisions of section fourteen apply to such way.

*Illustrations.*

(a.) A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently, and runs through C's land. B's easement is extinguished.

(b.) Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.

**45.** An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Extinction by destruction  
of either heritage.

*Illustration.*

A has a right of way over a road running along the foot of a sea cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

1.—See Hunooman Pershad's Rep., 196.

**46.** An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

by unity of

*Illustrations.*

(a.) A, as the owner of a house, has a right of way over B's field. A mortgages his house, and B mortgages his field to C. Then C forecloses both mortgages, and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(b.) The dominant owner acquires only part of the servient heritage : the easement is not extinguished, except in the case illustrated in section forty-one.

(c.) The servient owner acquires the dominant heritage in connection with a third person : the easement is not extinguished.

(d.) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages : the easements are not extinguished.

(e.) The joint owners of the dominant heritage jointly acquire the servient heritage : the easement is extinguished.

(f.) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.

(g.) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

**Note.**—See 15 B. L. R., 361.

**47.** A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

Extinction by non-enjoyment.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner, and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner :

Provided that, if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours or for another purpose, does not prevent its extinction under this section.

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section—

(a) where the cessation is in pursuance of a contract between the dominant and servient owners ;

(b) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period, or

(c) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

*Illustration.*

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

**48.** When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Extinction of accessory rights.

*Illustration.*

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section 47. The right of way is also extinguished.

**49.** An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

*Suspension of easement.*

**50.** The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section twenty-six, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

*Servient owner not entitled to require continuance.*

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

*Compensation for damage caused by extinguishment.*

*Illustration.*

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

**51.** An easement extinguished under section forty-five revives (a) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion; (b) when the destroyed heritage is a servient building, and, before twenty years have expired, such building is rebuilt upon the same site; and (c) when the destroyed heritage is a dominant building, and, before twenty years have expired, such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

*Revival of easements.*



An easement extinguished under section 46 revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

*Illustration.*

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

## CHAPTER VI.

### LICENSES.

**52.** Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

**53.** A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.

**54.** The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.

**55.** All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called accessory licenses.

*Illustration.*

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

**56.** Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

*Illustrations.*

(a.) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immovable property of B. The right cannot be transferred.

(b.) The Government grant B a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein, and remove grain therefrom.

**57.** The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

Grantor's duty to disclose defects.

**58.** The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

Grantor's duty not to render property unsafe.

**59.** When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.

Grantor's transferee not bound by license.

**60.** A license may be revoked by the grantor, unless—

License when revocable.

(a) it is coupled with a transfer of property, and such transfer is in force:

(b) the licensee, acting upon the license, has executed a work of a permanent character, and incurred expenses in the execution.

Revocation express or implied.

**61.** The revocation of a license may be express or implied.

*Illustrations.*

(a.) A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path. The license is revoked.

(b.) A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.

**Note.**

In a suit by a zamindar to have his right declared to build a house on some waste-land in the mauza, the defendants, who were tenants in the mauza, resisted the claim on the ground that they had built wells and water courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung:—*Held*, that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants

had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed.—I. L. R., 8 Al. 69.

License when deemed re-  
voked.

**62.** A license is deemed to be re-  
voked—

(a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license :

(b) when the licensee releases it, expressly or impliedly, to the grantor or his representative :

(c) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled :

(d) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right :

(e) where the licensee becomes entitled to the absolute ownership of the property affected by the license :

(f) where the license is granted for a specified purpose, and the purpose is attained, or abandoned, or becomes impracticable :

(g) where the license is granted to the licensee as holding a particular office, employment, or character, and such office, employment, or character ceases to exist :

(h) where the license totally ceases to be used as such for an unbroken period of twenty-years, and such cessation is not in pursuance of a contract between the grantor and the licensee :

(i) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

**63.** Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby, and to remove any goods which he has been allowed to place on such property.

**64.** Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.

Licensee's rights on revo-  
cation.

Licensee's rights on evic-  
tion.

# TRUSTS.

## ACT No. II. OF 1882.

RECEIVED THE G.-G.'S ASSENT ON THE 13TH JANUARY, 1882.

*An Act to define and amend the law relating to Private Trusts and Trustees.*

**Preamble.** WHEREAS it is expedient to define and amend the law relating to private trusts and trustees; It is hereby enacted as follows:—

### CHAPTER I.

#### PRELIMINARY.

**Short title.**  
**Commencement.**

1. This Act may be called “The

come into force on the first day of March 1882.

**Local extent.** It extends in the first instance to the territories respectively administered by the Governor of Madras in Council, the Lieutenant Gover-

nors of the North-Western Provinces and the Panjab, the Chief Commissioners of Oudh, the Central Provinces, Coorg, and Assam; and the Local Government may, from time to

**Savings.** time, by notification in the official Gazette, extend it to any other part of British India. But nothing herein contained affects the rules of

Muhammadan law as to *waqf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors; and nothing in the second chapter of this Act applies to trusts created before the said day.

**2.** The Statute and Acts mentioned in the schedule hereto annexed shall, to the extent mentioned in the said schedule, be repealed in the territories to which this Act for the time being extends.

**Repeal of enactments.**

**3.** A “trust” is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner:

the person who reposes or declares the confidence is called the "author of the trust;" the person who accepts the confidence is called the "trustee;" the person for whose benefit the confidence is accepted is called the "beneficiary;" the subject-matter of the trust is called "trust-property" or "trust-money;" the "beneficial interest" or "interest" of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument (if any) by which the trust is declared is called the "instrument of trust."

a breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a "breach of trust:"

and in this Act, unless there be something repugnant in the subject or context, "registered" means registered under the law for the registration of documents for the time being in force: a person is said to have 'notice' of fact either when he actually knows that fact, or when, but for wil-

Expressions defined in Act IX of 1872.

ful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, section 229; and all expressions used herein, and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

## CHAPTER II.

### OF THE CREATION OF TRUSTS.

4. A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is (a) forbidden by law or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

*Explanation.*—In this section, the expression “law” includes, where the trust-property is immoveable and situate in a foreign country, the law of such country.

*Illustrations.*

(a.) A conveys property to B in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void.

(b.) A bequeaths property to B in trust to employ it in carrying on a smuggling business, and out of the profits thereof to support A's children. The trust is void.

(c.) A, while in insolvent circumstances, transfers property to B in trust for A during his life, and after his death for B. A is declared an insolvent. The trust for A is invalid as against his creditors.

**5.** No trust in relation to immoveable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

Trust of immoveable property.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee.

of moveable pro-

These rules do not apply where they would operate so as to effectuate a fraud.

**6.** Subject to the provisions of section five, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust-property, and (unless the trust is declared by will, or the author of the trust is himself to be the trustees) transfers the trust-property to the trustee.

Creation of trust.

*Illustrations.*

(a.) A bequeaths certain property to B, “having the fullest confidence that he will dispose of it for the benefit of” C. This creates a trust so far as regards A and C.

(b.) A bequeaths certain property to B, “hoping he will continue it in the family.” This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(c.) A bequeaths certain property to B, requesting him to distribute it amongst such members of C's family as B should think most deserving. This does not create a trust, for the beneficiaries are not indicated with reasonable certainty.

(d.) A bequeaths certain property to B, desiring him to divide the bulk of it among C's children. This does not create a trust, for the property is not indicated with sufficient certainty.

(e.) A bequeaths a shop and stock-in-trade to B on condition that he pays A's debts and a legacy to C. This is a condition, not a trust for A's creditors and C.

Who may create trusts.

**7.** A trust may be created—

(a) by every person competent to contract, and,

(b) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor;

but subject in each case to the law for the time being in force as to the circumstances and extent in and to which the author of the trust may dispose of the trust-property.

Subject of trust.

**8.** The subject-matter of a trust must be property transferable to the beneficiary.

It must not be a merely beneficial interest under a subsisting trust.

Who may be beneficiary.

**9.** Every person capable of holding property may be a beneficiary.

A proposed beneficiary may renounce his interest under the trust by disclaimer addressed to the trustee, or by setting up with notice of the trust, a claim inconsistent therewith.

Disclaimer by beneficiary.

**10.** Every person capable of holding property may be a trustee; but, where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

Who may be trustee.

No one bound to accept trust.

No one is bound to accept a trust.

A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance.

Acceptance of trust.

Instead of accepting a trust, the intended trustee may, within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him.

Disclaimer of trust.

A disclaimer by one of two or more co-trustees vests the trust property in the other or others, and makes him or them sole trustee or trustees from the date of the creation of the trust.

#### *Illustrations.*

(a.) A bequeaths certain property to B and C, his executors, as trustees for D. B and C prove A's will. This is in itself an acceptance of the trust, and B and C hold the property in trust for D.



(b.) A transfers certain property to B in trust to sell it, and to pay, out of the proceeds, A's debts. B accepts the trust, and sells the property. So far as regards B, a trust of the proceeds is created for A's creditors.

(c.) A bequeaths a lakh of rupees to B upon certain trusts, and appoints him his executor. B severs the lakh from the general assets, and appropriates it to the specific purpose. This is an acceptance of the trust.

### CHAPTER III.

#### OF THE DUTIES AND LIABILITIES OF TRUSTEES.

**11.** The trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of its creation, except as modified by the consent of all the beneficiaries being competent to contract.

Trustee to execute trust.

Where the beneficiary is incompetent to contract, his consent may, for the purposes of this section, be given by a principal Civil Court of original jurisdiction.

Nothing in this section shall be deemed to require a trustee to obey any direction when to do so would be impracticable, illegal, or manifestly injurious to the beneficiaries.

*Explanation.*—Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be (a) to pay only the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or, when such instrument is a will, at the date of his death, and (b), in the case of debts not bearing interest, to make such payment without interest.

#### *Illustrations.*

(a.) A, a trustee, is simply authorized to sell certain land by public auction. He cannot sell the land by private contract.

(b.) A, a trustee of certain land for X, Y, and Z, is authorized to sell the land to B for a specified sum. X, Y, and Z, being competent to contract, consent that A may sell the land to C for a less sum. A may sell the land accordingly.

(c.) A, a trustee for B and her children, is directed by the author of the trust to lend, on B's request, trust-property to B's husband, C, on the security of his bond. C becomes insolvent, and B requests A to make the loan. A may refuse to make it.

**12.** A trustee is bound to acquaint himself, as soon as possible, with the nature and circumstances of the trust property, to obtain, where necessary, a transfer of the trust-property to himself, and (subject to the provisions of the instrument of trust) to get in trust-moneys invested on insufficient or hazardous security.

Trustee to inform himself of state of trust property.

*Illustrations.*

(a.) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discretionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(b.) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case required.

**13.** A trustee is bound to maintain and defend all such suits, and (subject to the provisions of the instrument of trust) to take such other steps as, regard being had to the nature and amount or value of the trust-property, may be reasonably requisite for the preservation of the trust-property and the assertion or protection of the title thereto.

Trustee to protect title to trust-property.

*Illustration.*

The trust-property is immoveable property which has been given to the author of the trust by an unregistered instrument. Subject to the provisions of the Indian Registration Act, 1877, the trustee's duty is to cause the instrument to be registered.

**14.** The trustee must not, for himself or another, set-up or aid any title to the trust-property adverse to the interest of the beneficiary.

Trustee not to set up title adverse to beneficiary.

**15.** A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own; and, in the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction, or deterioration of the trust-property.

Care required from trustee.

*Illustrations.*

(a.) A, living in Calcutta, is a trustee for B, living in Bombay. A remits trust-funds to B by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. A is not bound to make good the loss.

(b.) A, a trustee of leasehold property, directs the tenant to pay the rents on account of the trust to a banker, B, then in credit. The rents are accordingly paid to B, and A leaves the money with B only till wanted. Before the money is drawn out, B becomes insolvent. A, having had no reason to believe that B was in insolvent circumstances, is not bound to make good the loss.

(c.) A, a trustee of two debts for B, releases one, and compounds the other, in good faith, and reasonably believing that it is for B's interest to do so. A is not bound to make good any loss caused thereby to B.

(d.) A, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale, and otherwise fails in reasonable diligence in inviting competition. A is bound to make good the loss caused thereby to the beneficiary.

(e.) A, a trustee for B, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. A is bound to make good the loss thereby caused to B.

(f.) A, a trustee for B of a policy of insurance, has funds in hand for payment of the premiums. A neglects to pay the premiums, and the policy is consequently forfeited. A is bound to make good the loss to B.

(g.) A bequeaths certain moneys to B and C as trustees, and authorizes them to continue trust-moneys upon the personal security of a certain firm in which A had himself invested them. A dies, and a change takes place in the firm. B and C must not permit the moneys to remain upon the personal security of the new firm.

(h.) A, a trustee for B, allows the trust to be executed solely by his co-trustee, C. C misapplies the trust-property. A is personally answerable for the loss resulting to B.

**16.** Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature or a future or reversionary interest, the trustee is bound, unless an intention to the contrary may be inferred from the instrument of trust, to convert the property into property of a permanent and immediately profitable character.

*Illustrations.*

(a.) A bequeaths to B all his property in trust for C during his life, and on his death for D, and on D's death for E. A's property consists of three leasehold houses, and there is nothing in A's will to show that he intended the houses to be enjoyed in specie. B should sell the houses, and invest the proceeds in accordance with section twenty.

(b.) A bequeaths to B his three leasehold houses in Calcutta and all the furniture therein in trust for C during his life, and on his death for D, and on D's death for E. Here an intention that the houses and furniture should be enjoyed in specie appears clearly, and B should not sell them.

**17.** Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Trustee to be impartial.

Where the trustee has a discretionary power, nothing in this section shall be deemed to authorize the Court to control the exercise reasonably and in good faith of such discretion.

*Illustration.*

A, a trustee for B, C, and D, is empowered to choose between several specified modes of investing the trust-property. A in good faith chooses one of these modes. The Court will not interfere, although the result of the choice may be to vary the relative rights of B, C, and D.

**18.** Where the trust is created for the benefit of several persons in succession, and one of them is in possession of the trust-property, if he commits, or threatens to commit, any act which is des-

Trustee to prevent waste.

destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

**19.** A trustee is bound (*a*) to keep clear and accurate accounts of the trust-property, and (*b*), at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

Accounts and information.

**20.** Where the trust-property consists of money, and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money on the following securities, and on no others:—

Investment of trust-money.

(*a*) in promissory notes, debentures, stock, or other securities of the Government of India, or of the United Kingdom of Great Britain and Ireland;

(*b*) in bonds, debentures, and annuities charged by the Imperial Parliament on the revenues of India;

(*c*) in stock or debentures of, or shares in, Railway or other Companies, the interest whereon shall have been guaranteed by the Secretary of State for India in Council;

(*d*) in debentures or other securities for money issued by, or on behalf of, any municipal body under the authority of any Act of a Legislature established in British India;

(*e*) on a first mortgage of immoveable property situate in British India: provided that the property is not a leasehold for a term of years, and that the value of the property exceeds by one-third, or, if consisting of buildings, exceeds by one-half, the mortgage-money; or

(*f*) on any other security expressly authorized by the instrument of trust, or by any rule which the High Court may, from time to time, prescribe in this behalf:

Provided that, where there is a person competent to contract, and entitled in possession to receive the income of the trust-property for his life, or for any greater estate, no investment on any security mentioned or referred to in clauses (*d*), (*e*) and (*f*), shall be made without his consent in writing.

**21.** Nothing in Section twenty shall apply to investments made before this Act comes into force, or shall be deemed to preclude an investment on a mortgage of immoveable

of land pledged to Government under Act XXVI of 1871.

property already pledged as security for an advance under the Land Improvement Act, 1871, or, in case the trust-money does not exceed three thousand rupees, a deposit thereof in a Government Savings Bank.

**Note.**—Act XXVI. of 1871 is repealed by Act XIX. of 1883.

**22.** Where a trustee directed to sell within a specified time extends such time, the burden of proving, as between himself and the beneficiary, that the latter is not prejudiced by the extension, lies upon the trustee, unless the extension has been authorized by a principal Civil Court of original jurisdiction.

*Illustration.*

A bequeaths property to B, directing him, with all convenient speed and within five years, to sell it, and apply the proceeds for the benefit of C. In the exercise of reasonable discretion, B postpones the sale for six years. The sale is not thereby rendered invalid, but C, alleging that he has been injured by the postponement, institutes a suit against B to obtain compensation. In such suit the burden of proving that C has not been injured lies on B.

**23.** Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained, unless the beneficiary has by fraud induced the trustee to commit the breach, or the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, concurred in the breach, or subsequently acquiesced therein, with full knowledge of the facts of the case and of his rights as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases:—

- (a) where he has actually received interest :
- (b) where the breach consists in unreasonable delay in paying trust-money to the beneficiary :
- (c) where the trustee ought to have received interest, but has not done so :
- (d) where he may be fairly presumed to have received interest.

He is liable, in case (a), to account for the interest actually received, and, in cases (b), (c), and (d), to account for simple interest at the rate of six per cent. per annum, unless the Court otherwise directs.

(e) Where the breach consists in failure to invest trust-money, and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate.

(f) Where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the nett profits made by such employment.

*Illustrations.*

(a.) A trustee improperly leaves trust-property outstanding, and it is consequently lost: he is liable to make good the property lost, but he is not liable to pay interest thereon.

(b.) A bequeaths a house to B in trust to sell it, and pay the proceeds to C. B neglects to sell the house for a great length of time, whereby the house is deteriorated, and its market-price falls. B is answerable to C for the loss.

(c.) A trustee is guilty of unreasonable delay in investing trust-money in accordance with section twenty, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of the delay.

(d.) The duty of the trustee is to invest trust-money in any of the securities mentioned in section twenty, clause (a), (b), (c), or (d). Instead of so doing, he retains the money in his hands. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made and the intermediate dividends and interest thereon.

(e.) The instrument of trust directs the trustee to invest trust-money either in any of such securities or on mortgage of immoveable property. The trustee does neither. He is liable for the principal money and interest.

(f.) The instrument of trust directs the trustee to invest trust-money in any of such securities, and to accumulate the dividends thereon. The trustee disregards the direction. He is liable, at the option of the beneficiary, to be charged either with the amount of the principal money and compound interest, or with the amount of such securities as he might have purchased with the trust-money when the investment should have been made, together with the amount of the accumulation which would have arisen from a proper investment of the intermediate dividends.

(g.) Trust-property is invested in one of the securities mentioned in section twenty, clause (a), (b), or (d). The trustee sell, such security for some purpose not authorized by the terms of the instrument of trust. He is liable, at the option of the beneficiary, either to replace the security with the intermediate dividends and interest thereon, or to account for the proceeds of the sale with interest thereon.

(h.) The trust-property consists of land. The trustee sells the land to a purchaser for a consideration without notice of the trust. The trustee is liable, at the option of the beneficiary, to purchase other land of equal value to be settled upon the like trust, or to be charged with the proceeds of the sale with interest.

**24.** A trustee, who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property, cannot set-off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

**25.** Where a trustee succeeds another, he is not, as such, liable for the acts or defaults of his predecessor.

**26.** Subject to the provisions of sections thirteen and fifteen, one trustee is not, as such, liable for a breach of trust committed by his cotrustee:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

(a) where he has delivered trust-property to his co-trustee without seeing to its proper application:

(b) where he allows his co-trustee to receive trust-property, and fails to make due inquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require:

(c) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it, or does not, within a reasonable time, take proper steps to protect the beneficiary's interest.

A co-trustee, who joints in signing a receipt for trust-property, and proves that he has not received the same, is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

#### *Illustration.*

A bequeaths certain property to B and C, and directs them to sell it and invest the proceeds for the benefit of D. B and C accordingly sell the property, and the purchase-money is received by B and retained in his hands. C pays no attention to the matter for two years, and then calls on B to make the investment. B is unable to do so, becomes insolvent, and the purchase-money is lost. C may be compelled to make good the amount.

**27.** Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.



But, as between the trustees themselves, if one be less guilty than another, and has had to refund the loss, the former may compel the latter, or his legal representative, to the extent of the assets he had received, to make good such loss; and, if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

**28.** When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

**29.** When the beneficiary's interest is forfeited or awarded by legal adjudication to Government, the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as the Government may direct in this behalf.

**30.** Subject to the provisions of the instrument of trust and of sections twenty-three and twenty-six, trustees shall be respectively chargeable only for such moneys, stocks, funds, and securities as they respectively actually receive, and shall not be answerable the one for the other of them, nor for any banker, broker, or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

## CHAPTER IV.

### OF THE RIGHTS AND POWERS OF TRUSTEES.

**31.** A trustee is entitled to have in his possession the instrument of trust and all the documents of title (if any) relating solely to the trust-property.

**32.** Every trustee may reimburse himself, or pay or discharge out of the trust-property, all expenses properly incurred in or about

the execution of the trust, or the realization, preservation, or benefit of the trust-property, or the protection or support of the beneficiary.

If he pays such expenses out of his own pocket, he has a first charge upon the trust-property for such expenses and interest thereon ; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses.

Where a trustee has, by mistake, made an over-payment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment.

**33.** A person other than a trustee who has gained an advantage from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach ; and, where he is a beneficiary, the trustee has a charge on his interest for such amount.

Nothing in this sections shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

**34.** Any trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice, or direction on any present questions respecting the management or administration of the trust-property, other than questions of detail, difficulty, or importance not proper in the opinion of the Court for summary disposal.

A copy of such petition shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit.

The trustee stating in good faith the facts in such petition, and acting upon the opinion, advice, or direction given by the

Court, shall be deemed, so far as regards his own responsibility, to have discharged his duties as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court to which it is made.

**35.** When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect.

**36.** In addition to the powers expressly conferred by this Act and by the instrument of trust, and subject to the restrictions (if any) contained in such instrument, and to the provisions of section seventeen, a trustee may do all acts which are reasonable and proper for the realization, protection, or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract.

Every trustee in the actual possession or receipt of the rents and profits of land as defined in the Land Improvement Act, 1871,\* shall, for the purposes of that Act, be deemed to be a landlord in possession.

Except with the permission of a principal Civil Court of original jurisdiction, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained.

**37.** Where the trustee is empowered to sell any trust-property, he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

**38.** The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any condition of sale or contract for sale, as he thinks fit; and may also buy in the property, or any part thereof, at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so

\* Repealed by Act XIX. of 1883.

brought in, or as to which the contract is so recinded, without being responsible to the beneficiary for any loss occasioned thereby.

Where a trustee is directed to sell trust-property or to  
Time allowed for selling invest trust-money in the purchase of  
property. property, he may exercise a reasonable  
 discretion as to the time of effecting the sale or purchase.

*Illustrations.*

(a) A bequeaths property to B, directing him to sell it with all convenient speed, and pay the proceeds to C. This does not render an immediate sale imperative.

(b) A bequeaths property to B, directing him to sell it at such time and in such manner as he shall think fit, and invest the proceeds for the benefit of C. This does not authorize B, as between him and C, to postpone the sale to an indefinite period.

**39.** For the purpose of completing any such sale, the  
Power to convey. trustee shall have power to convey or  
 otherwise dispose of the property sold in  
 such manner as may be necessary.

**40.** A trustee may, at his discretion, call in any trust-  
Power to vary investments. property invested in any security, and  
 invest the same on any of the securities  
 mentioned or referred to in section twenty, and from time to  
 time vary any such investments for others of the same nature :

Provided that, where there is a person competent to contract, and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing.

**41.** Where any property is held by a trustee in trust for  
Power to apply property of minors, &c., for their maintenance, &c. a minor, such trustee may, at his discretion, pay to the guardians (if any) of  
 such minor, or otherwise apply for or to-  
 wards his maintenance or education or advancement in life,  
 or the reasonable expenses of his religious worship, marriage,  
 or funeral, the whole or any part of the income to which he  
 may be entitled in respect of such property ; and such trustee  
 shall accumulate all the residue of such income by way of  
 compound interest, by investing the same and the resulting  
 income thereof from time to time in any of the securities men-  
 tioned or referred to in section twenty, for the benefit of  
 the person who shall ultimately become entitled to the pro-  
 perty from which such accumulations have arisen : Provided

that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage, or funeral, the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement, or expenses.

Nothing in this section shall be deemed to affect the provision of any local law for the time being in force relating to the persons and property of minors.

**42.** Any trustees or trustee may give a receipt in writing for any money, securities, or other moveable property payable, transferable, or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring, or delivering the same therefrom, and from seeing to the application thereof, or being accountable for any loss or misapplication thereof.

Power to give receipts.

**43.** Two or more trustees acting together may, if and as they think fit—

Power to compound, &c.

(a) accept any composition or any security for any debt or for any property claimed;

(b) allow any time for payment of any debt;

(c) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the trust; and,

(d) for any of those purposes, enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust (if any) a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust (if any), and

shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force.

**44.** When an authority to deal with the trust-property is given to several trustees, and one of them disclaims or dies, the authority may be exercised by the continuing trustees, unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Power to several trustees of whom one disclaims or dies.

**45.** Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers, except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the Appellate Court.

Suspension of trustee's powers by decree.

## CHAPTER V.

### OF THE DISABILITIES OF TRUSTEES.

**46.** A trustee who has accepted the trust cannot afterwards renounce it, except (a) with the permission of a principal Civil Court of original jurisdiction, or (b), if the beneficiary is competent to contract, with his consent, or (c) by virtue of special power in the instrument of trust.

Trustee cannot renounce after acceptance.

**47.** A trustee cannot delegate his office or any of his duties either to a co-trustee or to a stranger, unless (a) the instrument of trust so provides, or (b) the delegation is in the regular course of business, or (c) the delegation is necessary, or (d) the beneficiary, being competent to contract, consents to the delegation.

Trustee cannot delegate.

*Explanation.*—The appointment of an attorney or proxy to do an act merely ministerial, and involving no independent discretion, is not a delegation within the meaning of this section.

#### *Illustrations.*

(a.) A bequeaths certain property to B and C on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. B dies. C may bequeath the trust-property to D and E upon the trusts of A's will.

(b.) A is a trustee of certain property with power to sell the same. A may employ an auctioneer to effect the sale.

.. (c.) A bequeaths to B fifty houses let at monthly rents in trust to collect the rents and pay them to C. B may employ a proper person to collect these rents.

**48.** When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

Co-trustees cannot act singly.

**49.** Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

Control of discretionary power.

**50.** In the absence of express direction to the contrary contained in the instrument of trust or of a contract to the contrary entered into with the beneficiary or the Court at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill, and loss of time in executing the trust.

Trustee may not charge for services.

Nothing in this section applies to any Official Trustee, Administrator-General, Public Curator, or person holding a certificate of administration.

**51.** A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust.

Trustee may not use trust-property for his own profit.

**52.** No trustee whose duty it is to sell trust-property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

Trustee for sale or his agent may not buy.

**53.** No trustee, and no person who has recently ceased to be a trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be given unless the proposed purchase, mortgage, or lease is manifestly for the advantage of the beneficiary.

Trustee may not buy beneficiary's interest without permission.

And no trustee whose duty it is to buy or to obtain a mortgage or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

Trustee for purchase.



**54.** A trustee or co-trustee whose duty it is to invest trust-money on mortgage or personal security must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.

Co-trustees may not lend to one of themselves.

## CHAPTER VI.

### OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

**55.** The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property.

Right to rents and

The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest;

Right to specific execution.

and, where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct.

Right to transfer of possession.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage.

#### *Illustrations.*

(a.) Certain Government securities are given to trustees upon trust to accumulate the interest until A attains the age of 24, and then to transfer the gross amount to him. A, on attaining majority, may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

(b.) A bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for B, who has attained his majority, and is otherwise competent to contract. B may claim the Rs. 10,000.

(c.) A transfers certain property to B, and directs him to sell or let it for the benefit of C, who is competent to contract. C may elect to take the property in its original character.

**57.** The beneficiary has a right, as against the trustee and all persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the

Right to inspect and take copies of instrument of trust, accounts, &c.

cuments of title relating solely to the trust-property, the accounts of the trust-property, and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

**58.** The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest :

Right to transfer bene-  
ficial interest.

Provided that, when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

**59.** Where no trustees are appointed, or all the trustees die, disclaim, or are discharged, or where, for any other reason, the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

Right to sue for execu-  
tion of trust.

**60.** The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Right to proper trustees.

*Explanation I.*—The following are not proper persons within the meaning of this section :—

A person domiciled abroad ; an alien enemy ; a person having an interest inconsistent with that of the beneficiary ; a person in insolvent circumstances ; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor.

*Explanation II.*—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least.

#### *Illustrations.*

(a.) A, one of several beneficiaries, proves that B, the trustee, has improperly disposed of part of the trust-property, or that the property is in danger from B's being in insolvent circumstances, or that he is incapacitated from acting as trustee. A may obtain a receiver of the trust-property.

(b.) A bequeaths certain jewels to B in trust for C. B dies during A's lifetime; then A dies. C is entitled to have the property conveyed to a trustee for him.

(c.) A conveys certain property to four trustees in trust for B. Three of the trustees die. B may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(d.) A conveys certain property to three trustees in trust for B. All the trustees disclaim. B may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

(e.) A, a trustee for B, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. B may institute a suit to have A removed and a new trustee appointed in his room.

**61.** The beneficiary has a right that his trustee shall  
 Right to compel to any be compelled to perform any particular  
 act of duty. act of his duty as such, and restrained  
 from committing any contemplated or probable breach of trust.

*Illustrations.*

(a.) A contracts with B to pay him monthly Rs. 100 for the benefit of C. B writes and signs a letter declaring that he will hold in trust for C the money so to be paid. A fails to pay the money in accordance with his contract. C may compel B on a proper indemnity to allow C to sue on the contract in B's name.

(b.) A is trustee of certain land, with a power to sell the same, and pay the proceeds to B and C equally. A is about to make an improvident sale of the land. B may sue on behalf of himself and C for an injunction to restrain A from making the sale.

**62.** Where a trustee has wrongfully bought trust-property, the beneficiary has a right to have  
 Wrongful purchase by trustee. the property declared subject to the trust  
 or re-transferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase-money paid by the trustee, with interest, and such other expenses (if any) as he has properly incurred in the preservation of the property; and the trustee or purchaser must (a) account for the nett profits of the property, (b) be charged with an occupation-rent, if he has been in actual possession of the property, and (c) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

Nothing in this section—

(a) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject

to the trust or re-transferred, have contracted in good faith with the trustee or purchaser ; or

(b) entitles the beneficiary to have the property declared subject to the trust or re-transferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

**63.** Where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust.

Following trust-property—  
into the hands of third  
persons ;

Where the trustee has disposed of trust-property, and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

*Illustrations.*

(a.) A, a trustee for B, of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. B is entitled to the land.

(b.) A, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust-money so mis-employed.

**64.** Nothing in section sixty-three entitles the beneficiary to any right in respect of property in the hands of—

Saving of rights of cer-  
tain transferees.

(a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or—

(b) a transferee for consideration from such a transferee.

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.

Nothing in section sixty-three applies to money, currency notes, and negotiable instruments in the hands of a *bona-fide* holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872, Section 108, or the liability of a person to whom a debt or charge is transferred.

**65.** Where a trustee wrongfully sells or otherwise transfers trust-property, and afterwards himself becomes the owner of the property, the property again becomes subject to the trust notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

Acquisition by trustee of trust-property wrongfully converted.

**66.** Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

case of blended

**67.** If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

Wrongful employment by partner-trustee of trust-property for partnership

The partners having such notice are jointly and severally liable for the breach of trust.

*Illustrations.*

(a.) A and B are partners. A dies, having bequeathed all his property to B in trust for Z, and appointed B his sole executor. B, instead of winding up the affairs of the partnership, retains all the assets in the business. Z may compel him, as partner, to account for so much of the profits as are derived from A's share of the capital. B is also answerable to Z for the improper employment of A's assets.

(b.) A, a trader, bequeaths his property to B in trust for C, appoints B his sole executor, and dies. B enters into partnership with X and Y in the same trade, and employs A's assets in the partnership-business. B gives an indemnity to X and Y against the claims of C. Here X and Y are jointly liable with B to C as having knowingly become parties to the breach of trust committed by B.

Liability of beneficiary joining in breach of trust.

**68.** Where one of several benefi-

(a) joins in committing breach of trust, or  
(b) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(c) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not, within a reasonable time, take proper steps to protect the interests of the other beneficiaries, or

(d) has deceived the trustee, and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him and all who claim

under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

**69.** Every person to whom a beneficiary transfers his Rights and liabilities of beneficiary's transferee. interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

## CHAPTER VII.

### OF VACATING THE OFFICE OF TRUSTEE.

**70.** The office of a trustee is vacated by his death or by his discharge from his office.

Office how vacated,

**71.** A trustee may be discharged from his office only as follows:—

Discharge of trustee.

- (a) by the extinction of the trust ;
- (b) by the completion of his duties under the trust ;
- (c) by such means as may be prescribed by the instrument of trust ;

(d) by appointment under this Act of a new trustee in his place ;

(e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract, or

(f) by the Court to which a petition for his discharge is presented under this Act.

**72.** Notwithstanding the provisions of section eleven, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office ; and, if the Court finds that there is sufficient reason for such discharge, it may discharge him accordingly, and direct his costs to be paid out of the trust-property. But, where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

Petition to be discharged from trust.

**73.** Whenever any person appointed a trustee dis-  
Appointment of new trustees on death, &c. claims, or any trustee, either original or substituted, dies, or is, for a continuous period of six months, absent from British India, or leaves British India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(a) the person nominated for that purpose by the instrument of trust (if any), or

(b) if there be no such person, or no such person-able and willing to act, the author of the trust, if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee the number of trustees may be increased.

The Official Trustee may, with his consent, and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

**74.** Whenever any such vacancy or disqualification occurs, and it is found impracticable to ap-  
Appointment by Court. point a new trustee under section seventy-three, the beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee, and the Court may appoint a trustee or a new trustee accordingly.

In appointing new trustees, the Court shall have regard  
Rule for selecting new trustees. (a) to the wishes of the author of the trust as expressed in or to be inferred



from the instrument of trust ; (b) to the wishes of the person, (if any) empowered to appoint new trustees ; (c) to the question whether the appointment will promote or impede the execution of the trust ; and (d) where there are more beneficiaries than one, to the interests of all such beneficiaries.

**75.** Whenever any new trustee is appointed under section seventy-three or section seventy-four, all the trust-property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee as the case may require.

Every new trustee so appointed, and every trustee appointed by a Court either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

**76.** On the death or discharge of one of several co-trustees, the trust survives, and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

## CHAPTER VIII.

### OF THE EXTINCTION OF TRUSTS.

**77.** A trust is extinguished—  
 (a) when its purpose is completely fulfilled ; or  
 (b) when its purpose becomes unlawful ; or  
 (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise ; or  
 (d) when the trust, being revocable, is expressly revoked.

**78.** A trust created by will may be revoked at the pleasure of the testator.

A trust otherwise created can be revoked only—

(a) where all the beneficiaries are competent to contract—by their consent ;

(b) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust ; or

(c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust.

*Illustration.*

A conveys property to B in trust to sell the same, and pay, out of the proceeds, the claims of A's creditors. A reserves no power of revocation. If no communication has been made to the creditors, A may revoke the trust. But if the creditors, are parties to the arrangement, the trust cannot be revoked without their consent.

**79.** No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

Revocation not to defeat what trustees have duly done.

## CHAPTER IX.

### OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

**80.** An obligation in the nature of a trust is created in the following cases.

Where obligation in nature of trust is created.

**81.** Where the owner of property transfers or bequeaths it, and it cannot be inferred, consistently with the attendant circumstances, that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

Where it does not appear that transferor intended to dispose of beneficial interest.

*Illustrations.*

(a.) A conveys land to B without consideration, and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the land. B holds the land for the benefit of A.

(b.) A conveys to B two fields, Y and Z, and declares a trust of Y, but says nothing about Z. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in Z. B holds Z for the benefit of A.

(c.) A transfers certain stock belonging to him into the joint names of himself and B. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the stock during his life. A and B hold the stock for the benefit of A during his life.

(d.) A makes a gift of certain land to his wife B. She takes the beneficial interest in the land free from any trust in favour of A, for it may be inferred from the circumstances that the gift was for B's benefit.

**82.** Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such

Transfer to one for consideration paid by another.

other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (*to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency*), section 36.

**83.** Where a trust is incapable of being executed, or where the trust is completely executed without exhausting the trust-property, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Trust incapable of execution, or executed without exhausting trust-property.

*Illustrations.*

(a.) A conveys certain land to B—

“upon trust,” and no trust is declared; or

“upon trust to be thereafter declared,” and no such declaration is ever made; or

upon trusts that are too vague to be executed; or

upon trusts that become incapable of taking effect; or

“in trust for C,” and C renounces his interest under the trust.

In each of these cases B holds the land for the benefit of A.

(b.) A transfers Rs. 10,000 in the four per cents. to B in trust to pay the interest annually accruing due to C for her life. A dies. Then C dies. B holds the fund for the benefit of A's legal representative.

(c.) A conveys land to B upon trust to sell it, and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. B sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. B holds the first moiety and the part unapplied of the second moiety for the benefit of A or his legal representative.

(d.) A bequeaths Rs. 10,000 to B, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. B holds for the benefit of A's legal representative the undisposed of interest in the money or land if purchased.

**84.** Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor.

Transfer for illegal purpose.

**85.** Where a testator bequeaths certain property upon trust, and the purpose of the trust appears on the face of the will to be unlawful, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Bequest for illegal purpose.  
Where property is bequeathed, and the revocation of the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

**86.** Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor subject to re-payment by the latter of the consideration actually paid.

**87.** Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

**88.** Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

*Illustrations.*

(a.) A, an executor, buys at an undervalue from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit of B the difference between the price and value.

(b.) A, a trustee, uses the trust property for the purpose of his own business. A holds for the benefit of his beneficiary the profits arising for such user.

(c.) A, a trustee, retires from his trust in consideration of his successor paying him a sum of money. A holds such money for the benefit of his beneficiary.

(d.) A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.

(e.) A, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. A holds the lakh for the benefit of the partnership.

(f.) A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital.

(g.) A, an agent employed to obtain a lease for B, obtains the lease for himself. A holds the lease for the benefit of B.

(h.) A, a guardian, buys up for himself incumbrances on his ward B's estate at an undervalue. A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid.

**89.** Where, by the exercise of undue influence, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

**90.** Where a tenant for life, co-owner, mortgagee, or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

#### *Illustrations.*

(a.) A, the tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.

(b.) A village belongs to a Hindu family. A, one of its members, pays nazrana to Government, and thereby procures his name to be entered as the inamdar of the village. A holds the village for the benefit of himself and the other members.

(c.) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

**91.** Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

**92.** Where a person contracts to buy property to be held on trust for certain beneficiaries, and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

**93** Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold for the benefit of such creditors the advantage so gained.

**94.** In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

*Illustrations.*

(a.) A, an executor, distributes the assets of his testator B to the legatees without having paid the whole of B's debts. The legatees hold for the benefit of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(b.) A by mistake assumes the character of a trustee for B, and under colour of the trust receives certain moneys. B may compel him to account for such moneys.

(c.) A makes a gift of a lakh of rupees to B, reserving to himself, with B's assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,000, and B holds that sum for the benefit of A.

**95.** The person holding property in accordance with any of the preceding sections of this chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it:

Provided that (a), where he rightfully cultivates the property, or employs it in trade or business, he is entitled to rea-

Where a firm of attorneys dissolved partnership after the death of a client, there being at that time papers and documents belonging to the client in their hands, and a debt due in respect of costs from the client to them—*Held* that the dissolution of partnership operated as a discharge of the firm, and that the attorneys were not entitled to retain the papers and documents until their costs were paid, but were bound to hand them over to the administrator of the client. Sec. 171 of the Contract Act does not give an attorney an absolute lien. Sec. 1 provides that nothing in the Act contained shall affect any usage or custom of trade, and, as no part of the English law is inconsistent with sec. 171, cases arising in this country must be governed by the English authorities. According to those authorities, while the relation of attorney and client exists, the client may either continue to employ the attorney or change him. When he claims to do the latter, the attorney being willing to act, he cannot ask the attorney to give up papers in his possession without first satisfying the lien. The attorney has his option : he may, if he chooses, either go on acting for his client, or cease to act ; if he adopt the latter course, he must give up the papers. On the death of the client his representative stands in exactly the same position with respect to the attorney as the client did.—I. L. R., 6 Cal. 1.

**2.** In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context.

Interpretation-clause.

—When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :

“Proposal.”

(b.)—When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted,\* becomes a promise :

“Promise.”

(c.)—The person making the proposal is called the ‘promisor,’ and the person accepting the proposal is called the ‘promisee :

“Promisor” and “Promisee.”

(d.)—When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise :

“Consideration.”

(e.)—Every promise and every set of promises, forming the consideration for each other, is an agreement.

“Agreement.”

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\* But see sec. 4, ill. b. *infra*.



- Promises which form the consideration or part of the consideration for each other are called reciprocal promises :
- “ Reciprocal promises.”
- (g.)—An agreement not enforceable by law is said to be void :
- “ Void agreement.”
- An agreement enforceable by law is a contract :
- “ Contract.”
- (i.)—An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract :
- “ Voidable contract.”
- (j).—A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.
- “ Void contract.”

#### Notes.

The interpolation of the name of a witness in a document which need not be attested is not a material alteration that would render the document void. *Suffell v. Bank of England*, 9 Q. B. D., 555, explained ; *Sitaram Krishna v. Dayi Davaji*, I. L. R., 7 B., 416, dissented from.—I. L. R., 12 Cal. 313.

L granted an estate to C, and directed her to make an annual payment to L's brothers. C, by agreement of even date made with L's brothers, promised to carry out L's directions. *Held* by Innes, J., following *Dutton v. Poole* (2 Lev. 210, 1 Ventr. 318, affirmed in error in the Exchr. Ch. T. Rayn 302), that the agreement was enforceable against C by L's brothers. *Held* by Kindersley, J., that the grant by L and the promise by C to the brothers of L being one transaction, there was a sufficient consideration for the promise within the meaning of the Indian Contract Act, sec. 2.—4 Madr. 137.

The administratrix of an estate having agreed to pay S his share of the estate if S would give a promissory note for a portion of a barred debt claimed by A from her, S executed a promissory note in favor of A, gave it to the administratrix, and received his share of the assets. *Held* that there was consideration for the promissory note within the meaning of sec. 2, cl. d of the Contract Act, 1872, and that A could recover upon it.—6 Madr. 351.

A material alteration made after execution does not vitiate a deed, if it be made with the consent of all the parties.—10 Bom. 487.

While certain hundis were running, the acceptor gave the holder, the drawer having become bankrupt, a mortgage of certain immoveable property as security for the payment of the hundis in the event of their dishonour when they became due. *Held*, in a suit on the mortgage-deed, the hundis having been dishonoured, that there was no consideration, within the meaning of that term in Act IX of 1872, for the agreement of mortgage, and the same was void under sec. 25 of that Act.—1 Al. 309.

M had for many years lived with G as his concubine. In consideration of such part cohabitation, G, by an agreement in writing dated the 28th March, 1869, and duly registered, settled an annuity on M, charging a portion of his real estate with the payment of such annuity. *Held* in a suit

by M against G's heir, his married wife, to enforce the agreement, that consideration for the agreement was not under the law then in force moral, nor was the agreement, under the same law, void for want of consideration. *Held* also that, before M could recover from the defendant on the agreement, it was necessary to show that the defendant had received funds available to meet the claim from the profits of the estate charged with the payment of the annuity or other property of G.—1 Al. 478.

The plaintiff sued to establish an agreement in writing, by which the defendants promised to pay him a commission on articles sold through their agency in a bazar in which they occupied shops, in consideration of the plaintiff having expended money in the construction of such bazar. Such money had not been expended by the plaintiff at the request of the defendants, nor had it been expended by him for them voluntarily, but it had been expended by him voluntarily for third parties. *Held* that such expenditure was not any consideration for the agreement within the meaning of sec. 2 (d) of Act IX of 1872, and the agreement did not fall within cl. 2, sec. 25 of that Act, and was void for want of consideration.—3 Al. 221.

Past cohabitation would not be an immoral consideration, if consideration it can properly be called, for a promise to pay a woman an allowance. Such a promise, however, is to be regarded as an undertaking by the promisor to compensate the promisee for past services voluntarily rendered to him, for which no consideration, as defined in the Contract Act, would be necessary.—3 Al. 787.

A person, while under arrest in execution of a decree which had been made against him by a Court having no jurisdiction to make it, gave the holder of such decree a bond for the amount of such decree, *plus* a small sum paid for him for the stamping and preparation of such bond, in order that he might be released from such arrest. *Held* that such bond was given under duress, and that it was executed without consideration, the small sum paid by the holder of such decree for preparing and stamping the bond not being in any legitimate sense of the phrase "consideration" for such bond, and therefore such bond was void.—4 Al. 352.

The consideration for a mortgage consisted partly of the amount of two decrees held by the mortgagee against the mortgagor. The mortgagee having sued to enforce the mortgage, the mortgagor pleaded failure of consideration as a bar to the enforcement of the mortgage. This plea was based on the allegation that the mortgagee had not certified the adjustment of the decrees as provided by section 258 of the Civil Procedure Code, and they were still in force under the terms of that section. *Per Duthoit, J.*—That the failure of the mortgagee to certify the adjustment of the decrees did not constitute a failure of consideration, because he did not covenant to certify such adjustment, and it was not, in fact, necessary for him to do so; because he could not seek execution of the decrees on the ground that, though unsatisfied, they were still in force under section 258 without becoming liable to penalties; and because if the mortgagor considered the entering up of the adjustment of the decrees to be imperative, he had his remedy by application to the Court in the terms of sec. 258. *Per Mahmood J.*—That the adjustment of a decree out of court, if never certified to the Court, is under section 258, ineffectual only so far as the execution of the decree is concerned; that there is nothing in the Contract Act to make such an adjustment invalid as the consideration for an agreement; that an agreement founded on such consideration may be enforced without defeating the objects of section 258; and that consequently there was, in respect

of the amount of the decrees, valid consideration for the mortgage. *Gunamani Dasi v. Pran Kishori Dasi*, *Meer Mahomed Kazem Jowharry v. Khetoo Bibee*, *Gani Khan v. Poonjo Behary Sein*, *Davlat v. Ganesh, Shashtri*, *Shadi v. Ganga Sahai* and *Sita Ram v. Mahipal* followed. *Patan- kar v. Devji* and *Pundurang Ramchandra Chowghule v. Narayan* dissented from.—7 Al. 124.

## CHAPTER I.

### OF THE COMMUNICATION, ACCEPTANCE, AND REVOCATION OF PROPOSALS.

**3.** The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate such proposal, acceptance, or revocation, or which has the effect of communicating it.

#### Note.

A letter of acceptance to a proposer, not correctly addressed could not, although posted, be said to have been “put in a course of transmission” to him, within the meaning of sec. 4 of the Contract Act (IX of 1872). *Townsend’s Case* referred to.—I. L. R., 9 Al. 366.

**4.** The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete, as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

#### Illustrations.

(a.) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b.) B accepts A’s proposal by a letter sent by post.

The communication of the acceptance is complete, as against A when the letter is posted;

as against B when the letter is received by A.

(c.) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

**Notes.**

A letter containing a request to borrow a certain sum of money, promising that the same should be repaid with interest on a certain day, is not liable to stamp duty. It is not a promissory note, but a mere proposal under section 4 of the Indian Contract Act IX. of 1872.—I. L. R., 13 Bom. 669.

See I. L. R., 9 Al. 366, noted under sec. 3.

**5.** A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

Revocation of proposals and acceptances.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

*Illustration.*

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Revocation how made.

**6.** A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party ;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time without communication of the acceptance ;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute.

**7.** In order to convert a proposal into a promise, the acceptance must—

(1) be absolute and unqualified ;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be

accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but, if he fails to do so, he accepts the acceptance.

**8.** Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Acceptance by performing conditions or receiving consideration.

**9.** In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Promises, express and implied.

## CHAPTER II.

### OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS.

**10.** All agreements are contracts\* if they are made by the free consent of parties competent to contract, for a lawful consideration,† and with a lawful object, and are not hereby expressly declared to be void.

What agreements are contracts.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.‡

#### Notes.

According to Hindu law, arrears of interest more than sufficient to double the debt are not recoverable, and the law upon this point was not affected by the Act (XXVIII of 1855) for the repeal of the Usury Laws, not by sec. 10 of the Contract Act. *Semble*.—The rule of Hindu law in question has not properly anything to do with the legality or illegality of any contract, but is rather a rule of limitation.—I. L. R., 5 Cal. 867.

A contract entered into with a minor is merely voidable at the option of the minor; and there is nothing to prevent him suing thereon, supposing the contract to be otherwise valid.—11 Cal. 522.

A money-bond taken by a minor is good in law, and may be sued on.—13 Bom. 50

\* See sec. 2, cl. h, *supra*.

† See sec. 25, expl. 2, and sec. 102, *infra*.

‡ See Now Act III. of 1877.

The defendants in Bombay charters a ship from the plaintiffs which was described in the charter-party as of the measurement of about 2,700—2,800 tons nett register. The ship had never been in Bombay and was wholly unknown to the defendants. Evidence was given that in the negotiations for the charter-party the plaintiffs stated to the defendants that the ship was certainly not more than 2,800 tonnage register. She, however, turned out to be of the registered tonnage of 3,045 tons, and the defendants refused to accept her in fulfilment of the charter-party. *Held*, that the defendants were entitled to treat the contract as void by reason of the erroneous statement of the plaintiffs with regard to the size of the ship.—14 Bom. 241.

**11.** Every person is competent to contract who is of the age of majority according to the law to which he is subject,\* and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

Who are competent to contract.

#### Notes.

On a reasonable construction of the whole of Reg. X of 1793, a ward of Court, duly constituted as such, is not thereby absolutely incapacitated from contracting, but the power of the ward to contract is taken away so far as regards all property which, under the provisions of the law, comes under the charge and control of the Court of Wards. The view taken by the Courts of the Regulation and Acts concerned with the Court of Wards in Bengal is, that although the possession of a revenue-paying property is a condition precedent to the jurisdiction of the Court of Wards attaching, yet when once that jurisdiction has attached, all the property of the ward comes under the control and management of the Court.—I. L. R., 8 Cal. 620.

See I. L. R., 13 Bom. 50 and 11 Cal. 522, noted under sec. 10.

**12.** A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it, and of forming a rational judgment as to its effect upon his interests.

What is a sound mind for the purposes of contracting.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.†

#### Illustrations.

(a.) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b.) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment

\* See Act IX. of 1875. For exception to this rule in the case of emigrants, See Act I. of 1882, sec. 11 and Act XXI, of 1883, sec. 39.

† But see sec. 68, *infra*.

as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

**13.** Two or more persons are said to consent when they agree upon the same thing in the same sense.

“Consent” defined.

**Notes.**

On the 3rd March, 1881, N drew a bill in English at Cawnpore in favour of F on a Calcutta firm, and gave it to F's agent, who did not understand English. F's agent kept the bill till the 10th March 1881 without ascertaining its nature. On that date the Calcutta firm on which the bill was drawn became insolvent. F subsequently sued N for the money he had paid for the bill, on the ground that his agent had asked N for a bill drawn on himself, and not one drawn on the Calcutta firm. N asserted in defence to the suit that F's agent had not asked for a bill drawn on himself, but merely for a bill on Calcutta. *Held* that assuming that the sale of the bill was void by reason of both parties being under a mistake as to the bill, yet F could not recover the amount of the bill from N, because his agent had been guilty of gross negligence in taking the bill and keeping it so long without ascertaining its nature and applying for redress.—I.L.R., 4 Al. 334.

See I. L. R., 3 Bom. 242, noted under sec. 18; 14 Bom. 241, noted under sec. 10.

**14.** Consent is said to be free when it is not caused by—

“Free consent” defined.

- (1) coercion, as defined in section fifteen, or
- (2) undue influence, as defined in section sixteen, or
- (3) fraud, as defined in section seventeen, or
- (4) misrepresentation, as defined in section eighteen, or
- (5) mistake, subject to the provisions of sections twenty, twenty-one, and twenty-two.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

**Note.**—See I. L. R., 14 Bom. 241, noted under sec. 10.

**15.** “Coercion” is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

“Coercion” defined.

*Explanation.*—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

*Illustration.*

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.



A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

#### Notes.

In execution of a decree the plaintiff purchased certain property. Subsequently the defendant, in execution of another decree against the former owner of the property, proceeded to execute his decree against the same property. The plaintiff thereupon preferred a claim, which was disallowed, as he had not then obtained, and consequently could not produce, the sale certificate. In order to prevent the sale he then paid the amount of the defendant's decree into Court, and subsequently instituted a suit against the defendant to recover the amount so paid into Court to prevent the sale. The defendant contended that the amount was paid voluntarily and could not be recovered back. *Held*, following *Dooli Chand v. Ram Kishen Sing*, L. R., 8 I. A., 93; S. C., I. L. R., 7 Cal. 648, that it was not a voluntary payment, and that the plaintiff was entitled to a decree. *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdhry*, 12 Moore's I. A., 65; S. C., 10 W. R., P. C., 29, referred to. *Asibun v. Ram Proshad Das*, 1 Shome, 25, doubted.—I. L. R., 15 Cal. 656.

The minor widow of a deceased Hindu of the Komati or Vaisya caste (who had authorized her to adopt a son) corporeally accepted a boy as in adoption from his natural father who (*semble*) belonged to a different gotram from her deceased husband. There were no formal declarations of giving and taking the child, and *datta homam* was not performed. At the time when the child was handed over to the widow her husband's corpse was still in the house, and the relatives of the child and other members of the caste obstructed the removal of the corpse until the child had been accepted as above and the widow had executed a deed of adoption:—*Held*, that there was no valid adoption by the widow. *Per cur.*—We cannot say that obstructing the removal of a corpse by the deceased's widow or her guardian, unless she made an adoption and signed a document is not an unlawful act or not an act such as is defined by sec. 15 or 16 of the Indian Contract Act. *Dicta* in *Mahasheya Shosinath Ghose v. Srimati Krishna Soondari Dasi* (1) as to incidents of a formal adoption discussed. Observations on the necessity of *datta homam* in a ceremonial adoption among members of a twice-born class, and on an adoption taking place during the pollution of the adoptive parent.—13 Madr. 214.

See I. L. R., 4 Al. 352, noted under sec. 2.

“Undue influence” defined.

16. “Undue influence” is said to be employed in the following cases:—

(1.)—When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained:

(2.)—When a person, whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.

## Notes.

In a transaction between two persons where one is so situated as to be under the control and influence of the other, the Courts in this country have to see that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise. Where a fiduciary or quasi-fiduciary relation had existed courts of equity have invariably placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another. The plaintiff, who on the death of the widow of his brother became entitled to the estate of the deceased, found himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the Revenue Court, and while plaintiff was residing with the defendant, he executed a sale-deed in favor of defendant's brother for the nominal consideration of Rs. 9,500, or half the property he claimed; and again, shortly after the mutation case had terminated in his favor, he executed a deed of endowment of the remaining half in favor of a temple founded by the ancestor of the defendant, and in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands. Plaintiff sued for cancellation of the deed of endowment, on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud, and obtained a decree. On appeal by the defendant it was *held* that, looking at all the facts, such a relation between plaintiff and defendant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest *bona fide* transaction and one that ought to be upheld.—I. L. R., 10 Al. 535.

See I. L. R., 13 Madr. 214, noted under sec. 15.

**17.** “Fraud” means and includes any of the following acts committed by a party to a contract,\* or with his connivance, or by his agent,† with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :\*—

(1.)—The suggestion, as a fact, of that which is not true, by one who does not believe it to be true ;

(2.)—The active concealment of a fact by one having knowledge or belief of the fact ;

\* Read ‘agreement.’

† Compare sec. 238, *infra*.

(3.)—A promise made without any intention of performing it;

(4.)—Any other act fitted to deceive;

(5.)—Any such act or omission as the law specially declares to be fraudulent.

*Explanation.*—Mere silence as to facts likely to affect the willingness of a person to enter into a contract,\* is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak,† or unless his silence is, in itself, equivalent to speech.

*Illustrations.*

(a.) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b.) B is A's daughter, and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c.) B says to A, "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d.) A and B, being traders, enter upon a contract.\* A has private information of a change in prices which would affect B's willingness to proceed with the contract.\* A is not bound to inform B.

**Notes.**

In a suit brought to recover Rs. 815, principal and interest due according to the terms of a registered mortgage bond, it was found that the plaintiff had fraudulently altered the terms of the bond prior to registration (1) by inserting a condition, making the whole sum payable upon default of payment of any instalment, and (2) by doubling the rate of interest. The defendant admitted in his written statement that he had received a certain portion of the consideration for the bond from the plaintiff. At the trial the plaintiff claimed to amend the plaint and recover the first instalment according to the terms of the bond as executed by defendant:—*Held*, by the Full Bench (Kernan, Offg. C. J., Muttusami Ayyar, Hutchins, Parker and Handley JJ.) that the suit must be dismissed. *Per* Kernan and Muttusami Ayyar, JJ.—The decision in Ramasamy Son's case is in conformity with the law of England. *Per* Kernan, Hutchins, Parker and Handley, JJ.—The rule in *Master v. Miller* is in consonance with equity and good conscience and applicable to the mufassal. *Per* Muttusami Ayyar, J.—That rule is more penal than equitable, but having been adopted by the courts since 1866 must be followed.—[L. R., 9 Madr. 399.]

If a vendor has been guilty of fraud within the meaning of sec. 17 of the Indian Contract Act by actively concealing a fact which it was material for the purchaser to know, and the purchaser was induced thereby to purchase, the fact that the purchaser by exercise of ordinary diligence might have ascertained the truth affords no answer to a suit to recover the purchase money. Such a case does not fall within the exception to sec. 19 of the Contract Act.—11 Madr. 419.

"Misrepresentation" defined.

**18.** "Misrepresentation" means and includes—

\* Read 'agreement.'

† See sec. 143, *infra*.

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

#### Notes.

J having represented to C that there were good roads, metalled to within six or seven miles of the place where he wanted C to forward a certain engine and boiler, and a fair kucha road the remainder, C relying on his statement, agreed to forward the same to the place of destination for a certain sum, part of which C received on different occasions, and duly forwarded to the place the engine, but, on passage across an iron suspension bridge on the road being refused to the boiler by the officer in charge of the bridge on account of its weight, C threw up the contract. J, having conveyed the boiler across the *nala* spanned by the bridge, and finally, to the place of destination, sued to recover from C the money expended by him in so doing, alleging breach of contract. It was held that the suit was rightly dismissed on the ground that the agreement was voidable by C under the provisions of sec. 19 of Act IX of 1872. It was also held that the plaintiff could not recover in suit any portion of the moneys advanced to the defendant.—4 H. C. R., (N.-W. P.) 350.

The firm of Nicol and Co. having suspended payment, a general meeting of creditors was convened, at which it was unanimously resolved that the business of the firm should be wound up by voluntary liquidation under the supervision of a committee; and that the winding up should be conducted by two trustees under the supervision and control of the said committee. At a subsequent meeting of the creditors the above resolutions were confirmed, and it was further resolved that a composition-deed should be prepared in pursuance of the terms of the above resolutions. The adoption of this last resolution was strongly pressed upon the meeting by the Solicitor for the insolvent firm on the ground that the mode of procedure therein proposed was proposed solely in the interests of the creditors. Entirely repudiated the idea that the members of the firm were to obtain any benefit by the proposed measure. No mention was made at either of the meetings of any release to be given to the parties. The plaintiffs were creditors of Nicol & Co., and R, S, and B, were their respective agents in Bombay. R, S, and B, attended the said meetings on the plaintiffs' behalf, and were appointed members of the committee of supervision and control. A few days after the last mentioned meeting, M, one of the partners of the insolvent firm, called upon R, who at the time was deeply engaged in pressing and important business. M produced a deed which had been prepared by the solicitors of the firm, and which contained a clause by which the creditors, in consideration of the assignment of the estate to trustees, released and discharged the members of the firm from all claims. M was aware of the existence of the release in the deed. He asked R, to execute the deed, stating that it was the "trust deed." R requested M to

leave the document, saying that he would go over it, and return it in the course of the day. M then earnestly pressed him to execute the document at once, stating that it was of the utmost importance that no time should be lost, as the native creditors were coming to his office, and that it was necessary that all the members of the committee of supervision should sign first. R objected to sign the document without reading it, and M thereupon led him to suppose that the deed only carried out what was agreed to at the creditors' meeting. Upon the faith of that assurance, R executed the deed on behalf of the first plaintiffs in the belief that it was nothing more than an assignment to trustees for the benefit of creditors. Subsequently, on the same day, M took the deed to S, and asked him to sign. S was also engaged in pressing business, and asked M to leave the deed for perusal; but M gave the same reason for not doing so that he had given to R, and further stated that R had signed, and that he (M) hoped that S would also sign. S glanced at the deed, and being assured by M that it was in order, thereupon on the faith of that assurance, and believing that the deed was nothing more than an assignment of the estate to the trustees, executed the deed on behalf of the second plaintiffs without reading it. M on the same day took the deed, with the signature of R and S attached thereto, to B, who was also engaged in pressing business, and asked him to sign it. After some conversation, B said to M: "The deed, then, is merely an assignment of the firm's effect for the creditors," and M replied in the affirmative. B then on behalf of the third plaintiffs, executed the deed without reading it, believing it to be merely an assignment of the estate to the trustees. On the 15th October, R and B heard that the deed contained a release by the creditors to the debtors, and on the 16th October S was also for the first time informed of it. On the 16th October, R and S wrote a letter to M repudiating their signatures, and refusing to be bound by the deed; and on the 26th October, B caused a similar letter to be written to M's solicitor. The plaintiffs sued to have the signatures of their said agents and managers severally cancelled, and to have it declared that the deed was not binding on the plaintiffs. *Held* that, having regard to what passed at the meetings of creditors, the deed, so far as it operated as a release, was a different deed from that which R, S and B either intended to execute, or thought they were executing when they affixed their signatures, and that, not having read the deed, but having trusted to M to inform them as to its contents, their signatures could not be held to be a consent to its contents, and that, therefore, so far as the deed operated as a release, their signatures were null. *Held* also that, under the special circumstances of the case, it became the duty of M to communicate to R, S, and B the existence of the release, and that, not having done so, he committed a breach of duty, such as is contemplated by clause 2 of sec. 18 of the Contract Act (IX of 1872). *Held*, also that, under the circumstances, R, S, and B had not the means of discovering the truth with ordinary diligence, and that the exception to section 19 of the Contract Act was not applicable.—I. L. R., 3 Bom. 242.

On the 9th October, 1878, the National Bank purchased from the N company a bill of exchange for 4,000 dollars, equivalent to Rs. 8,680, drawn by the N company upon the firm of N K & Co., of Hongkong. The bill was in the following form: "Sixty days after sight of this first of Exchange (second the third of same tenor and date not being paid) pay to the order of the National Bank of India the sum of dollars four thousand only (value received), and place the same to account of Nursey Kessowji, Ghe-labhoy Pudumsey, Directors. Nursey Kessowji, Secretary, Treasurer, and

Agent, The Nursey Spinning and Weaving Company, Limited." The bill was duly accepted and presented for payment, but was dishonored. On the 6th January 1879, the Bank gave notice of dishonor, and demanded payment from the Company as drawers of the bill. On the 18th January 1879, the N Company was ordered to be wound up, and the Bank sent in a claim against the Company as drawers of the bill, and subsequently sent in an alternative claim for Rs. 8,680, being the "amount paid by the bank to and received by the Company." *Held*, on the authority of *In re The New Fleming Spinning and Weaving, Limited* (I. L. R., 4 Bom. 275), that having regard to the form of the bill, the N Company could not be made liable as drawers, but *held* also that the bank was entitled to recover the amount of the bill from the N company as money received to the use of the bank, on the ground that the directors of the N Company, while acting within their authority, had sold to the bank on behalf of the Company, as a bill, upon which the Company was liable, one upon which the Company was not liable, and had, therefore, been guilty of misrepresentation within meaning of secs. 18 and 19 of the Indian Contract Act (IX of 1872).—5 Bom. 92.

See I. L. R., 4 Cal. 801, noted under sec. 19; 14 Bom. 241, noted under sec. 10.

**19.** When consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

*Exception.*—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section seventeen, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

*Explanation.*—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

#### *Illustrations.*

(a.) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b.) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.



(c.) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.\*

(d.) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e.) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

### Notes.

A contracted with B to sell him 975 maunds of rice, the whole contents of a certain golah at Kalyagunge (near which place B resided), at a certain rate. B paid to A certain earnest-money, and agreed to remove the whole of the rice, after weighing, on or before a certain date. B transferred his contract to C, who, through his servant, took delivery from A of 130 maunds, paying to A Rs. 1,000; but subsequently refused to take delivery of the residue, as he alleged it to be of inferior quality to that contracted for. The golah was accidentally burnt, and the residue of the rice destroyed. In a suit by A to recover from B the balance of the purchase-money (after deducting the payments made) under the contract: *Held* that the sale was complete, and the ownerships, with the risk of loss in the rice sold, passed to B under secs. 78 and 86 of the Contract Act, because the Contract was for "ascertained goods" for which B had paid earnest-money and taken part delivery; and that it was not open to B to rescind the sale on alleging and proving a breach of warranty on the part of A, unless he could bring the case within the provisions of sec. 19; but that he was precluded from so doing, because he might have discovered the inferiority of the quality of the rice by using "ordinary diligence."—I. L. R., 4 Cal. 801.

See 4 H. C. R., (N.-W. P.) 350; I. L. R., 3 Bom. 242; 5 Bom. 92, noted under sec. 18; 4 Al. 352, noted under sec. 2; 11 Madr. 419, noted under sec. 17; 14 Bom. 241, noted under sec. 10.

Agreement void where both parties are under mistake as to matter of fact.

**20.** Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

*Explanation.*—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

### Illustrations.

(a.) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away, and the goods lost. Neither party was aware of these facts. The agreement is void.

(b.) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

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\* Read 'paid off' or 'discharged.'



(c.) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

#### Notes.

The plaintiff, a minor, was, as daughter and one of the heirs of A, entitled to 7-24ths of his estate. The value of A's estate was uncertain, and depended on whether or not A had been a partner in business with M, and whether or not a sum of Rs. 30,000 had been paid by M to A in satisfaction of all claims which A had against M in respect of the estate of K, a deceased brother of A and former partner in the same business. M having, on A's death, possessed himself of all the estate of A, the plaintiff brought a suit against M, in which a decree was made ordering an account to be taken of the estate of A which had come into the hands of M. Pending such account, M died, leaving a will, by which he appointed the son of A and another his executors, and the suit was revived against them. In their application for probate they stated that the value of M's estate, so far as they had been able to ascertain and were aware, was Rs. 4,41,000. Shortly after probate was granted, negotiations were entered into between the executor and the advisers of the plaintiff for a compromise, and a petition was, with the concurrence of the executors, presented by the plaintiff to the Court, asking for its sanction to the terms agreed upon by the parties, which were, that the plaintiff should receive Rs. 20,000 in full of all demands, and Rs. 5,000 for her costs of suit. This petition took, as the value of M's estate, the amount stated by the executors in their application for probate, and stated that the value of A's estate, in case the above mentioned payment by M was proved, would be Rs. 30,000, and in case it was not proved, then a moiety of the estate of M; and that, considering the difficulties the plaintiff had to meet in proving her case, and with a view to put an end to further trouble, litigation, and expense, the above terms had been agreed to on her behalf. These terms of compromise were sanctioned by the Court on the 11th September, 1876. Shortly afterwards, further property was discovered belonging to the estate of M. The plaintiff brought a suit against the executors to set aside the compromise, alleging that the terms had been accepted by her on the faith of the representation made by the executors in their application for probate, and charging them with wilful and fraudulent concealment. There was evidence to show that some of the property subsequently discovered was such that the defendants as executors ought to have known, even if they did not know of its existence at the time of the compromise. *Held* that, even though the executors had no such knowledge, and there was no actual fraud, yet there was such culpable ignorance and neglect of duty on their part as to amount to such fraud, and to carry with it the consequence of knowledge, and as the compromise had in consequence been entered into by the parties and sanctioned by the Court under a misapprehension of material fact, the plaintiff was entitled to have the compromise set aside, and the parties restored to their rights in the former suit at the time it was effected. *Per* PONTIFEX, J.—In cases where the sanction of the Court is required, as where there is an infant concerned, each party is bound to see that the materials on which the sanction of the Court is asked for are unimpeachable. *Per* PONTIFEX, J.—*Quære*.—Whether in this suit, if the questions were found to arise, it would be necessary for the Court to consider whether it would be for the benefit of the minor that the compromise should be set aside? *Per* GARTH, C. J.—*Semhle*.—Even if it only appeared that the compromise had been entered into and sanctioned under an entire mistake of the parties and of the Court

with regard to the subject-matter of the agreement, it ought to be set aside under sec. 20 of the Contract Act. *Per* GARTH, C. J.—In a substantive suit by a minor to set aside a compromise made with the sanction of the Court obtained by fraud or mistake, it is not in the province of the Court to inquire whether it would or would not be for the benefit of the minor that the compromise should be set aside; though it might be otherwise on an application for review to the Court which granted the sanction.—I. L. R., 6 Cal. 687.

See I. L. R., 4 Al. 334, noted under sec. 13; 4 H. C. R., (N.-W. P.) 350, noted under sec. 18.

**21.** A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

#### *Illustrations.*

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation. The contract is not voidable.

A and B make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France. The contract is voidable.

#### **Notes.**

By an agreement in writing, defendants, trustees of a temple, in consideration of an advance of money which they represented was required to pay off debts incurred for the benefit of the temple, granted to plaintiff a lease of the right to manage the temple lands, and plaintiff promised that he would repay himself out of the profits to be derived from the lands and that neither the defendants nor their family property should be made liable for the debt. In a suit by plaintiff against a tenant of the temple lands, this lease was held to be void for illegality. Defendants subsequently resumed management and plaintiff sued them to recover the money advanced by him. It was found that the agreement was entered into by both parties under a mistake as to the validity of the lease:—*Held* that, assuming sec. 65 of the Contract Act was not intended to vary the rule, that a mistake of law is no ground for relieving a party from his own contract, plaintiff was nevertheless entitled to recover on the ground that the agreement which provided for repayment was collateral and had failed. An agreement that an obligation which is contracted shall be discharged in some particular mode is collateral to the primary contract which created the obligation, though the two agreements may be mixed up in one contract.—I. L. R., 9 Madr. 441.

In 1848, B and R mortgaged a piece of land to V. It was to be redeemed in eight years, or else to become the absolute property of the mortgagee. It was not redeemed; and in 1859, B., in whose name the land was entered in the Government records, executed a *razinama* in favour of V, and V passed a *kabulayat* accepting the land. B and R then became V's tenants, and were, as such, successfully sued by him for rent in 1863. In 1872, V sold the land to N, who again sold it to the defendant. The plaintiff, an purchaser from the original mortgagors (B and R) of their alleged equity of redemption, filed the present suit to redeem the property. *Held*, that as the *razinama* given by B contained no reservation, and as it was

accompanied by a transfer of possession, it had the effect of a conveyance of all the mortgagor's rights to the mortgagee. It operated to extinguish the equity of redemption, notwithstanding any misconception or ignorance, on B's part, of his rights as mortgagor. Under the Indian Contract Act (IX of 1872, sec. 21), error of law does not vitiate a contract, much less will it annul a conveyance after the lapse of many years, unless there has been some fraud or mis-representation and an absence of negligence.—11 Bom. 174.

Contract caused by mistake of one party as to matter of fact.

**22.** A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

#### Notes.

On the 21st of January, 1883, the plaintiff contracted to purchase from the defendant the right to receive dividend on 50 shares of the Empress Mill at Rs. 37 *per share*, the plaintiff being under an impression that the dividend was to be declared on some subsequent day. The plaintiff deposited Rs. 100 with the defendant as part payment of the purchase-money. Subsequently it was ascertained that the dividend had been already declared on 17th January, 1883 (*i. e.*, four days before the contract) at Rs. 25. The plaintiff thereupon sued the defendant to have the contract declared cancelled, and sought to recover the deposit of Rs. 100, with interest. The Judge of the Court of Small Causes at Broach, being of opinion that the contract was in its nature a *sutta* or wagering contract, they rejected the plaintiff's claim. The plaintiff applied to the High Court, under its extraordinary jurisdiction, to set aside the lower Court's decision:—*Held*, that, in the first instance, the plaint, as framed, not disclosing any cause of action, ought to have been returned for amendment. It should either have alleged a mistake common to both parties to the contract, or should have contained an allegation of fraud, on the defendant's part, inducing the plaintiff to enter into the agreement. The mere circumstance, that the contract was "caused by one of the parties to it being under a mistake as to a matter of fact," would not under section 22, have made the contract voidable:—*Held*, also, that, if the contract was really a wager, the deposit could not be recovered under section 65 of the Contract Act, as its nature must from the first have been known to the parties. To an agreement, so known to be void, section 65 does not apply. If the contract was, in the intention of both parties, a wager, the suit would be barred by section I of Bombay Act III of 1865, which though it formed a part of Act XXI of 1848, which is repealed by the Contract Act, is not, being a special Act, applicable to the Bombay Presidency, itself repealed. It must be read with section 30 of the Contract Act:—*Held*, also, that to constitute a wager the transaction between the parties must "wholly depend on the risk in contemplation," and "neither party must look to anything but the payment of money on the determination of an uncertainty." But if one of the parties has "the event in his own hands," the transaction is not a wager. If the plaintiff's real contention was that defendant was aware of a declaration of dividends, at Rs. 25 *per share*, and, by keeping plaintiff in ignorance of the fact, induced him to enter a wagering agreement for payment of differences at a contract rate of Rs. 37 *per share*, then to a suit for the recovery of the deposit made to the defendant with reference to such an agreement, Bombay Act III of 1865, has no application. Wagering contracts are not illegal. They are simply destitute of legal effect. If fraud

practised on plaintiff, the maxim *potior est conditio defendentis* would not apply.

The High Court reversed the lower Court's decision, in order that the plaintiff might be given an opportunity to amend his plaint, so as to show that his action was one for deceit.—I. L. R., 8 Bom. 358.

What considerations and objects are lawful, and what not.

**23.** The consideration or object of an agreement is lawful, unless—

it is forbidden by law ;\* or  
is of such a nature that, if permitted, it would defeat the provisions of any law ; or  
is fraudulent ; or  
involves or implies injury to the person or property of another ; or the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement, of which the object or consideration is unlawful, is void.

#### *Illustrations.*

(a.) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b.) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c.) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d.) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e.) A, B and C, enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f.) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g.) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A on his principal.

(h.) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

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\* See secs. 26, 27, 28, 30,

(i.) A's estate is sold for arrears of revenue under the provisions of an Act of the legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j.) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favor of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k.) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

#### Notes.

An adoption of a son after payment of price is not recognized in the present, the kali yuga. The only adoption now recognized is that of the dattaka son, or son given. A contract to give a son in adoption, in consideration of an annual allowance to the natural parents, is void under sec. 23 of Act IX of 1872, inasmuch as the contract, if carried out, would involve an injury to the person and property of the adopted son, and would defeat the provisions of the Hindu law.—13 B. L. R., Ap. 42.

A *bona fide* purchase of a share in a claim about to be enforced by a suit is not void under sec. 23 of the Indian Contract Act; and a suit may, after such purchase, be properly brought by the vendee and vendors as co-plaintiffs. A and B having a claim against C for Rs. 13,099-3, but not being in circumstances themselves to institute a suit for its enforcement, sold fourteen annas or fourteen-sixteenths of their claim to D for Rs. 4000; and a suit was then instituted by A, B, and D against C. C pleaded that the sale to D was void under sec. 23 of the Indian Contract Act, and that A and B could not sue for two annas only of their entire claim. *Held* that the sale to D was not void; that the suit was properly framed; and that, even if the sale had been void, the suit by A and B was not liable to dismissal.—I. L. R., 5 Cal. 4.

The plaintiff sued the defendant for possession of a house and premises, which he had bought from the latter. The defence was, that the sale was made for the purpose of raising money to be given to certain third parties as a bribe to induce them to withdraw a charge of criminal breach of trust, which they had preferred against the defendant. The lower Appellate Court held that the defence was bad, on the ground that there was no evidence to show that the plaintiff was a party to, or in any way concerned in, the unlawful agreement, and gave the plaintiff a decree. *Held* that the decree was correct, as there was no evidence to show either that the plaintiff knew of the agreement to suppress the criminal prosecution, or that any money had been paid in pursuance of such unlawful agreement.—8 Cal. 24.

The question whether an unambiguous written contract for the sale and purchase of Government paper is a contract or agreement by way of wager must be decided on the expressed terms of the contract itself, and parol evidence is not admissible to vary or contradict those terms. Where a contract for the sale and purchase of Government paper provides for the delivery of the paper on a subsequent date, it is not necessary, in order to sustain an action against the buyer for non-acceptance on the due date, that the plaintiff should have taken the Government paper contracted for

to the place of business of the defendant and then and there made an actual tender of it.—9 Cal. 791.

The defendant in consideration of Rs. 100 promised to give his minor daughter in marriage to the plaintiff; the defendant failed to fulfil his part of the promise, and the plaintiff brought a suit to recover the money paid as consideration for the promise. *Held*, that such a suit would lie. *Jugges-hur Chuckerbutty v. Punch Cowree Chuckerbutty*. 4 W. R., 154, approved. *Quære*.—Whether the Court could have enforced the payment of the Rs. 100 to the father of the minor as against the person engaging to marry the minor.—10 Cal. 1054.

The Bengal Excise Act of 1878 is not an Act framed solely for the protection of the revenue, but is one embracing other important objects of public policy as well. An agreement, therefore, for the sale of fermented liquors, entered into by a person who has not obtained a license under that Act, is void and cannot be recovered on.—16 Cal. 436.

Plaintiff agreed to give his daughter in marriage to defendant's nephew in consideration of a payment of Rs. 400. It was not alleged that the money was to be a dowry or settlement for the bride. Rs. 200 were paid and defendant executed a bond for the balance. The marriage took place in the *asura* form. The plaintiff now sued on the bond:—*Held*, the consideration for the bond was not unlawful.—13 Madr. 83.

An agreement to pay a tax prohibited by an Act of the Legislature would defeat the object of the Act, and was, consequently, void, and could not be enforced—Indian Contract Act IX of 1872, sec. 23.—8 Bom. 398.

M took a lease for three years of a Government ferry, and covenanted with the Magistrate, who granted the lease, not to underlet or assign the lease without leave or license of the Magistrate. M subsequently admitted B as his partner to share with him equally in the profits to be derived from the lease. *Held* that such partnership was not void by reason of the covenant not to underlet or assign the lease. S. A. No. 119 of 1872, decided on the 1st August, 1872, overruled.—2 Al. 411.

Where a person who had lost a bet on a horse-race requested another to pay the amount of such bet, agreeing to repay him, and the latter paid such amount: *Held* that the money so paid was recoverable from the person for whom it was paid, the consideration for the agreement not being unlawful within the meaning of sec. 23 of the Contract Act, 1872, and the agreement not being one by way of wager, within the meaning of sec. 30 of the same Act.—5 Al. 443.

The judgment of the Privy Council in *Ram Coomar Coondoo v. Chunder Canto Mookerjee* shows that while the specific English law of maintenance and champerty has not been introduced into India, and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced. For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the re-



quest of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time he was without even the means of subsistence; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interests; that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond; that without such assistance he could not have appealed to the High Court; and that the obligee gave him such assistance upon his application. *Held* also that the obligee could not, under the circumstances, have considered both that the obligor's claim was a just one and reasonably likely to succeed, and that the Rs. 25,000 was a reasonable recompense in the event of success for the advance of Rs. 3,700; and the bond was therefore a gambling in litigation, which it would be contrary to public policy to enforce. The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent. per annum from the date of the bond to the date of the decree, with costs in proportion, and interest at 6 per cent. per annum on the Rs. 3,700, interest and costs, from the date of the decree until payment.—11 Al. 57.

See I. L. R., 16 Cal. 504, noted under sec. 257A of the Civil Pro. Code.

### VOID AGREEMENTS.

- 24.** If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Agreements void, if considerations and objects unlawful in part.

#### *Illustration.*

A promises to superintend, on behalf of B, a legal manufacture of indigo and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

#### **Notes.**

The defendant, a Mahomedan husband, executed a kabinnama in favour of his wife, by which he agreed, among other things, that he would maintain her, and make over to her whatever money he should earn; that he would never exercise any violence upon her; that he would not take her away from home; that it should not be within his power to marry or make any nika without her permission; that he would do nothing without her permission, and, if he did, she should be at liberty to divorce him, and realize from him the amount of dinmobur forthwith, and the nika would then be null and void. The plaintiff sued her husband upon this document, which was registered, to recover from him all his earnings amounting to



Rs. 565, after deducting Rs. 54, which she admitted having received from him. The lower appellate Court held, reversing the decision of the Munsif, that the agreement had been made subsequently to the marriage, and was, though registered, void for want of consideration. *Held* on appeal that the agreement, being registered, came within sec. 25 of the Contract Act, and was not void on the ground that there was no consideration. Although some parts of the agreement might be illegal as being contrary to public policy, and therefore void, yet those which were legal could be enforced. The Court treated the suit as one to enforce that part only of the contract which was legal, and considered the plaintiff entitled to recover a fair sum for her maintenance.—15 B. L. R., Ap. 5.

There is nothing in secs. 23 and 24 of the Indian Contract Act (IX of 1872) to support the opinion that a sale, made with the view of defeating a probable execution, is a sale with fraudulent and unlawful object, and, therefore, void within the meaning of those sections.—I. L. R., 4 Bom. 70.

F was required by the Magistrate, under the Code of Criminal Procedure, to furnish two sureties, who should be responsible for his good behaviour, each in a certain sum. S agreed to become a surety on condition that F would deposit with him the amount of the security. F made the deposit, and S became a surety. The period for which S was responsible for F's good conduct having expired without F committing any act to forfeit the security, and S refusing to return the deposit, F sued S to recover the deposit. *Held* that, as the consideration for the agreement defeated the object of the law, the consideration was unlawful, and F was not entitled to relief.—1 Al. 751.

See I. L. R., 8 Bom. 358, noted under sec. 22.

Agreement without consideration, void, unless—

**25.** An agreement made without consideration is void, unless—

(1) it is expressed in writing and registered under the law for the time being in force for the registration of documents,\* and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promiser was legally compellable to do; or unless

(3) it is a promise, made in writing, and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.†

\* See now Act III. of 1877, The word "documents" has been substituted for the word "assurances" by Act XII. of 1891.

† See now Act XV. of 1877.

In any of these cases, such an agreement is a contract.

*Explanation 1.*—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

*Explanation 2.*—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

*Illustrations.*

(a.) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b.) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing, and registers it. This is a contract.

(c.) A finds B's purse, and gives it to him. B promises to give A Rs. 50. This is a contract.

(d.) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e.) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f.) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract, notwithstanding the inadequacy of the consideration.

(g.) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

**Notes.**

A obtained a decree in 1858 against B, but did not apply for execution till 1864, when B, although objecting that the decree was barred, presented to the Court, under arrangement with A, a petition acknowledging a certain sum to be due, and executed a Kistibandi agreeing to pay the debt by monthly instalments. B paid several instalments, but did not do so on one occasion, until execution was taken out against her. On her death shortly afterwards, execution was taken out against her representatives. The representatives objected that the decree was barred, and that the Kistibandi could not be substituted for the decree. The objection was, an appeal to the High Court, allowed. A then brought a suit on the Kistibandi. *Held* that, at the time the Kistibandi was entered into, the decree was, under the limitation law then in force, capable of being executed, and that there was, therefore, valid consideration for the Kistibandi. *Held*, also that, even had there been no valid consideration for the Kistibandi yet the principle laid down in sec. 25, clause 3 of Act IX of 1872, and which prevailed before the passing of that Act, would have saved the Kistibandi from becoming void for want of consideration.—I. L. R., 4 Cal. 500.

The plaintiff, a member of an undivided Hindu family, having, by a registered document, renounced all right to the family-property in favour

of the remaining coparceners, who were to manage the estate in future, pay all debts, and maintain the plaintiff in the family, sued to recover his share of the family-property : *Held* that the plaintiff was still a coparcener, and was not estopped by the document from bringing the suit.—6 *Madr.* 71.

The “promise” referred to in sec. 20 of Act IX of 1872 is a promise introduced by way of exception in a suit founded on the original cause of action, and not a promise constituting a new contract, and extinguishing the original cause of action. Accordingly a suit is not barred which is brought on a bond executed, in consideration of a barred debt, after the expiration of the period prescribed for its recovery.—1 *Bom.* 590.

Act IX of 1871, sec. 20, cl. *a*, does not prevent a plaintiff from maintaining a substantive action on a promissory note passed to secure the amount due on an old note which was barred by limitation at the time of the making of the new, the plaintiff’s right to bring such action being recognized by the latter enactment.—2 *Bom.* 230.

A *Khata*, or account stated, bearing a stamp of one anna, but containing no promise in writing, *held* to be a mere acknowledgment sufficiently stamped, and not a contract within the meaning of sec. 25 cl. 3 Act IX of 1872.—8 *Bom.* 194.

The Gujarati words “*bkai-deva*,” which are of common use in balancing accounts, import no more than the English words “balance due,” from which an unwritten contract may be inferred, but which do not of themselves amount to a promise to pay within the sense of Act IX of 1872, sec. 25, cl. 3.—8 *Bom.* 405.

Where the defendant, after his debt had become barred by limitation, wrote as follows to his creditor in reply to a demand for payment:—“I bear the matter in mind, and will do my utmost to repay this money as soon as I possibly can.” *Held*, that this promise by the defendant was only a conditional promise, *viz.*, to pay when he was able; and the plaintiff having failed to prove the defendant’s ability to pay, the promise did not operate, and the plaintiff could not recover.—11 *Bom.* 580.

By a written instrument, duly registered, T agreed, in consideration of the recognition by his two brothers of his rights in the joint and undivided property of the three brothers, not to sell, transfer, mortgage his share except to them, and should he desire to dispose of it, to them for a certain sum. In breach of this agreement he gave a usufructuary mortgage of his share to L. *Held* in a suit by L to enforce the mortgage, that the agreement was valid, and that the mortgage was bad against T’s brothers.—1 *Al.* 618.

The holder of a decree for money, dated the 22nd June, 1868, applied for execution on the 23rd February, 1869. In September, 1869, before the decree had been executed, the judgment-debtor, admitting that a certain amount was due under the decree, agreed to pay such amount by instalments; and that, if default were made, the decree should be executed for the whole amount thereof. Default having been made early in 1873, the decree-holder applied at once for execution of the decree. On the 5th May, 1873, a petition, signed by the judgment-debtor, was preferred on his behalf to the Court executing the decree, such petition being in effect as follows: “Execution-case for Rs. 6,839-15-3; in this case the decree-holder has filed an application for execution of his decree in consequence of a default in payment of instalments; the fact is that the petitioner has failed to pay the instalments simply owing to illness, otherwise he has no objec-

tion to the decree-holder's demand ; in future he will not fail to pay instalments ; he has written a letter to plaintiff asking him to pardon his breach of promise, and to agree to realize the decree-money by the instalments formerly fixed, and to stay execution of the decree for the present ; the decree-holder has granted this request ; the petitioner, therefore, presents this petition, and prays that monthly instalments of Rs. 150 may be fixed, and execution of the decree be postponed for the present ; in case of default being made in payment of two instalments in succession, the decree-holder will be at liberty to realize the balance of the decree-money with interest at twelve per cent. per annum." At the time such petition was preferred, execution of the decree was barred by limitation. *Held* that a " debt " within the meaning of sec. 25 (3) of Act IX of 1872 includes a judgment-debt, and such petition was a promise to pay a debt barred by limitation within the meaning of that law, and a suit founded on such petition to recover the balance of the money due under the decree was maintainable.—3 Al. 781.

See I. L. R., 3 Al. 221, 1 Al. 309, 4 Al. 352 & 3 Al. 787, noted under sec. 2 ; 15 B. L. R., Ap. 5, noted under sec. 24.

**26.** Every agreement in restraint  
of the marriage of any person, other  
than a minor,\* is void.

**27.** Every agreement by which any one is restrained  
from exercising a lawful profession, trade,  
or business of any kind, is to that extent  
void.

*Exception 1.*—One who sells the good-will of a business  
may agree with the buyer to refrain  
from carrying on a similar business,  
within specified local limits, so long as  
the buyer, or any person deriving title to the good-will from  
him, carries on a like business therein, provided that such  
limits appear to the Court reasonable, regard being had to the  
nature of the business.

*Exception 2.*—Partners may, upon or in anticipation of  
a dissolution of the partnership, agree  
that some or all of them will not carry  
on a business similar to that of the  
partnership within such local limits as are referred to in the  
last preceding exception.

*Exception 3.*—Partners may agree that some one or all  
of them will not carry on any business  
other than that of the partnership, during  
the continuance of the partnership.

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\* During his or her minority, as to which see Act IX of 1875.

**Notes.**

The effect of Act XXVI of 1864 is that suits in the Small Cause Court are to be decided according to the law or equity administered in the High Court; by the Charter of 1862 that law or equity was to be "the law or equity which would have been applied by the Supreme Court;" and by the Charter of 1865 that "which would have been applied by the High Court," under the Charter of 1862. The Statute 21 Geo. III., c. 70, which applied to the Supreme Court, and gave to Hindus the right to have matters of contract decided by their own laws, became, if its provisions apply to the High Court, part of the law of that Court, not by virtue of the Statute itself, but by virtue of the Charter, which was subject to alteration by the Governor-General in Council; and having ceased to have any operation as an Act, it was unnecessary to repeal it expressly by the Contract Act (IX of 1872). That Act is applicable to Hindus residing in Calcutta; therefore, where the plaintiff, a Hindu, agreed with the defendants, also Hindus, that he would cease to carry on his business in a certain locality in Calcutta, in consideration of receiving from them a specified sum, it was held in a suit to enforce the contract that such an agreement was void under sec. 27 of the Contract Act. The words "not inconsistent with the provisions of this Act" in sec. 1 of the Contract Act apply to "any usage or custom of trade" or "any incident of any contract."—14 B. L. R., 76.

The plaintiffs, on the 4th August, 1881, entered into a contract with the defendant for the sale to the latter of a quantity of goods of a certain description, "to be delivered up to the 31st December, 1881." The plaintiffs stipulated that they would make no sales of goods of the same description to others before 1st December, 1881; and the contract contained an arbitration-clause to the effect that, "if the buyers object to accept all or any of the goods offered to them by the sellers in fulfilment of the contract on the ground of any variance, difference from the sample or muster, inferiority in weight or quality or colour, or damage or defect, or any other ground whatsoever," such objections should, in case of disagreement, be referred to two arbitrators, one to be named by the sellers, and the other by the buyers. Such arbitrators to decide "whether the buyers' objections were valid, and, if so, what allowance on the whole contract price will be a reasonably adequate compensation to the buyers for such variance, difference, inferiority, damage or defeat, if any, and such decision shall be final and binding on both parties." If either buyers or sellers failed "to name an arbitrator within two days after being requested by the other to do so, the decision of the arbitrators named by the buyers or sellers, as the case may be, shall be final and binding on both parties." The goods arrived in Calcutta between the 4th & 24th November, 1881. On the 15th August, the plaintiffs entered into other contracts with other buyers for the sale of the same description of goods at a lower price than that at which they had sold to the defendant; these contracts were on the terms that the goods were not to arrive in Calcutta until after the 31st December, 1881. The defendant refused to accept the goods on the ground that the plaintiffs had committed a breach of the contract by entering into other agreements for sale of the same description of goods before the 1st December, and refused to pay the difference between the contract price and the market value which the plaintiffs demanded from him. The plaintiffs thereupon appointed an arbitrator, who (the defendant declining to appoint an arbitrator) proceeded to act in the matter, and, finding that the plaintiffs had not committed a breach of the contract, made an award in their favour for Rs. 850, the difference in price of the goods at the contract and market values. The

plaintiffs sued to recover the amount due to them under the award, or in the alternative for Rs. 850 as damages for non-acceptance of the goods. *Held* that the defendant was not estopped by the award from setting up the breach of the stipulation not to sell other goods of the same description before the 1st December, 1881, as a defence to the suit. *Per* GARTH, C. J.—The question whether the plaintiffs, by making the other contract, had committed a breach of the stipulation, was not properly a subject of reference to the arbitrator under the arbitration-clause. The general words in that clause, “or any other grounds whatsoever,” mean any other grounds of a like character, and do not include a pure question of law. *Held* also that the stipulation itself amounted to a condition precedent to the defendant’s obligation to accept the goods. *Held*, further, a stipulation in a contract prohibiting any sales of goods to others during a particular period, of a similar description to those bought under the contract, is not a stipulation in restraint of trade under sec. 27 of Act IX of 1872.—I. L. R., 8 Cal. 809.

A contract under which a person is partially restrained from competing, after the term of his engagement is over, with his former employer, is bad under section 27 of the Contract Act. *Quære* as to the effect of an agreement of service by which a person binds himself, *during the term of his agreement*, not, directly or indirectly, to compete with his employer.—11 Cal. 545.

A Contract under which goods were purchased at a certain rate for the Cuttack market, containing a stipulation that, if the goods went to Madras, a higher rate should be paid for them, is not one in restraint of trade; and where the purchasers sold the goods to a person in Calcutta, who in turn resold to another, who took them to Madras: *Held* that the original purchasers were, under the terms of the contract, liable to pay at the enhanced rate.—17 Cal. 320.

Sec. 27 of the Contract Act does away with the distinction observed in the English cases between partial and total restraint of trade, and makes all contracts falling within its terms void unless they fall within its exceptions. The section was intended to prevent a partial as well as a total restraint of trade. A and B, two ghat serangs, entered into a contract with X and five others who carried on the business of dubashes at Chittagong for the purpose of carrying on their respective businesses in unanimity and not injuring one another’s trade. The contract, which was to last for three years, provided, *inter alia*, that A and B were to act as ghat serangs only and do no service to ships in any other capacity; that X and the other dubashes were to give A five vessels, secured by them, every year for him to act as ghat serang to; and that A was only to act as ghat serang to the said five ships, and, with the exception of ships for which he had previously acted as ghat serang, he should not act as ghat serang or do any other services for ships belonging to any one else. The contract also contained provisions as to the apportionment of the five ships so to be given to A amongst the various dubashes, and amongst such, an agreement by X to give A the third ship he should secure. It also contained a provision for the payment of Rs. 1,000 as damages by any one breaking the contract to the person who should suffer by the breach. In a suit by A against X alleging a breach of the contract by the latter in not giving him the third ship as agreed, and claiming Rs. 1,000 by way of damages, X pleaded that the contract was void under sec. 27 of the Contract Act as being in restraint of trade. *Held*, that the contention was sound and that the suit must be dismissed. The consideration for the promise by X to give the ship to



A was the agreement by A not to carry on any other business than that of a ghat serang, and that only in respect of his old ships and the five agreed to be so furnished to him by the dubashes. The effect of this agreement was absolutely to restrain. A from carrying on the business of a dubash and to create a partial restraint on his power to carry on the business of a ghat serang, and whether or not (even had the latter stipulation not been illegal), the contract would have been void under the provisions of sec. 24 of the Act, by reason of part of the consideration being the undertaking by A absolutely to refrain from carrying on the business of a dubash, it was void for both reasons under the provisions of sec. 27, and A was not entitled to recover any damages under it.—19 Cal. 765.

D and E, being in England, entered into a written agreement with A, B, and C, the partners of a firm carrying on trade in Madras, to go to Madras, and there enter into the service of the firm; the service to last for five years or to be determined at any time by certain notice being given; and covenanted that on the expiry of the five years, or sooner determination of the service, they would not carry on, within 800 miles from Madras, any business carried on by the firm; and also covenanted that on such expiry, or sooner determination, they would, whenever requested by the firm so to do, return to England. In pursuance of the agreement, D and E went to Madras, and entered into the service of the firm. After it had continued for about  $2\frac{1}{2}$  years, the service was determined by notice from the firm. D and E then, in violation of their said covenants, refused to return to England, though requested to do so by the firm, and proceeded to set up and carry on, on their own account, business of the same kind as that carried on by the firm. *Held*, in a suit by the firm against D and E for damages for breaches of the said covenants, and for a perpetual injunction restraining D and E from carrying on in Madras, or within 800 miles from Madras, any business carried on by the firm, that treating the covenant in restraint of trade as one entered into in England, it could not, even if valid by the law of England, be enforced in India, inasmuch as its object was to contravene the law of India—(sec. 27 of Act 1X of 1872.) *Held* further that that covenant would have been void by the law of England, because the limit of the restriction was unreasonable; and, as no narrower limit had been mentioned in the agreement, this was not a case where the covenant could have been enforced within a narrower and reasonable limit. *Held* also that the covenant to return to England, except so far as it operated improperly in restraint of trade, was a covenant, the breach of which did not in any way cause damage to the firm, and, therefore, such breach did not entitle them to any damages. The agreement was first executed in England by D and E and by A, the senior partner in the firm, and stamped with the stamp required by English law for agreements executed in England, and it was subsequently executed in India by B and C, the other two partners, but not stamped with an Indian stamp. *Held* that the agreement was liable to Indian stamp duty, and was not admissible in evidence, unless and until the proper stamp duty and penalty under Act XVIII of 1869 were paid.—1 Madr. 134.

One having a license for the manufacture of salt entered into a contract with a firm of merchants, whereby it was provided that he should not manufacture salt in excess of the quantity which the firm at the commencement of each manufacturing season should require him to manufacture; and that all salt manufactured by him should be sold to the firm for a fixed price. The agreement was to be in force for a period of five years. In a suit by the merchants for an injunction restraining the licensee from selling his



salt to others :—*Held*, that whether or not the first of these clauses was invalid under sec. 27 of the Contract Act, it was separable from the second clause which was not bad as being in restraint of trade.—13 Madr. 472.

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**28.** Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

*Exception 1.*—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.\*

*Exception 2.*—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

#### Notes.

A contract entered into between the plaintiffs and the defendants contained a clause, that “in case of any dispute, the same to be decided by two competent London brokers—one to be appointed by the buyers’ and the other by the sellers’ agents; such brokers’ decision to be final,” but did not provide that no action should be brought till such decision was pronounced. Matter of dispute arising, the defendants refused to appoint an arbitrator. In a suit for damages for breach of the contract: *Held* that the contract was not one of the nature referred to in sec. 28, Act IX of 1872. That section only refers to contracts which wholly or partially prohibit the parties absolutely from having recourse to a Court of Law. The first exception in that section applies only to a class of contracts where the parties

\* The second clause of this exception, having been repealed by the Specific Relief Act, 1877, which extends to the whole of British India except the Scheduled Districts (see Act I. of 1877, secs. 1 and 2), has been omitted.

have agreed that no action shall be brought, until some question of amount has first been decided by the arbitrators. *Semble*.—A suit will not lie to enforce an agreement to refer to arbitration, even in the case referred to in the first exception to sec. 28 of Act IX of 1872.—I. L. R., 1 Cal. 466.

A contract entered into by the plaintiffs with the defendants contained a clause providing, in case of any dispute, for a reference to two arbitrators in England, one to be appointed by each of the contracting parties whose decision in the matter was to be final. The contract contained no provision for making the submission to arbitration a rule of Court, so that 9 & 10 Will. III. C. 15, and 3 & 4 Will. IV. C. 42, sec. 39, did not apply. Matter of dispute arising, the defendants refused to appoint an arbitrator, and an award was made by arbitrators appointed by the plaintiffs. Previous to the making of the awards, the plaintiffs, under the provisions of the Common Law Procedure Act, 1854, had the submission to arbitration made a rule of the Court of Common Pleas. In a suit in which the plaintiff's claim was for damages awarded by the arbitrators and incurred by the plaintiffs in respect of the breach of the contract. *Held* that the award was invalid. The making the submission a rule of Court has not the effect of depriving a party of his right to revoke, at any time before the award, the authority of arbitrators whom he has appointed: still less could it have any effect to prevent him from declining to appoint an arbitrator. *Held* also, that the contract was not within the scope of sec. 28, Act IX of 1872. To make an agreement conform to excep. 1 of that section, the jurisdiction of the Courts must be excluded in all respects except the matter which is the result of the arbitrator's award. Agreements which exclude the jurisdiction of the Courts until an award is made, as in *Scott v. Avery* (2 Jur. N. S. 815; S. C., 5 H. L. C. 811) are within that exception, and are not illegal. *Quære*.—Whether it was intended by that exception authorize the Court to entertain a suit for specific performance of an agreement to refer to arbitration? Sec. 28, Act IX of 1872, does not forbid an action for damages for the breach of such an agreement.—1 Cal. 42.

Where in consideration of A giving B time to satisfy a decree against him held by A, B agreed not to appeal against the decree and did appeal, held that the agreement was not prohibited by sec. 28 of Act IX of 1872, and that the Appellate Court was bound by the rules of justice, equity, and good conscience to give effect to it, and to refuse to allow B to proceed with the appeal which he had instituted in contravention of it.—1 Al. 267.

**29.** Agreements, the meaning of which is not certain, or capable of being made certain, are void for uncertainty.

#### *Illustrations.*

(a.) A agrees to sell to B 'a hundred tons of oil.' There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b.) A agrees to sell to B one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

(c.) A, who is a dealer in cocoanut-oil only, agrees to sell to B 'one hundred tons of oil.' The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d.) A agrees to sell to B 'all the grain in my granary at Ramnagar.' There is no uncertainty here to make the agreement void.

(e.) A agrees to sell to B 'one thousand maunds of rice at a price to be fixed by C.' As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f.) A agrees to sell to B 'my white horse for rupees five hundred or rupees one thousand.' There is nothing to show which of the two prices was to be given. The agreement is void.

#### Notes.

Where certain persons, describing themselves as resident of J, give a bond for the payment of money in which, as collateral security, they charge "their property" with such payment, they do not thereby create a charge on their immoveable property situated in J. *Martin v. Parsram* (H. C. R., N.-W. P., 1867, 124) distinguished.—I. L. R., 1 Al. 275.

A deed of simple mortgage described the mortgaged property as "our zamindari property" (*zamindari apni*), and gave no further specification, or description. It was proved that at the date of the mortgage the mortgagors had a definite and ascertained fractional share in two zamindaris. *Held* that the words "our zamindari property" were sufficiently certain, or at any rate were capable of being made certain by the proof of the mortgagors being, at the date of the mortgage-deed, the owners of a specific zamindari interest; and that the mortgage was therefore not void for uncertainty. *Kanhia Lal v. Muhammad Husain Khan*, *Bishen Dayal v. Udit Narain*, *Ramsidh Pande v. Balgobind*, *Rae Manik Chand v. Behari Lal*, *Deojit v. Pitambar*, *Tailby v. The Official Receiver*, and *Tadman v. D'Epi-neuil* referred to.—12 Al. 175.

**30.** Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.\*

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code apply.

Section 294A of the Indian Penal Code not affected.

#### Note.

See I. L. R., 9 Cal. 791, 5 Al. 443, noted under sec. 23; 8 Bom. 358, noted under sec. 22.

\*Compare 8 and 9 Vic., c. 109, sec. 18.

## CHAPTER III.

## OF CONTINGENT CONTRACTS.

**31.** A 'contingent contract' is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

*"Contingent contract" defined.*

*Illustration.*

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

**32.** Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

*Enforcement of contracts contingent on an event happening.*

If the event becomes impossible, such contracts become void.

*Illustrations.*

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b.) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c.) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

**33.** Contingent contracts to do or not to do anything, if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible and not before.

*Enforcement of contracts contingent on an event not happening.*

*Illustration.*

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

**34.** If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

*event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.*

*Illustration.*

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die, and that C may afterwards marry B.

**35. Contingent contracts to do or not to do anything,**

When contracts become void, which are contingent on happening of specified event within fixed time.

if a specified uncertain event happens within a fixed time, become void, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

**Contingent contracts to do or not to do anything, if a**

When contracts may be enforced which are contingent, on specified event not happening within fixed time.

specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired, and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

*Illustrations.*

(a.) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b.) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

**36. Contingent agreements to do or not to do anything,**

Agreements contingent on impossible events void.

if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

*Illustrations.*

(a.) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b.) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

**CHAPTER IV.****OF THE PERFORMANCE OF CONTRACTS.***Contracts which must be performed.***37. The parties to a contract must either perform, or**

Obligation of parties to contracts.

offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance,\* unless a contrary intention appears from the contract.

\* This probably means "to the extent of the assets received by them as such, and not duly applied." See *Madho Doss v. Radha Mal*, 9 Punjab Record, 213.

*Illustrations.*

(a.) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(b.) A promises to paint a picture for B by a certain day at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

**Notes.**

To a contract between the plaintiffs and the defendant, for the purchase by the defendant of a cargo of salt, the plaintiffs, after the contract had been signed by the defendant, added in the margin: "Ten days' demurrage will be allowed at Rs. 250 per diem." *Held* that the addition of the words in the margin did not amount to an alteration within the rule of English law: the alteration must be either something which appears to be attested by the signature, or something which alters the character of the instrument.—I. L. R., 3 Cal. 220.

**38.** Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:—

1. It must be unconditional.

2. It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.

3. If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

*Illustration.*

A contracts to deliver to B at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

**Notes.**

The defendant agreed to purchase from the plaintiffs one hundred full-pressed bales "fully good fair Kishli cotton" at Rs. 208-8 per candy, to be delivered from March 15th to April 1st. On March 21st, the plaintiffs sent the defendant a letter, reminding him of the contract, and requesting him to take delivery. On receipt of this letter the defendant put the matter into

deliver, nor did the letter refer to any particular bales. At 11-30 o'clock A. M., on March 30th, the plaintiffs sent the defendants a letter enclosing a sampling order directed to an empyoe of Messrs. H and S, on whose premises the bales referred to in the order were lying. V, on behalf of the defendant, got samples taken of the cotton, and examined them, but without reference on that day to any standard. He then, however, conceived doubts as to the quality of the cotton, and expressed his doubts to the plaintiff in the evening of that day. On 31st March, the plaintiffs sent the defendant a delivery-order enclosed in a letter from their solicitors, calling on the defendant to attend with his surveyor at 1 P. M., on the day to survey the cotton, as otherwise an *ex-parte* survey would be held. This letter reached the defendant at 11-30 o'clock A. M., and was given by him to V at noon of the same day. V applied to M to attend as surveyor, but M was unable to do so. The plaintiffs had an *ex-parte* survey held by Messrs. C and B at 1 P. M., and they pronounced the cotton, samples of which were submitted to them, to be "fully good fair Kishli cotton." While this survey was going on, the defendant was on the Cotton Green, but declined to attend, saying that V and his surveyor were coming. Shortly afterwards V did come, and subsequently wrote a letter to plaintiffs in the defendant's name, stating that the cotton was not of the description contracted to be sold by them, and asking for a survey. This letter reached the plaintiffs at 2-19 o'clock P. M. After this there was a discussion between plaintiffs and defendant and V. On that afternoon (the 31st March), the plaintiffs' solicitors sent a letter to the defendant, stating the result of the survey, and requiring him to take delivery. This was answered by a letter of next day (April 1st) from the defendant's solicitors denying that the cotton was of proper quality or that proper notice of the survey had been given, alleging that the defendant had that morning attended with his surveyor and asked leave to survey the cotton which had been refused, and stating that the contract must be treated as cancelled. The cotton was sold by auction on April 5th. The plaintiffs brought this suit to recover Rs. 1,631-1-11 as damages for non-acceptance of the cotton. The defendants contended that there had been no reasonable time allowed by the plaintiffs for the examination of the cotton, and that a joint survey should have been held. *Held* that a joint survey was not necessary under the terms of sec. 38 of the Indian Contract Act (IX of 1872), and that the defendant, having had a period of twenty-four hours for inspection, had a reasonable opportunity of seeing whether the cotton offered by the plaintiffs was such cotton as the plaintiffs were bound by their contract to deliver. A purchaser of goods is not entitled to continue inspecting and examining the goods offered by the vendor until the expiration of the period for delivery. A reasonable opportunity for such inspection and examination is all that he is entitled to.—I. L. R., 6 Bom. 692.

**39.** When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract,\* unless he has signified, by words or conduct, his acquiescence in its continuance.

Effect of refusal of party to perform promise wholly.

\* And see sec. 75, *infra*.



*Illustrations.*

(a.) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b.) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation, for the damage sustained by him through A's failure to sing on the sixth night.

**Notes.**

Sec. 39 of the Contract Act only enacts what was the law in England and in India before the Act was passed—namely, that where a party to a contract refuses altogether to perform, or is disabled from performing, his part of it, the other party has a right to rescind. In a suit for damages for the non-delivery of linseed upon a contract, the terms of which as to payment were cash on delivery, part delivery had been made by the defendants, and a sum of Rs. 1,000 had been paid on account by the plaintiffs. The plaintiffs then made a claim against the defendants for excess refraction, and the defendants thereupon refused to deliver the remainder of the linseed unless the plaintiffs paid the full amount owing for the portion that had been delivered. The plaintiffs declined to accept these terms, and the defendants then cancelled the contract. *Held* that there was not such a refusal on the part of the plaintiffs to perform their part of the contract as to entitle the defendants to rescind under sec. 39 of the Contract Act. *Held* by GARTH, C. J.—that sec. 51 of the Act was not applicable, inasmuch as it did not appear that the plaintiffs were unwilling to pay for the deliveries which the defendants refused to make, and that time was not of the essence of the contract so as to bring the case within the provision of sec. 55 of the Act. *Held* by MARKBY, J.—That sec. 51 would have applied if the defendants, when they came to make delivery, had insisted upon the contract being strictly performed and upon payment being made on delivery, and that, if the defendants had so insisted, time might have been of the essence of the contract within the meaning of sec. 55.—I. L. R., 4 Cal. 252.

**BY WHOM CONTRACTS MUST BE PERFORMED.**

**40.** If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Person by whom promise is to be performed.

*Illustrations.*

(a.) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B, or by causing it to be paid to by another ; and, if A dies before the time appointed for payment, his

representatives must perform the promise, or employ some proper person to do so.

(b.) A promises to paint a picture for B. A must perform this promise personally.

Effect of accepting performance from third person.

**41.** When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

**42.** When two or more persons have made a joint promise, then (unless a contrary intention appears by the contract) all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Devolution of joint liabilities.

**43.** When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one "or more"\* of such joint promisors to perform the whole of the promise.

Any one of joint promisors may be compelled to perform.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Each promisor may compel contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Sharing of loss by default in contribution.

*Explanation.*—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

#### *Illustrations.*

(a.) A, B, and C, jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b.) A, B, and C, jointly promise to pay D the sum of 3,000 rupees, C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

\* The words "or more" have been inserted by Act XII. of 1891.

(c.) A, B, and C, are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d.) A, B, and C, are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

#### Notes.

In a suit for damages against A and others for breach of a covenant not to open a ferry at a particular place, a decree was obtained against all the defendants. The amount of this decree was levied by execution from A alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrong-doers, and that no suit for contribution would lie as between them. On second appeal to the High Court:—*Held*, that the rule of law relied on by the Courts below had no application to the circumstances of the present case, and that the plaintiff was entitled to maintain his action.—I. L. R., 13 Cal. 300.

A suit in which a decree has been obtained against one of several joint makers of a promissory note is a bar to a subsequent suit against the others. The effect of sec. 43 of the Contract Act is not to create a joint and several liability in such a case. That section merely prohibits the defendant in such a suit pleading in abatement, and thus places the liability arising from the breach of a joint contract and the liability arising from a tort on the same footing. The rule laid down in the case of *King v. Hoare* (13 M. and W., 494, 505) and *Brinsmead v. Harrison* (L. R., 7 c. p. 547) is one of principle, not merely of procedure.—3 Cal. 353.

In a suit brought upon a contract made by a firm, the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed, allowing his right of suit against those whom he does not make defendants to be barred.—6 Bom. 700.

**44.** Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.\*

#### Note.

In a suit for damages against a partnership's firm, the plaintiffs compromised the suit with one of the partners upon the terms contained in the following receipt: "Received from A the sum of Rs. 9,500 in full discharge of all claims upon him as an individual and as a partner in the late firm of B. S. and Co., and we hereby under-take to immediately withdraw the suit against him and others." *Held* that, although, according to English law, the receipt operated as a discharge to all the remaining defendants, yet that sec. 44 of the Contract Act applies to liabilities arising out of the breach of a contract, as well as to the performance of contracts, and that A alone was released.—I. L. R., 4 Cal. 336.

**45.** When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.\*

Devolution of joint rights.

*Illustration.*

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representatives jointly with C during C's life, and, after the death of C, with the representatives of B and C jointly.

**Note.**

In a suit by surviving partners for the recovery of a partnership debt which became due during the life of a deceased partner, the representatives of such deceased partner, having regard to sec. 45 of the Contract Act (IX of 1872), are necessary parties; and the provisions of sec. 4 of the Succession Certificate Act (VII of 1889) must be complied with in order that the suit may be properly constituted. *Quære* whether in the case of a family partnership under the Mitacshara law a question might arise as to the applicability of sec. 45 of the Contract Act and sec. 4 of the Succession Certificate Act (VII of 1889). *Gobind Prasad v. Chandar Sekhar*, I. L. R. 9 Al. 486, dissented from.—I. L. R., 18 Cal. 86.

TIME AND PLACE FOR PERFORMANCE.

**46.** Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Time for performance of promise where no time is specified and no application to be made.

*Explanation.*—The question, 'What is a reasonable time?' is, in each particular case, a question of fact.

**47.** When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Time and place for performance of promise where time is specified and no application to be made.

*Illustration.*

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

\* But see, as to Government Securities, Act XIII. of 1886, sec. 5.

**48.** When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Application for performance to be at proper time and place.

*Explanation.*—The question, ‘What is a proper time and place?’ is, in each particular case, a question of fact.

**49.** When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Place for performance of engagement where no application to be made and no place fixed.

*Illustration.*

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Performance in manner or at time prescribed or sanctioned by promisee.

The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

*Illustrations.*

(a.) B owes A 2,000 rupees. A desires B to pay the amount to A’s account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A’s credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b.) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sum which they owed to each other.

(c.) A owes B 2,000 rupees. B accepts some of A’s goods in reduction of the debt. The delivery of the goods operates as a part-payment.

(d.) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

**PERFORMANCE OF RECIPROCAL PROMISES.**

**51.** When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

*Illustrations.*

(a.) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b.) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

**Note.**—See I. L. R., 4 Cal. 252, noted under sec. 39.

## 52. Where the order in which reciprocal promises are

Order of performance of reciprocal promises. to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

*Illustrations.*

(a.) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b.) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

## 53. When a contract contains reciprocal promises, and

Liability of party preventing event on which contract is to take effect. one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation\* from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

*Illustration.*

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

**Note.**

B sued the obligees to enforce a bond hypothecating immoveable property, to the discharge of which he had agreed by means of a sale of the

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\* See sec. 73, *infra*.

property. The contract of sale was never carried into effect, although the vendors were ready and willing to put him in possession of the property, as B failed to pay the price which he covenanted to pay. It was held that B was not at liberty to enforce the bond.—7 H. C. R., (N.-W. P.) 152.

**54.** When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Effect of default as to that which should be first performed, in contract promises.

*Illustrations.*

(a.) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b.) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c.) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d.) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

**55.** When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable, at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but

Effect of failure to perform at fixed time, on contract is es-

Effect of such failure when time is not essential.



the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract, voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance he gives notice to the promisor of his intention to do so.\*

Effect of acceptance of performance at time other than that agreed upon.

#### Notes.

In a contract for the sale of ascertained goods, terms cash on delivery, to be given and taken it ten or eleven days, the vendee obtained an extension of the time for the performance of the contract, agreeing to pay godown-rent and interest. He took delivery of, and paid for, some of the goods, and subsequently obtained a further extension of time. A small balance remained in the vendor's hands, after giving the vendee credit for the goods taken delivery of, godown-rent, and interest. After the expiration of the further time, the vendee tendered the price of the remaining goods, and demanded delivery, when the vendors stated that they had rescinded the contract. In an action for damages for non-delivery: *Held* that time was of the essence of the contract, and that, under sec. 55 of the Contract Act, the vendors were entitled to rescind.—I. L. R., 6 Cal. 64.

See I. L. R., 4 Cal. 252, noted under sec. 39.

Agreement to do impossible act void.

**56.** An agreement to do an act impossible in itself is void.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.†

Contract to do impossible act or one which afterwards becomes impossible or illegal when void.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Compensation for loss on non performance of act known to be impossible or unlawful.

#### Illustrations.

(a.) A agrees with B to discover treasure by magic. The agreement is void.

(b.) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

Compare secs. 62 and 63, *infra*.

† But see sec. 65, *infra*. And See Act I. of 1877, sec. 13.

(c.) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d.) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e.) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

#### Notes.

A contract was entered into between the plaintiff and the defendant, by which the plaintiff agreed to cultivate indigo for the defendant, for a specified number of years in certain specified lands situated in different villages, with respect to portion of which lands the plaintiff was a subtenant only. Subsequently, during the continuance of the contract, the plaintiff lost possession of those lands, through his immediate landlord having failed to pay the rent, and having been in consequence ejected therefrom by the owner. In a suit by him, under the above circumstances, to have so much of the contract as related to those lands cancelled, on the ground that it had become impossible of performance through no neglect on his part;—*Held*, that such a case came within the provisions of cl. 2, sec. 56 of Act [X of 1872 (Contract Act)], and that the mere fact that the plaintiff could have paid up the debt due by his immediate landlord, and so retained possession of the land, was not sufficient to constitute such an omission or neglect on his part as take to it out of the provisions of that section. *Held* also that ch. IV of Act I of 1877 (Specific Relief Act) did not apply to such a case, but that the plaintiff was entitled to the relief he sought under sec. 40 of that Act, inasmuch as the contract was evidence of different obligations, viz., to cultivate indigo in different villages.—I. L. R., 7 Cal. 474.

Money having been advanced, a contract was made to secure repayment of it by a usufructuary mortgage, with possession to be given to the lender, of land, which however had then already been attached under a decree, and had been taken under the Collector's management under sec. 326 of the Code of Civil Procedure. To perform the contract by delivery of possession of the land having thus become impossible, it was *held* that the lender of the money was entitled to compensation, the damages being the amount of the advance, together with interest from the date when, had performance been possible, the land should have been made over to him.—17 Cal. 432.

By a contract made with the plaintiffs the defendants agreed to carry from Bombay to Jeddah, in their steamer "Mobile," 500 pilgrims who were about to arrive in Bombay from Singapore in the plaintiffs' ship the "Stura." The defendants were to be paid at the rate of Rs. 26 *per* head, and the ship "Mobile" was to receive the pilgrims on the 3rd May, 1888. The "Stura" arrived in Bombay on the 1st May with about 600 pilgrims on board, and on the 2nd May the plaintiffs gave notice to the defendants that 500 of them were ready to go on board the "Mobile" on the next day, in accordance with the contract. The defendants refused to receive the pilgrims on board the "Mobile," on the ground that they had come to Bombay in the "Stura," and that during the voyage of that ship to Bombay there had been an outbreak of small-pox on board; that the 500 pilgrims had been in close contract with those who had been suffering from the dis-

ease, and that on the 3rd May fresh cases were occurring among the pilgrims brought from Singapore. They pleaded that under these circumstances they were not bound to ship and carry the 500 pilgrims, contending (1) that it was an implied term in the contract that the 500 pilgrims should be free from small-pox or other dangerous disease, and (2) that the performance of the contract had under the circumstances become unlawful (sec. 269 of the Penal Code and sec. 56 of the Contract Act). *Held* that the defendants were bound to carry out the contract. In the absence of proof, that a term providing that the pilgrims should be free from small-pox was to be implied by the usage of the pilgrim-carrying trade, there could be no reason for implying it. The possibility that some of the 500 pilgrims might have the germs of the disease in them owing to their exposure to infection, might make carrying them more expensive and onerous, but it was a contingency which from the very nature of the trade must have been known to the defendants, and if they wished to provide against it they should have done so by express terms. *Held*, also, that the performance of the contract had not become unlawful. The risk of disease was not greater than would necessarily be incurred in every crowded emigrant ship. But, even if special precautions were desirable under the circumstances, it was for the defendants, who had entered into an absolute agreement, to have taken them.—14 Bom. 147.

**57.** Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract; but the second is a void agreement.

Where there are promises to do things legal and also other things illegal, the former are a contract, the latter a void agreement.

*Illustration.*

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house, and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

**Note.**—See B. L. R., Ap. 5, noted under sec. 24.

**58.** In the case of an alternative promise, one branch of which is legal, and the other illegal, the legal branch alone can be enforced.

In alternative promise, one branch being illegal, legal branch alone enforceable.

*Illustrations.*

A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

APPROPRIATION OF PAYMENTS.

**59.** Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to

Application of payment where debt to be discharged is indicated.

be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

*Illustrations.*

(a.) A owes B, among other debts, 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b.) A owes B, among other debts, the sum of 567 rupees. B writes to A, and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Application of payment where debt to be discharged is not indicated.

**Notes.**

In consideration of an advance of Rs. 118, the defendants executed in favour of the plaintiff mortgage bond, dated 3rd November 1879, by which it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rubid crops of every description produced at the first class rates; and in case the same is not paid in kind, it will be paid principal with interest from the date of execution at one anna per cent. per mensem in cash in the month of Baisakh 1287 F. S. (April 1880)." The defendants admitted execution of the bond, and pleaded payments in grain to the amount of Rs. 136, which they failed to prove. It was found that the plaintiff had received payments in grain to the extent of Rs. 71, more than half of which, however, he claimed to be entitled to appropriate to the payment of other antecedent debts which were due to him by the defendants. It was not stated at the time of payment towards which debt the payments were to be applied; but all the payments were admittedly made in kind:—*Held*, that the plaintiff was not entitled to appropriate the payments to the antecedent debts, inasmuch as, within the meaning of sec. 60 of the Contract Act, there were "other circumstances" indicating that the payments were made in liquidation of the amount of the bond:—*Held*, also, that increased rate of interest being made payable from the date of the bond, and not only from the breach of the contract, must be taken to be in the nature of a penalty and only to be taken into consideration as a basis upon which damages for the breach of contract were to be estimated. The principle on this subject laid down in the case of *Mackintosh v. Crow*. I. L. R., 9 Cal. 689, approved of.—I. L. R., 12 Cal. 164.

**61.** Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not force for the time being as to the limitation of suits. If the

Application of payment where neither party makes appropriation.

debts are of equal standing, the payment shall be applied in discharge of each proportionably.

#### CONTRACTS WHICH NEED NOT BE PERFORMED.

**62.** If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Contracts changed, rescinded, or altered need not be performed.

#### *Illustrations.*

(a.) A owes money to B under a contract. It is agreed between A, B, and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b.) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new Contract, and extinguishes the old.

(c.) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

#### **Notes.**

The mere fact of one party alleging that a new contract has been substituted for an old one does not of itself put an end to the old contract, even as against the party so alleging, unless the allegation is proved to be true.—I. L. R., 8 Cal. 926.

*Held*, where a promissory note made payable simply to the payee without the addition of the words order or bearer, and, therefore, not negotiable was assigned to a third person, that the assignee could sue upon such note, a chose in action being, by the law of India, assignable, and that the assignee could sue in the courts of India in his own name.—1 Al. 732.

The plaintiff sued to recover the sum of Rs. 1,173 due on a bond. It was found as a fact that after the due date of the bond an arrangement was come to between the plaintiff and the defendant by which the plaintiff agreed to accept in satisfaction of what was due to him at the time of the arrangement Rs. 400 in cash and a fresh bond for Rs. 701, payable by instalments; and it was further found that the plaintiff never intended or agreed to accept the naked promise of the defendant to pay the Rs. 400 and to give the bond for Rs. 701. The defendant did not pay the Rs. 400 or give the bond, but pleaded that there had been a novation of the original contract by reason of the subsequent agreement, and that the suit being based on the original contract could not be maintained, and he relied on the provisions of secs. 62 and 63 of the Contract Act in support of his contention. *Held*, that neither section had any bearing on the case, and that upon the breach by the defendant of the terms which he had made, and upon the non-performance by him of the satisfaction which he had promised to give, the parties were relegated to their rights and liabilities under the original contract, and that consequently the plaintiff was entitled to the relief he claimed. *Held*, further, that sec. 62 of the Contract Act is merely a legislative expression of the common law, and the provisions thereof do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to.—15 Cal. 319.

**63.** Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance,\* or may accept, instead of it, any satisfaction which he thinks fit.

Promisee may dispense or remit performance of promise.

*Illustrations.*

(a.) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b.) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c.) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.†

(d.) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e.) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition‡ of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

**Notes.**

A hypothecation bond provided for payment of interest on the principal sum at the rate of 9 per cent., and contained a further provision, that on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor:—*Held*, (1) that the plaintiff had not waived any right under the bond by accepting the payment on account of interest: (2) that the provision for enhanced interest calculated from the date of the bond on default, was of the nature of a penalty under sec. 74 of the Contract Act: (3) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent. *Balkishen Das v. Run Bahadur Singh* (I. L. R., 10 Cal., 305) discussed and distinguished; *Baij Nath Singh v. Shah Ali Hosain* (I. L. R., 14 Cal., 248) dissented from.—I. L. R., 12 Madr. 161.

**64.** When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.§

Consequences of rescission of a voidable contract.

\* But see sec. 135, *infra*. † See sec. 41, *supra*.

‡ Substituted for "compensation" by Act XII. of 1891. § See secs. 75, *infra*.



**65.** When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Obligation of person who has received advantage under void agreement, or contract that becomes void.

*Illustrations.*

(a.) A pays B 1,000 rupees, in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b.) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c.) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d.) A contracts to sing for B at a concert for 1,000 rupees which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

**Notes.**

Where two Numbudri females—a mother and daughter (plaintiff)—executed a document in favour of defendant, a male relative (nephew of the former), which purported to divest the plaintiff and her mother of the entire property of the Illom of which they were the sole proprietors, and to vest it in the defendant in consideration of his promise to marry and raise up heirs to the Illom to which the plaintiff and her mother belonged, and to maintain the plaintiff and her mother till death, and it was proved that plaintiff was well aware of what she was doing, and had subsequently clearly recognized the defendant as absolute proprietor of the property, and was contended with his having assumed the position pointed out in the documents:—*Held*, that the transaction was valid and could not be called into question on the suggestion that plaintiff was placed at a disadvantage and was not fully cognizant of the irrevocable nature of the deed, and that the rule laid down by the Privy Council in *Ashgar Ali v. Delroos Banoo Begam* (1. L. R., 3 Cal. 324) and in *Takoorden Tewarry v. N. Syed Ali* (L. R., 1 IA. 392) had been complied with, and that defendant had discharged the burden of proof upon him. *Held* further by INNES, J.—That the document aimed at defeating the right of escheat of the Government, and the transaction was against public policy with reference to the decision in *Cavali Venkatanarayanappa's case* [*Collector of Musulipattam v. Cavali Vencatanaryanappah*] (8 M.I.A. 500), but that the plaintiff, being in *pari delicto* with the defendant, could not recover the property. *Held* by KIN- DERSLEY, J.—That no claim was made by the crown, it was not necessary to decide as to rights which may or may not be claimed by the crown, and that if plaintiff and her mother were not, as apparently they were not, in the position of ordinary Hindu widows, there was nothing opposed to



public policy in their disposing of the property, as being the last owners, and competent to dispose of it absolutely.—I. L. R., 3 Madr. 215.

K, on the one part, and his creditors, including C, on the other part, agreed in writing to refer to arbitration the differences between them regarding the payment of his debts by K. The award compounded K's debts, and assigned his property to his creditors, and directed that K should dispose of such property for their benefit, and that, if he misappropriated any of the property, he should be personally liable for the loss sustained by the creditors on account of such misappropriation. C signed the award amongst other creditors, but the award was not signed by all the creditors. C received a dividend under the award. *Held*, in a suit by C against K to recover a debt which had been compounded under the award, in which suit C alleged that several creditors had not signed the award, that some of them had sued K and recovered debts in spite of the award; that K had misappropriated some of the property; and that, if the plaintiff did not sue, there would be no assets left to satisfy his debt, that such suit was not maintainable.—2 Al. 173.

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**66.** The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.\*

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Effect of neglect of promisee to afford promisor reasonable facilities for performance.

*Illustrations.*

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

## CHAPTER V.

### OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

**68.** If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Claim for necessaries supplied to person incapable of contracting, or on his account.

\* See secs. 3 and 5, *supra*.

the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

If, in case of a contract, voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless at the time of such acceptance he gives notice to the promisor of his intention to do so.\*

Effect of acceptance of performance at time other than that agreed upon.

#### Notes.

In a contract for the sale of ascertained goods, terms cash on delivery, to be given and taken it ten or eleven days, the vendee obtained an extension of the time for the performance of the contract, agreeing to pay godown-rent and interest. He took delivery of, and paid for, some of the goods, and subsequently obtained a further extension of time. A small balance remained in the vendor's hands, after giving the vendee credit for the goods taken delivery of, godown-rent, and interest. After the expiration of the further time, the vendee tendered the price of the remaining goods, and demanded delivery, when the vendors stated that they had rescinded the contract. In an action for damages for non-delivery: *Held* that time was of the essence of the contract, and that, under sec. 55 of the Contract Act, the vendors were entitled to rescind.—I. L. R., 6 Cal. 64.

See I. L. R., 4 Cal. 252, noted under sec. 39.

Agreement to do impossible act void.

**56.** An agreement to do an act impossible in itself is void.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.†

Contract to do impossible act or one which afterwards becomes impossible or illegal when void.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Compensation for loss on non performance of act known to be impossible or unlawful.

#### Illustrations.

(a.) A agrees with B to discover treasure by magic. The agreement is void.

(b.) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

\* Compare secs. 62 and 63, *infra*.

† But see sec. 65, *infra*. And See Act I. of 1877, sec. 13.

(c.) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d.) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e.) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

### Notes.

A contract was entered into between the plaintiff and the defendant, by which the plaintiff agreed to cultivate indigo for the defendant, for a specified number of years in certain specified lands situated in different villages, with respect to portion of which lands the plaintiff was a subtenant only. Subsequently, during the continuance of the contract, the plaintiff lost possession of those lands, through his immediate landlord having failed to pay the rent, and having been in consequence ejected therefrom by the owner. In a suit by him, under the above circumstances, to have so much of the contract as related to those lands cancelled, on the ground that it had become impossible of performance through no neglect on his part;—*Held*, that such a case came within the provisions of cl. 2, sec. 56 of Act IX of 1872 (Contract Act), and that the mere fact that the plaintiff could have paid up the debt due by his immediate landlord, and so retained possession of the land, was not sufficient to constitute such an omission or neglect on his part as take it out of the provisions of that section. *Held* also that ch. IV of Act I of 1877 (Specific Relief Act) did not apply to such a case, but that the plaintiff was entitled to the relief he sought under sec. 40 of that Act, inasmuch as the contract was evidence of different obligations, viz., to cultivate indigo in different villages.—I. L. R., 7 Cal. 474.

Money having been advanced, a contract was made to secure repayment of it by a usufructuary mortgage, with possession to be given to the lender, of land, which however had then already been attached under a decree, and had been taken under the Collector's management under sec. 326 of the Code of Civil Procedure. To perform the contract by delivery of possession of the land having thus become impossible, it was *held* that the lender of the money was entitled to compensation, the damages being the amount of the advance, together with interest from the date when, had performance been possible, the land should have been made over to him.—17 Cal. 432.

By a contract made with the plaintiffs the defendants agreed to carry from Bombay to Jeddah, in their steamer "Mobile," 500 pilgrims who were about to arrive in Bombay from Singapore in the plaintiffs' ship the "Stura." The defendants were to be paid at the rate of Rs. 26 *per* head, and the ship "Mobile" was to receive the pilgrims on the 3rd May, 1888. The "Stura" arrived in Bombay on the 1st May with about 600 pilgrims on board, and on the 2nd May the plaintiffs gave notice to the defendants that 500 of them were ready to go on board the "Mobile" on the next day, in accordance with the contract. The defendants refused to receive the pilgrims on board the "Mobile," on the ground that they had come to Bombay in the "Stura," and that during the voyage of that ship to Bombay there had been an outbreak of small-pox on board; that the 500 pilgrims had been in close contract with those who had been suffering from the dis-

ease, and that on the 3rd May fresh cases were occurring among the pilgrims brought from Singapore. They pleaded that under these circumstances they were not bound to ship and carry the 500 pilgrims, contending (1) that it was an implied term in the contract that the 500 pilgrims should be free from small-pox or other dangerous disease, and (2) that the performance of the contract had under the circumstances become unlawful (sec. 269 of the Penal Code and sec. 56 of the Contract Act). *Held* that the defendants were bound to carry out the contract. In the absence of proof, that a term providing that the pilgrims should be free from small-pox was to be implied by the usage of the pilgrim-carrying trade, there could be no reason for implying it. The possibility that some of the 500 pilgrims might have the germs of the disease in them owing to their exposure to infection, might make carrying them more expensive and onerous, but it was a contingency which from the very nature of the trade must have been known to the defendants, and if they wished to provide against it they should have done so by express terms. *Held*, also, that the performance of the contract had not become unlawful. The risk of disease was not greater than would necessarily be incurred in every crowded emigrant ship. But, even if special precautions were desirable under the circumstances, it was for the defendants, who had entered into an absolute agreement, to have taken them.—14 Bom. 147.

**57.** Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract; but the second is a void agreement.

Where there are promises to do things legal and also other things illegal, the former are a contract, the latter a void agreement.

*Illustration.*

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house, and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

**Note.**—See B. L. R., Ap. 5, noted under sec. 24.

**58.** In the case of an alternative promise, one branch of which is legal, and the other illegal, the legal branch alone can be enforced.

In alternative promise, one branch being illegal, legal branch alone enforceable.

*Illustrations.*

A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

APPROPRIATION OF PAYMENTS.

**59.** Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to

Application of payment where debt to be discharged is indicated.

be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

*Illustrations.*

(a.) A owes B, among other debts, 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes B no other debt of that amount. On the 1st June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b.) A owes B, among other debts, the sum of 567 rupees. B writes to A, and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

**60.** Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

**Notes.**

In consideration of an advance of Rs. 118, the defendants executed in favour of the plaintiff mortgage bond, dated 3rd November 1879, by which it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rubid crops of every description produced at the first class rates; and in case the same is not paid in kind, it will be paid principal with interest from the date of execution at one anna per cent. per mensem in cash in the month of Baisakh 1287 F. S. (April 1880)." The defendants admitted execution of the bond, and pleaded payments in grain to the amount of Rs. 136, which they failed to prove. It was found that the plaintiff had received payments in grain to the extent of Rs. 71, more than half of which, however, he claimed to be entitled to appropriate to the payment of other antecedent debts which were due to him by the defendants. It was not stated at the time of payment towards which debt the payments were to be applied; but all the payments were admittedly made in kind:—*Held*, that the plaintiff was not entitled to appropriate the payments to the antecedent debts, inasmuch as, within the meaning of sec. 60 of the Contract Act, there were "other circumstances" indicating that the payments were made in liquidation of the amount of the bond:—*Held*, also, that increased rate of interest being made payable from the date of the bond, and not only from the breach of the contract, must be taken to be in the nature of a penalty and only to be taken into consideration as a basis upon which damages for the breach of contract were to be estimated. The principle on this subject laid down in the case of *Mackintosh v. Crow*. I. L. R., 9 Cal. 689, approved of.—I. L. R., 12 Cal. 164.

**61.** Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by force for the time being as to the limitation of suits. If the

debts are of equal standing, the payment shall be applied in discharge of each proportionably.

#### CONTRACTS WHICH NEED NOT BE PERFORMED.

Contracts changed, rescinded, or altered need not be performed.

**62.** If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

#### *Illustrations.*

(a.) A owes money to B under a contract. It is agreed between A, B, and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b.) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new Contract, and extinguishes the old.

(c.) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

#### **Notes.**

The mere fact of one party alleging that a new contract has been substituted for an old one does not of itself put an end to the old contract, even as against the party so alleging, unless the allegation is proved to be true.—I. L. R., 8 Cal. 926.

*Held*, where a promissory note made payable simply to the payee without the addition of the words order or bearer, and, therefore, not negotiable was assigned to a third person, that the assignee could sue upon such note, a chose in action being, by the law of India, assignable, and that the assignee could sue in the courts of India in his own name.—1 Al. 732.

The plaintiff sued to recover the sum of Rs. 1,173 due on a bond. It was found as a fact that after the due date of the bond an arrangement was come to between the plaintiff and the defendant by which the plaintiff agreed to accept in satisfaction of what was due to him at the time of the arrangement Rs. 400 in cash and a fresh bond for Rs. 701, payable by instalments; and it was further found that the plaintiff never intended or agreed to accept the naked promise of the defendant to pay the Rs. 400 and to give the bond for Rs. 701. The defendant did not pay the Rs. 400 or give the bond, but pleaded that there had been a novation of the original contract by reason of the subsequent agreement, and that the suit being based on the original contract could not be maintained, and he relied on the provisions of secs. 62 and 63 of the Contract Act in support of his contention. *Held*, that neither section had any bearing on the case, and that upon the breach by the defendant of the terms which he had made, and upon the non-performance by him of the satisfaction which he had promised to give, the parties were relegated to their rights and liabilities under the original contract, and that consequently the plaintiff was entitled to the relief he claimed. *Held*, further, that sec. 62 of the Contract Act is merely a legislative expression of the common law, and the provisions thereof do not apply to a case where there has been a breach of the original contract before the subsequent agreement is come to.—15 Cal. 319.



**63.** Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance,\* or may accept, instead of it, any satisfaction which he thinks fit.

Promisee may dispense with or remit performance of promise.

*Illustrations.*

(a.) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b.) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c.) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.†

(d.) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e.) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a composition‡ of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

**Notes.**

A hypothecation bond provided for payment of interest on the principal sum at the rate of 9 per cent., and contained a further provision, that on default being made in payment of interest accruing due, interest should be paid from the date of the bond at the rate of 15 per cent. Default was made when the first and second payments of interest became due. After the second payment had become due, the creditor accepted payment on account of interest of a sum a little more than the arrears calculated at 9 per cent. In a suit by the creditor:—*Held*, (1) that the plaintiff had not waived any right under the bond by accepting the payment on account of interest: (2) that the provision for enhanced interest calculated from the date of the bond on default, was of the nature of a penalty under sec. 74 of the Contract Act: (3) that the plaintiff was entitled to interest on decree amount from date of decree to date of payment at 6 per cent. *Balkishen Das v. Run Bahadur Singh* (I. L. R., 10 Cal., 305) discussed and distinguished; *Baij Nath Singh v. Shah Ali Hosain* (I. L. R., 14 Cal., 248) dissented from.—I. L. R., 12 Madr. 161.

. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.§

Consequences of rescission of a voidable contract.

\* But see sec. 135, *infra*. † See sec. 41, *supra*.

‡ Substituted for "compensation" by Act XII. of 1891. § See secs. 75, *infra*.



**65.** When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Obligation of person who has received advantage under void agreement, or contract that becomes void.

*Illustrations.*

(a.) A pays B 1,000 rupees, in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b.) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c.) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d.) A contracts to sing for B at a concert for 1,000 rupees which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

**Notes.**

Where two Numbudri females—a mother and daughter (plaintiff)—executed a document in favour of defendant, a male relative (nephew of the former), which purported to divest the plaintiff and her mother of the entire property of the Illom of which they were the sole proprietors, and to vest it in the defendant in consideration of his promise to marry and raise up heirs to the Illom to which the plaintiff and her mother belonged, and to maintain the plaintiff and her mother till death, and it was proved that plaintiff was well aware of what she was doing, and had subsequently clearly recognized the defendant as absolute proprietor of the property, and was contended with his having assumed the position pointed out in the documents:—*Held*, that the transaction was valid and could not be called into question on the suggestion that plaintiff was placed at a disadvantage and was not fully cognizant of the irrevocable nature of the deed, and that the rule laid down by the Privy Council in *Ashgar Ali v. Delroos Banoo Begam* (1. L. R., 3 Cal. 324) and in *Takoorden Tewarry v. N. Syed Ali* (L. R., 1 IA. 392) had been complied with, and that defendant had discharged the burden of proof upon him. *Held* further by INNES, J.—That the document aimed at defeating the right of escheat of the Government, and the transaction was against public policy with reference to the decision in *Cavali Venkatanarayanappa's case* [*Collector of Musulipattam v. Cavali Vencatanaryanappah*] (8 M.I.A. 500), but that the plaintiff, being in *pari delicto* with the defendant, could not recover the property. *Held* by KINDERSLEY, J.—That no claim was made by the crown, it was not necessary to decide as to rights which may or may not be claimed by the crown, and that if plaintiff and her mother were not, as apparently they were not, in the position of ordinary Hindu widows, there was nothing opposed to

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See I. L. R., 9 Bom. 358, noted under sec. 22.

**66.** The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.\*

Mode of communicating or revoking rescission of voidable contract.

**67.** If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

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A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

## CHAPTER V.

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**68.** If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Claim for necessaries to person incapable or on

\* See secs. 3 and 5, *supra*.

*Held* on appeal, per MARKBY, J., that the plaintiffs were not entitled to put aside the sale as invalid, and treat the case as one for damages for breach of contract. Under the circumstances they were not entitled to even nominal damages. The mere shipment on board the *Grecian* did not pass the property in the coal to the defendant under sec. 77 of Act IX of 1872. Per PONTIFEX, J.—Whether, by virtue of the contract and the subsequent appropriation and shipment, the property in the coal passed or did not pass to the defendant within the meaning of sec. 84 or sec. 83 of Act IX of 1872, even if the sale were invalid, the plaintiffs were not entitled, considering their conduct in dealing with the coal, and the concealment of their interest in the purchase, and in the absence of satisfactory evidence of what ultimately became of the coal, to recover any damages?—15 B. L. R., 276.

A suit to recover arrears of rent upon a registered contract is governed by art. 116, Sch. II, Act XV of 1877. Compensation is used in the same sense in that article as in the Contract Act, sec. 73.—3 Madr. 76.

In January 1883 W. & Co. of Madras contracted to deliver to P. & Co. of Madras certain goods of a certain quality, subject to survey before shipment, at a certain price “f. o. b. Cocanada, delivery in April and May; terms, full advance and local exchange  $\frac{3}{4}$  per cent, payable at Madras.” This contract was contained in bought and sold notes. It was further agreed that the goods were to be delivered on board any ship P. & Co. might direct at the port of Cocanada. P. & Co. paid the full amount of the purchase money in January. On the 31st March P. & Co. wrote to W. & Co. requesting that the goods might be marked in a certain way. On the 18th May W. & Co. wrote to P. & Co., enclosing a letter from W. & Co. to S. N. & Co. of Cocanada requesting S. N. & Co. to hold the goods (which were said to have been purchased to W. & Co. from S. N. & Co. and to be in godown) at the disposal of P. & Co. In the letter to P. & Co. from W. & Co. the goods were also said to be in godown at that date. On the same day P. & Co. wrote to S. N. & Co. enclosing a delivery order for the goods (which P. & Co. stated they believed to be in godown), requesting that they might be marked in a particular way. On the 25th May S. N. & Co. wrote to P. and Co. informing them that they held the goods at P. and Co.’s disposal. On the 28th May P. & Co. received this letter. On the 31st May P. & Co. chartered a ship to take on board the said goods and other goods brought by P. & Co. from S. N. & Co. and others, and wrote to S. N. & Co. informing them that the ship would arrive about the 12th June. On the 5th June P. & Co. wrote to S. N. & Co. acknowledging receipt of a letter which stated that only a portion of the goods to be shipped was ready. On the 9th June P. and Co. received a letter from S. N. & Co. stating that all the goods were ready. On the 17th June the ship arrived at Cocanada. On the 21st June S. N. and Co. stopped payment and ceased to carry on business. No goods were delivered according to the contract. S. N. & Co. never had the goods to deliver between 18th May and 17th June. In a suit by P. & Co. to recover from W. and Co. the price paid and damages for breach of contract to deliver the goods, it was contended for W. and Co. I.—That the transfer of the delivery order of the 18th May amounted to a delivery of the goods:—*Held*, that as S. N. and Co. had neither had possession of the goods to be delivered nor had appropriated any goods to the contract, the delivery order was inoperative. II.—That the acceptance of the delivery order by P. and Co. amounted to an agreement that S. N. and Co. should deliver to P. & Co. the goods when ready, and that the liability of S. N. and Co. was substituted for that of W. and Co.:—*Held*, that such an agreement could not be inferred. III.—that as S. N. & Co. by accepting

the delivery order were estopped from denying that they had possession of the goods as against P. & Co., S. N. & Co. were discharged as against W. & Co., and therefore P. & Co. had no remedy against W. & Co.:—*Held*, (1) that S. N. and Co. were not discharged as against W. and Co., as S. N. and Co.'s representations were false; (2) that even if S. N. and Co. were discharged, this could not affect P. & Co. IV.—That as P. & Co. had not supplied a ship in May, they had failed to perform their part of the contract and could not recover:—*Held*, distinguishing *Bowes v. Shand* (L. R., 2 App. Ca., 455) and *Renter v. Sala* (L. R., 4 C. P. D., 239), that the presence of the ship in May was not a condition precedent to P. & Co. recovering V.—That W. and Co. had rescinded the contract on the 29th June by refusing to deliver, and therefore P. and Co. were only entitled to recover the price paid:—*Held*, that W. and Co. were not entitled to rescind the contract:—*Held*, also that P. & Co. having paid in advance, were entitled to a reasonable time after the 29th June prepare to purchase other goods, and were entitled to the difference between the contract price and the market price on the 1st of July as damages for the breach to deliver.—8 Madr. 38.

In 1881 A Hindu executed a sale-deed of a house in the Mufassal. The deed contained no covenant for title. The purchaser having been ejected from a portion of the house under a decree, of which the vendor was aware at the time of the sale, sued the vendor for damages. The Munsif decreed damages on the ground that the vendor had fraudulently concealed the fact that he was not the owner. On appeal the district Judge reversed this decree, holding that, as the purchaser had not insisted on a covenant for title, he must be held to have accepted all risks: *Held*, that, if there had been fraudulent concealment as alleged, the purchaser was entitled to damages.—9 Madr. 89.

On 6th March 1883 V promised to sell 5,000 bags of gingelly seed at Rs. 7 As. 11 a bag to S. Two-thirds of the price was paid in advance. V agreed to deliver the 5,000 bags at the end of April and to give S, notice as instalments of 1,000 bags were ready for delivery within the stipulated time, and S promised to pay V the balance of the contract price on each instalment when ready for delivery. There was neither delivery nor payment in terms of the contract, 3,000 bags were delivered by V, but S did not pay the balance of the price due, and 2,000 bags were never delivered. On 7th May V declined to deliver these bags, on the ground that S had not paid the balance of the contract price for the 3,000 bags delivered when ready for delivery, and subsequently, repaid to S the balance due to him of the money advanced. In a suit by S against V for damages for non-delivery of 2,000 bags:—*Held* that V was not excused from performance of his promise by the failure of S to pay the balance due for the bags delivered, and that S was entitled to recover the difference between the market and the contract price on the day the contract was broken by V.—9 Madr. 359.

In a deed of mortgage, dated in July, 1870, the mortgagors covenanted, among other things, as follows:—“That, having repaid the principal amount in the course of three years we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of Re 1-2 per cent. per mensem; that, should we in any year fail to pay the amount of interest, it shall, at the close of the year, be consolidated with the principal amount, and we shall pay compound interest at Re. 1-2 per cent. per mensem.....that, in the event of non-payment of the principal and interest on the expiration of the appointed time, the “mortgagee” shall be at liberty to recover from us the whole amount due to him with

interest by means of a law suit":—*Held* that the terms of the bond amounted to a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due; that, the bond containing an express covenant for the payment of interest at that rate, the interest was not affected by the considerations of the reasonableness or otherwise of the rate; and that the mortgagee was therefore entitled to interest up to the date of the decree at the rate of Re. 1-2 per mensem. *Baldeo Panday v. Gokal Rai* referred to.—7 Al. 333.

**74.** When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.

Title to compensation for breach of contract in which a sum is named as payable in case of breach.

*Exception.*—When any person enters into any bail-bond, recognizance, or other instrument of the same nature, or, under the provisions of any law or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

*Explanation.*—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

#### *Illustrations.*

(a.) A contracts with B to pay B Rs. 1,000 if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b.) A contracts with B that, if A practises as a Surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a Surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c.) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

#### **Notes.**

The defendant one D, on the 6th April, 1875, gave to the plaintiff, a money-lender, a promissory note, by which they jointly and severally promised to pay the plaintiff on the 6th September Rs. 400 "for value received in cash in hand paid on signing and delivering this bond; should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date of payment at the defaulting rate of 10 per cent. *per mensem*." At the date of the note, the defendant and D were in

the plaintiff's debt in respect of other promissory notes, and a sum of Rs. 100 was deducted from the amount of the note of the 6th April, in respect of one of these which was given up, and in respect of interest on three others. A further sum of Rs. 125 was deducted as interest in advance for the five months previous to the due date of the note, and the balance (Rs. 175) was paid by cheque to D. D died before the note became due. In a suit brought to recover Rs. 400 principal, and Rs. 400 interest, on the promissory note, on default being made in payment: *Held* that this was not a case in which a certain sum was agreed to be paid on a breach of contract, and, therefore, sec. 74 of the Contract Act did not apply. The stipulation to pay interest at the "defaulting rate" was not in the nature of a penalty. *Held* also that, looking at the nature of the transaction, the note contained a false statement of the consideration, which amounted only to Rs. 275; and there being nothing to show that the defendant understood the real nature of the transaction, the rate of interest being exorbitant, and the consideration inadequate, the transaction was not one which ought to be enforced by a Court of Equity.—2 Cal. 202.

A loan to a *purdanashin* woman from her own *mukthear* at an exorbitant rate of interest, the security being ample, may be a hard and unconscionable bargain on which the Contract for such rate of interest, will not be enforced. *Benyon v. Cook*, L. R., 10 Ch. Ap., 389, referred to and followed.—12 Cal. 225.

The stipulation in a bond was in these terms:—"I cannot pay Rs. 1,000 now, so I will pay it within two months and 15 days; if I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of two annas per rupee per month":—*Held*, that the stipulation was one for the payment of interest within the meaning of sec. 2, Act XXV of 1855, and did not fall under sec. 74 of the Contract Act. *Mackintosh v. Crow*, I. L. R., 9 Cal., 689, approved; *Balkishen Das v. Run Bahadur Singh*, I. L. R., 10 Cal., 305, considered.—13 Cal. 200.

In a suit on a bond, wherein it was stipulated that the loan was to be repaid on a certain date and to bear interest at the rate of 2 per cent. per mensem, but that if the loan were not repaid on the date named the principal was to bear interest at the rate of 4 per cent. per mensem from the date of the loan: *Held*, on the authority of the decision in *Balkishen Das v. Run Bahadur Singh*, I. L. R., 10 Cal. 305, that the stipulation as to the payment of interest at the higher rate was not in the nature of a penalty, and that the plaintiff was entitled to a decree for the amount due on the bond with interest at the increased rate from the date of the bond, and that, whether the interest at the increased rate, in case of non-payment on the date fixed in the contract, was payable from the commencement of the loan or from the date of fixed for the repayment of the loan, sec. 74 of the Contract Act was not applicable. *Mackintosh v. Crow*, I. L. R., 9 Cal. 689, upon this point dissented from. The decision in the case of *Balkishen Das v. Run Bahadur Singh*, I. L. R., 10 Cal. 305, overrules the decision in the case of *Muthura Persad Singh v. Luggun Kooer*, I. L. R., 9 Cal. 615, and all similar cases cited in *Mackintosh v. Crow*, which held that the stipulation for the payment of a higher rate of interest in the event of the non-payment of the debt on the date fixed in the contract, from the commencement of the loan, is in the nature of a penalty.—14 Cal. 248.

*Held* by the FULL BENCH (BANERJEE, J., dissenting as to part)—A provision in a bond to the effect that the principal should be repaid with interest on the due date, and that on failure thereof interest should be paid



at an increased rate from the date of the bond up to the date of realization, amounts to a provision for a penalty, and sec. 74 of the Contract Act applies to the money claimed at the increased rate of interest from the date of the bond until realization. *Mackintosh v. Crow*, *Nanjappa v. Nanjappa*, and *Sajaji Panhaji v. Maruti*, approved. *Baij Nath Singh v. Shah Ali Hosain* overruled so far as it dissents from *Mackintosh v. Crow*. *Balkishen Das v. Run Bahadur Singh* distinguished. *Banerjee, J.*—The decision in *Mackintosh v. Crow*, which regards the interest at the increased rate as a penalty, is correct as to the claim of interest up to the stipulated day of re-payment, and *Baij Nath Singh v. Shah Ali Hosain* was wrongly decided as to this point. Sec. 74 of the Contract Act applies only to that part of the claim for interest which is in respect of the period from the date of the bond to the due date, and has no application to the claim for interest for the period from the due date to the date of realization. This view is in accordance with the decision in *Mackintosh v. Crow*.—19 Cal. 392.

V lent Rs. 1,500 to C and the members of his family under a bond by which it was agreed that C's family should demise certain land on kanom to V and receive a further sum. It was also stipulated in the bond that C and the members of his family should pay interest at 6 per cent. upon Rs. 1,500 until the execution of the kanom deed, and interest at 24 per cent. from the date of the loan in the event of their not making the demise. The demise was not made. *Held* that the stipulation for the enhanced rate of interest did not create an independent obligation, and that the proper course was to determine what would be a sufficient compensation for the breach of contract. C tendered what he considered sufficient compensation to V before suit, and claimed exemption from payment of interest and costs. *Held* that as C had not tendered the amount stipulated for in the bond, V was justified in coming to the Court to obtain a decision as to the rate of compensation which should be paid, and was entitled to his costs.—3 Madr. 224.

A promise to pay interest, if the principal sum is not repaid within fifteen days, at the rate of one anna per rupee per diem from the date of the promise (intended to secure prompt payment) cannot be enforced, but interest-rate may be allowed. *Per INNES J.*—*Quære*: Whether sec. 74 of the Indian Contract Act is applicable to such a case?—6 Madr. 167.

An agreement to pay the principal of a debt by instalments with interest, and on default of payment of each instalment to pay an enhanced rate of interest thereon from the date of default of payment, is not an agreement which should be relieved against. *Dictum* of *Wilson J.*, in *Mackintosh v. Crow* (I. L. R., 9 Cal. 689) approved.—9 Madr. 276.

A mortgagor agreed that if any instalment of interest accruing due on the mortgage was not paid, he should pay compound interest and discharge the principal in one year, and further that if the principal was not so discharged he should pay interest at an enhanced rate:—*Held* that the mortgagee could enforce the agreement.—10 Madr. 203.

Where a mortgage-deed provided for repayment of the debt in four instalments with interest at 6 per cent. and in default of payment of any instalment on the due date, for interest at 12 per cent. from the date of the bond:—*Held*, following *Balkishen Das v. Run Bahadur Singh* (I. L. R., 10 Cal., 305) that the stipulation being reasonable, the plaintiff was entitled on default to recover the higher rate of interest from the date of the bond.—11 Madr. 294.

A mortgage-bond provided that interest for the loan should be paid at Rs. 2 per month, and that if the loan were not paid off by a certain day,



then future interest from the date of default should be paid at Rs. 3 *per* month. *Held*, that the higher rate of interest was not a penalty, and might be enforced.—I. L. R., 14 Bom. 200.

A mortgage-bond provided for repayment of the loan on a certain date with interest at the rate of  $8\frac{1}{4}$  *per cent.* In default of payment on the due date, interest was to be paid at the rate of 37 *per cent.* to be calculated from the commencement of the loan. *Held*, that the higher rate of interest was a penalty, and not to be enforced.—14 Bom. 274.

Under sec. 74 of the Contract Act, 1872, the Courts are not bound, even in cases where the parties to a contract have, in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum. As a general principle, compensation must be commensurate with the injury sustained. Acting upon this principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantage as he might reasonably be expected to have derived from the contract, had the breach not occurred. *Held*, therefore, where the parties to a contract to deliver a certain quantity of raw indigo on a certain day agreed that a certain sum should be paid as compensation in case such indigo was not delivered as agreed, that the method of assessing damages in case of a breach of the contract would be to ascertain the quantity of indigo which could have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which the indigo might have been fairly sold in the market during the season to which the contract related, and to deduct from such price the ordinary charges of producing and selling the quantity of indigo in question; and that more than the amount so ascertained ought not equitably to be awarded, such amount being "reasonable compensation" for a breach of the contract—5 Al. 238.

The obligor of a bond promised to pay the amount on demand with interest at the rate of Rs. 6-4-0 *per cent.* *per mensem*, to pay the interest every six months, and, if he made default in the payment of the interest for any six months, to pay interest on such interest at such rate. *Held*, in a suit on the bond, default in the payment of interest as agreed having occurred, that as the obligor expressly undertook to pay such high rate of interest, and there was no question of penalty, that is to say, of a liability to damages for breach of the terms of a contract in the sense of sec. 74 of the Contract Act, the contract rate of interest stipulated to be paid could not be interfered with.—6 Al. 63.

The obligor of a bond for the payment of money agreed therein in respect of interest as follows :—"I will pay the money with interest at one rupee one anna *per cent.* *per mensem* on demand : as regards interest, I agree that I will pay the interest of the amount every six months which may be found due under the accounts : in the event of non payment every six months I will pay the interest at the rate of one rupee eight annas *per mensem* from the date of the execution of the bond." *Held* by STUART, C. J., that the stipulation to pay the higher rate of interest in case of non-payment of interest at the lower rate was a stipulation in the nature of a penalty, and should be so treated in the accounts to be taken. *Bichook Nath Pandey v. Ram Lochan Singh* referred to : *Kharag Singh v. Bhola Nath* observed on. *Held* by TYRRELL, J., that the non-payment of interest at the lower rate was not a breach of the contract, the contract being that the obligor might adopt either of the scales of payment, and therefore the sti-

pulation in question was not in the nature of a penalty. *Mackintosh v. Hunt* followed : *Kharag Singh v. Bhola Nath* distinguished.—6 Al. 179.

The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that in case of such breach, he shall be entitled to recover compound interest, or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due, both compound interest and an increased rate shall be payable, amounts to a penalty, inasmuch as the two stipulations together cannot be regarded as a fair agreement with reference to the loss sustained by the lender.

In a bond dated in February, 1877, for a sum of money payable in June, 1882, it was provided that interest should be paid at the rate of Rs. 9 per cent. per annum on the *Puranmashi* of every *Jaith*, and that, if the interest were not duly paid, the rate should be increased to Rs. 15 per cent. per annum, and compound interest should be payable. There was no provision for payment of interest from the time when the principal became due. In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond to the date of the institution of the suit at Rs. 15 per annum, and compound interest for the same period at the same:—*Held*, that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendant's breach of the contract to pay the interest at the due date:—*Held* that, for this purpose, the proper course was to reduce the interest to Rs. 9 per cent. per annum, reckoned at compound interest, with yearly rests, to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at Rs. 9 per cent. from the due date of payment, upon the entire sum which was due when the bond became due, i. e., the principal added to the compound interest calculated at Rs. 9 per cent.

The same obligee held another bond executed by the same obligors in June, 1879, for a sum of money payable in June, 1882, with interest at Rs. 9 per cent. per annum. There was a provision in the bond that if the principal and interest were not paid on the due date, the obligee should be entitled to recover the principal with interest at the rate of Rs. 24 per cent. per annum from the date of the bond. In December, 1884, the obligee brought a suit on the bond against the obligor claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of Rs. 24 per cent. per annum:—*Held* that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond; and that, as the plaintiff failed to enforce payment for a long time, the interest, from the due date, might fairly revert to the old rate of Rs. 9 per cent. per annum, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond.—8 Al. 185.

See I. L. R., 3 Cal. 379, noted under sec. 78; 12 Madr. 161, noted under sec. 63; 10 Al. 29, noted under sec. 256 of the Indian Succession Act. (No. 10 of 1865).

**75.** A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

*Party rightfully rescinding contract, entitled to compensation.*

*Illustration.*

(a.) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

## CHAPTER VII.

### SALE OF GOODS.

*When property in goods sold passes.*

**76.** In this chapter, the word 'goods' means and includes every kind of moveable property.

*'Goods' defined.*

**Note.**—See I. L. R., 3 Cal. 379, noted under sec. 78.

**77.** "Sale" is the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

*"Sale" defined.*

**Note.**—See 15 B. L. R., 276, noted under sec. 73.

**78.** Sale is effected by offer and acceptance of ascertained goods for a price, or of a price for ascertained goods, together with payment of the price or delivery of the goods; or with tender, part-payment, earnest, or part-delivery; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

*Sale how effected.*

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price, or when the earnest, is paid, or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

*Illustrations.*

(a.) B offers to buy A's horse for 500 Rupees. A accepts B's offer, and delivers the horse to B. The horse becomes B's property on delivery.

(b.) A sends goods to B, with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve

of them. B retains the goods, and informs A that he approves of them. The goods become B's when B retains them.

(c.) B offers A, for his horse, 1,000 rupees, the horse to be delivered to B on a stated day, and the price to be paid on another stated day. A accepts the offer. The horse becomes B's as soon as the proposal is accepted.

(d.) B offers A, for his horse, 1,000 rupees on a month's credit. A accepts the offer. The horse becomes B's as soon as the offer is accepted.

(e.) B, on the first January, offers to A, for a quantity of rice, 2,000 rupees, to be paid on the first March following, the rice not to be taken away till paid for. A accepts the offer. The rice becomes B's as soon as the offer is accepted.

#### Notes.

A Government currency note was stolen from A, and cashed by B in good faith for C. On the conviction of C for theft, the Magistrate ordered the note to be given to B. A appealed to the Sessions Judge, who was of opinion that he was not competent to interfere as a Court of appeal under sec. 419 of the Criminal Procedure Code; but submitted the case for the orders of the High Court. *Held* that the case could be disposed of by the Judge under sec. 419 of the Criminal Procedure Code, and that the words "Court of Appeal" in that section are not necessarily limited to a Court before which an appeal is pending. *Held*, further, that the provisions of sec. 76, of the Contract Act did not apply, as the change of a currency note for money is not a contract of sale, and that, as the note came honestly into the hands of B, the order of the Magistrate was right.—I. L. R., 3 Cal. 379.

B. K. agreed to buy from M. R. five bales of chrome orange twist, "or any part thereof that may be in a merchantable condition, *ex* 'City of Cambridge' or other vessel or vessels," with specific marks and numbers, each bale containing 500 lbs. at so much per lb. to be paid for on or before delivery. B. K. took delivery of and paid for only one bale, but rejected the others. M. R. brought a suit for the price of the four bales rejected. *Held*, that the property in the goods did not pass to the defendant by the terms of the contract, nor was the delivery that was taken by him of the one bale a delivery of "part of the goods" within the meaning of secs. 78 and 92 of the Contract Act; the suit, therefore, did not lie. *Held*, also, that the question whether the defendant was entitled to refuse the goods, in other words whether the goods were according to the contract or not, was one that was unnecessary for the purposes of the present suit; but it would have been otherwise if the suit were one for damages on the ground of the defendant's refusal to accept the goods. A purchaser's right to reject goods by reason of their not answering the description in the Contract may be independent of the question whether the property in the goods has passed to him or not.—I. L. R., 15 Cal. 1.

**79.** Where there is a contract for the sale of a thing which has yet to be ascertained, made, or finished,\* the ownership of the thing is not transferred to the buyer until it is ascertained, made, or finished.

Transfer of ownership of thing sold, which has yet to be ascertained, made, or finished.

#### Illustration.

B orders A, a barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B pays to A

\* See sec. 80.

money from time to time on account of the price. The ownership of the barge does not pass to B until it is finished.

**80.** Where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

Completion of sale of goods, which the seller is to put into state in which buyer is to take them.

*Illustration.*

(a.) A, a ship-builder, contracts to sell to B, for a stated price, a vessel which is lying in A's yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to B until the vessel has been rigged, fitted up, and delivered.

**81.** Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

Completion of sale of goods, when seller has to do anything thereto in order to ascertain price.

*Illustrations.*

(a.) A, the owner of a stack of bark, contracts to sell it to B, weigh and deliver it, at 100 rupees per ton. B agrees to take and pay for it on a certain day. Part is weighed and delivered to B; the ownership of the residue is not transferred to B until it has been weighed pursuant to the contract.

(b.) A contracts to sell a heap of clay to B at a certain price per ton. B is, by the contract, to load the clay in his own carts, and to weigh each load at a certain weighing machine, which his carts must pass on their way from A's grounds to B's place of deposit. Here, nothing more remains to be done by the seller; the sale is complete, and the ownership of the heap of clay is transferred at once.

**82.** Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained.\*

Completion of sale, when goods are unascertained at date of contract.

*Illustration.*

A agrees to sell to B 20 tons of oil in A's cisterns. A's cisterns contain more than 20 tons of oil. No portion of the oil has become the property of B.

**83.** Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete.

Ascertainment of goods by subsequent appropriation.

\* See sec. 79.

*Illustration.*

A, having a quantity of sugar in bulk more than sufficient to fill 20 hogsheads, contracts to sell B 20 hogsheads of it. After the contract, A fills 20 hogsheads with the sugar, and gives notice to B that the hogsheads are ready, and requires him to take them away. B says he will take them as soon as he can. By this appropriation by A, and assent by B, the sugar becomes the property of B.

**84.** Where the goods are not ascertained at the time of making the contract of sale, and, by the terms of the contract, the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the contract, and, by his doing so, the goods are ascertained.

Ascertainment of goods by seller's selection.

*Illustration.*

B agrees with A to purchase of him, at a stated price, to be paid on a fixed day, 50 maunds of rice out of a larger quantity in A's granary. It is agreed that B shall send sacks for the rice, and that A shall put the rice into them. B does so, and A puts 50 maunds of rice into the sacks. The goods have been ascertained.

**Note.**—See 15 B. L. R., 276, noted under sec. 73.

**85.** Where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property.

Transfer of ownership of moveable property, when sold together with immoveable.

*Illustration.*

A agrees with B for the sale of a house and furniture. The ownership of the furniture does not pass to B until the house is conveyed to B.

**86.** When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury.

Buyer to bear loss after goods have become his property.

*Illustrations.*

(a.) B offers, and A accepts, 100 rupees for a stack of fire-wood standing on A's premises, the fire-wood to be allowed to remain on A's premises till a certain day, and not to be taken away till paid for. Before payment, and while the fire-wood is on A's premises, it is accidentally destroyed by fire. B must bear the loss.

(b.) A bids 1,000 rupees for a picture at a sale by auction. After the bid, it is injured by an accident. If the accident happens before the hammer falls the loss falls on the seller; if afterwards, on A.

**87.** When there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done, after the goods are produced in pursu-

Transfer of ownership of goods agreed to be sold while non-existent.

ance of the contract, by the seller, or by the buyer with the seller's assent.

*Illustrations.*

(a.) A contracts to sell to B, for a stated price, all the indigo which shall be produced at A's factory during the ensuing year. A, when the indigo has been manufactured, gives B an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in B from the date of the acknowledgment.

(b.) A, for a stated price, contracts that B may take and sell any crops that shall be grown on A's land in succession to the crops then standing. Under this contract, B, with the assent of A, takes possession of some crops grown in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in B.

(c.) A, for a stated price, contracts that B may take and sell any crops that shall be grown on his land in succession to the crops then standing. Under this contract, B applies to A for possession of some crops grown in succession to the crops which were standing at the time of the contract. A refuses to give possession. The ownership of the crops has not passed to B, though A may commit a breach of contract in refusing to give possession.

**88.** A contract for the sale of goods to be delivered at

Contract to sell and deliver, at a future day, goods not in seller's possession at date of contract.

a future day is binding, though the goods are not in the possession of the seller at the time of making the contract, and though, at that time, he has no reasonable

expectation of acquiring them otherwise than by purchase.

*Illustration.*

A contracts, on the first January, to sell B 50 shares in the East Indian Railway Company, to be delivered and paid for on the first March of the same year. A, at the time of making the contract, is not in possession of any shares. The contract is valid.

**89.** Where the price of goods sold is not fixed by the

Determination of price not fixed by contract.

contract of sale, the buyer is bound to pay the seller such a price as the Court

considers reasonable.

*Illustration.*

B, living in Patna, orders of A, a coach-builder at Calcutta, a carriage of a particular description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between the buyer and the seller, the Court must decide what price it considers reasonable.

DELIVERY.

**90.** Delivery of goods sold may be made by doing any-

Delivery how made.

thing which has the effect of putting them in the possession of the buyer, or of any

person authorized to hold them on his behalf.

*Illustrations.*

(a.) A sells to B a horse, and causes or permits it to be removed from A's stables to B's. The removal to B's stable is a delivery.



(b.) B, in England, orders 100 bales of cotton from A, a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery to B.

(c.) A sells to B certain specific goods which are locked up in a godown. A gives B the key of the godown in order that he may get the goods. This is a delivery.

(d.) A sells to B five specific casks of oil. The oil is in the warehouse of A. B sells the five casks to C. A receives warehouse-rent for them from C. This amounts to a delivery of the oil to C, as it shows an assent on the part of A to hold the goods as warehouseman of C.

(e.) A sells to B 50 maunds of rice in the possession of C, a warehouseman. A gives B an order to C to transfer the rice to B, and C assents to such order, and transfers the rice in his books to B. This is a delivery.

(f.) A agrees to sell B five tons of oil, at 1,000 rupees per ton, to be paid for at the time of delivery. A gives to C, a wharfinger, at whose wharf he had twenty tons of the oil, an order to transfer five of them into the name of B. C makes the transfer in his books, and gives A's clerk a notice of the transfer for B. A's clerk takes the transfer notice to B, and offers to give it to him on payment of the price of the oil. B refuses to pay. There has been no delivery to B, as B never assented to make C his agent to hold for him the five tons selected by A.

## 91. A delivery to a wharfinger or carrier of the goods

Effect of delivery to wharfinger or carrier. sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

### *Illustration.*

B, at Agra, orders of A, who lives at Calcutta, three casks of oil to be sent to him by railway. A takes three casks of oil directed to B to the railway station, and leaves them there without conforming to the rules which must be complied with in order to render the Railway Company responsible for their safety. The goods do not reach B. There has not been a sufficient delivery to charge B in a suit for the price.

## 92. A delivery of part of goods, in progress of the deli-

Effect of part-delivery. very of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

### *Illustrations.*

(a.) A ship arrives in a harbour laden with a cargo consigned to A, the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to A in progress of the delivery of the whole. This is a delivery of the cargo to A for the purpose of passing the property in the cargo.

(b.) A sells to B a stack of fire-wood, to be paid for by B on delivery.

After the sale, B applies for and obtains from A leave to take away some of the fire-wood. This has not the legal effect of delivery of the whole.

(c.) A sells 50 maunds of rice to B. The rice remains in A's warehouse. After the sale, B sells to C 10 maunds of the rice, and A, at B's desire, sends the 10 maunds to C. This has not the legal effect of a delivery of the whole.

#### Note.

It was agreed between the Bank of Bengal at Calcutta and C and Co., who carried on business there, that the Branch of the Bank at Cawnpur should discount bills to a certain extent drawn by C, who carried on business at Cawnpur, on C and Co. against goods to be consigned by rail to C and Co., and that the railway receipts for such consignments should be forwarded to C and Co. through the Cawnpur Branch of the Bank. C accordingly drew a bill on C and Co. payable twenty-one days after date, which the Cawnpur Branch of the Bank discounted, receiving the railway receipt for certain goods consigned to C and Co. C and Co. having accepted this bill, the Bank handed over the railway receipt to them. In a suit by the Bank against C on the bill, the latter set up as a defence that the bill had been discounted by the Bank on the oral understanding that the railway receipt was not to be transferred to C and Co. until they had paid the amount of the bill, and that the Bank had, by the breach of this condition, determined the defendant's liability. *Held* by STRAIGHT, J. (SPANKIE, J. dissenting), that evidence of such oral understanding was not admissible even under proviso 3 of sec. 92 of Act 1 of 1872.—I. L. R., 2 Al. 598.

Seller not bound to deliver until buyer applies for delivery.

**93.** In the absence of any special promise the seller of goods is not bound to deliver them until the buyer applies for delivery.\*

#### Note.

On the 25th December, 1886, the defendant contracted to deliver to the plaintiff on the 26th May, 1887, one hundred bales of cotton at Rs. 196 per candy. On the 28th February, 1887, the plaintiff assigned this contract to one Khorsi Khetsi, and a few days afterwards, viz., 7th March, 1887, he became insolvent. In his schedule there was no mention of this contract, or its assignment, or of the receipt of any consideration for the assignment. Khorsi Khetsi, as the beneficial assignee of the contract, subsequently called on the defendant to give delivery of the goods, and offered payment of the price; but the defendant, who was then aware of the plaintiff's insolvency, refused, on the ground that Khorsi Khetsi was not a *bona fide* assignee of the contract for value; that the assignment was a sham, and was not intended to pass the beneficial interest in the contract. A suit was then brought against the defendant by Khorsi Khetsi claiming damages for breach of the contract. This suit was dismissed, on the ground that the assignment of the contract was fraudulent. The plaintiff knew of the dismissal of Khorsi Khetsi's suit in 1887, but had never himself made any demand on the defendant for the performance of the contract. On the 6th November, 1889, the plaintiff's petition in insolvency was dismissed for non-prosecution, and on the 18th November, 1889, Khorsi Khetsi re-assigned the contract to the plaintiff. The plaintiff now sued the defendant to recover damages for breach of the contract. He contended that his

\* See sec. 46, *supra*.

assignment to Khorsi Khetsi, though in fraud of the Official Assignee and the creditors of the insolvency, was not in fraud of the defendant, and that by the dismissal of his petition the parties, as to their rights and liabilities under the contract, had been relegated to the position which they occupied prior to the plaintiff's insolvency. *Held*, that the plaintiff was not entitled to recover damages from the defendant. There had been no demand for delivery by the plaintiff, or on his account, as required by sec. 93 of the Contract Act IX of 1872. Khorsi Khetsi had asked for delivery as beneficial owner, but the property had not passed to him by the assignment; and although the defendant would be bound to recognize an assignee who could establish his title of full ownership in the contract, he was under no obligation to recognize Khorsi Khetsi when, as a fact, the beneficial interest in the contract still remained in the plaintiff, with whom the defendant had originally contracted. In England, where there has been an assignment by deed, the assigned property passes by force of the deed, and it cannot be impeached at law by the assignor or by third parties other than creditors, on the ground of its not being a real transaction: but where the assignment is not by deed, the true nature of it as a sham may be proved. In India it is in all cases open to third parties to show that such was the case.—I. L. R., 15 Bom. 1.

**94.** In the absence of any special promise as to delivery;  
 Place of delivery. goods sold are to be delivered at the place  
 at which they are at the time of the sale;  
 and goods contracted to be sold are to be delivered at the  
 place at which they are at the time of the contract for sale,  
 or, if not then in existence, at the place at which they are pro-  
 duced.

#### SELLER'S LIEN.

**95.** Unless a contrary intention appears by the con-  
 Seller's lien. tract, a seller has a lien on sold goods as  
 long as they remain in his possession, and  
 the price or any part of it remains unpaid.

**96.** Where, by the contract, the payment is to be made  
 Lien where payment to at a future day, but no time is fixed for  
 be made at a future day, the delivery of the goods, the seller has  
 but no time fixed for de- no lien, and the buyer is entitled to a pre-  
 livery. sent delivery of the goods, without pay-  
 ment. But if the buyer becomes insolvent before delivery of  
 the goods, or if the time appointed for payment arrives before  
 the delivery of the goods, the seller may retain the goods for  
 the price.

*Explanation.*—A person is insolvent who has ceased to pay  
 his debts in the usual course of business,  
 'Insolvency' defined. or who is incapable of paying them.

#### *Illustration.*

A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's

warehouse. Before the expiry of the three months, B becomes insolvent A may retain the goods for the price.

**97.** Where, by the contract, the payment is to be made at a future day, and the buyer allows the goods to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price.

*Seller's lien where payment to be made at future day, and buyer allows goods to remain in seller's possession.*

*Illustration.*

A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse till the expiry of the three months, and then does not pay for them. A may retain the goods for the price.

**98.** A seller, in possession of goods sold, may retain them for the price against any subsequent buyer, unless the seller has recognized the title of the subsequent buyer.

*Seller's lien against subsequent buyer.*

STOPPAGE IN TRANSIT.

**99.** A seller who has parted with the possession of the goods, and has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.

*Power of seller to stop in transit.*

**100.** Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

*When goods are to be deemed in transit.*

*Illustrations.*

(a.) B, living at Madras, orders goods of A, at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to C, a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of C, are in transit.

(b.) B, at Delhi, orders goods of A at Calcutta. A consigns and forwards the goods to B at Delhi. On arrival there, they are taken to the warehouse of B, and left there. B refuses to receive them, and immediately afterwards stops payment. The goods are in transit.

(c.) B, who lives at Puna, orders goods of A at Bombay. A sends them to Puna by C, a carrier appointed by B. The goods arrive at Puna, and are placed by C, at B's request, in C's warehouse for B. The goods are no longer in transit.

(d.) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

(e.) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. A delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to A's order or assigns. The cotton arrives at London, but, before coming into B's possession, B becomes insolvent. The cotton has not been paid for. A may stop the cotton.

**101.** The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf.

**102.** The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods,\* assigns it, while the goods are in transit, to a second buyer, who is acting in good faith, and who gives valuable consideration for them.

*Illustrations.*

(a.) A sells and consigns certain goods to B, and sends him the bill of lading. A being still unpaid, B becomes insolvent, and, while the goods are in transit, assigns the bill of lading for cash to C, who is not aware of his insolvency. A cannot stop the goods in transit.

(b.) A sells and consigns certain goods to B. A being still unpaid, B becomes insolvent, and, while the goods are still in transit, assigns the bill of lading for cash to C, who knows that B is insolvent. The assignment not being in good faith, A may still stop the goods in transit.

**103.** Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit.

*Illustrations.*

(a.) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bill of lading for these goods to C, to secure a specific advance of 5,000 rupees made to him upon the bill of lading by C. B becomes insolvent, being indebted to C to the amount of 9,000 rupees. A is not entitled to stop the goods except on payment or tender to C of 5,000 rupees.

(b.) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bill of lading for these goods to C, to secure the sum of 5,000 rupees due from him to C upon a general balance of account. B becomes insolvent. A is entitled to stop the goods in transit without payment or tender to C of the 5,000 rupees.

\* See sec. 108, except. 1, *infra*.

**Note.**

The firm of China Devakaran carried on business in Bombay. A, the agent of the firm, bought from the first defendant, Hanmandas, at Bijapur, a quantity of wheat which at A's request was on the 28th and 29th May, 1889, consigned by Hanmandas to the firm of China Devakaran at Bombay, on the understanding that the consignees were not to have the wheat until they had paid the *hundis* drawn in respect of it. The wheat was sent to Bombay on the 28th and 29th May, 1889, in three consignments, viz., of 56, 104 and 181 bags respectively, and two *hundis* for Rs. 1,000 and Rs. 1,500 respectively payable at sight were drawn by A in Bijapur on the firm of China Devakaran in Bombay, and were given by him to the first defendant, Hanmandas, who thereupon handed to A the three railway receipts for the three consignments which had been despatched by the first defendant's agent at Bijapur railway station. The *hundis* were sent by the first defendant Hanmandas to his agent in Bombay for collection. The *hundi* for Rs. 1,000 arrived in Bombay on the 31st May, and was paid on the 1st June. The *hundi* for Rs. 1,500 arrived in Bombay on the 1st June, and was dishonoured on the 2nd June by the firm of China Devakaran, which afterwards stopped payment and became insolvent. The railway receipts given by the first defendant to A at Bijapur were in the following form:—

“Received from Hanmandas Ramkison the undermentioned goods, 181 bags of wheat.

“This receipt must be produced by the consignee, or the goods will not be delivered; if he does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made. If the consignment, or this railway receipt, is sold one or more times, the endorsement must be a distinct order to deliver to a certain person or firm, and this order must be on a one-anna stamp. If more than one order appear on the face hereof, each order must bear a stamp.

“I (we) hereby certify that I (we) am (are) aware that the Southern Mahratta Railway has received the abovementioned goods subject to the conditions noted on the back, and that I (we) agree that it should receive them subject to these conditions.

“ (Sender's signature)—————.”

On obtaining these railway receipts, A sent them at once to the firm of China Devakaran in Bombay, and on the 31st May, 1889, they were endorsed by China Kanji, a member of the firm, to the second defendant, Virji Hansraj, to secure an advance of Rs. 2,000. The endorsement was as follows:—“Signature of China Devakaran. I have sold the delivery, as *per* this receipt, to Virji Hansraj. The handwriting of China Kanji.” Two consignments (*viz.*, 56 bags and 104 bags) and part of the third (*viz.* 73 bags out of 181) had arrived in Bombay by the 2nd June, in bags bearing China Devakaran's marks. On that day the second defendant, Virji Hansraj, applied to the Railway Company for delivery, and paid full freight on all three consignments. He was allowed to remove the 56 bags and the 104 bags. After having done this he loaded his carts with the 73 bags, which had then arrived, out of the consignment of 181 bags without any objection on the part of the Railway Company, but he was not allowed to take them out of the station yard, and the 73 bags were consequently unloaded, and together with the balance of the consignment of 181 bags, which subsequently arrived, were retained by the Railway Company. The given by the Company's servants for the detention was the receipt



of a telegram sent by the first defendant, Hanmandas, from Bijapur, on hearing of the dishonour of the *hundi* for Rs. 1,500, directing that the 181 bags should not be delivered. At the trial the Judge found that this telegram had probably been received before all of the 73 bags had been loaded into the carts.

*Held*—(1) That there was no such delivery of the 181 bags to China Devakaran's agent at Bijapur as to deprive the first defendant Hanmandas of his right of stoppage *in transitu*. (2) That there was such a delivery of the 73 bags at the railway station to the second defendant, Virji Hansraj, as to determine the first defendant's right of stoppage *in transitu*. It was to be assumed that the first defendant's telegram did not arrive in time to prevent the bags being placed, with the consent of the Railway Company, on the second defendant's carts, for it was not until the carts had been loaded that the Company's servants interfered to prevent their leaving the station yard. Before that time the freight for the 73 bags had been paid by the second defendant, and the railway receipt had been given up to the Company duly signed by the second defendant's servant. Everything had been done on the part of the Company to divest themselves of their lien as carriers; for the mere fact that the carts were still standing in the goods compound of the railway station after the bags had been placed on them could not affect the question, there being no suggestion that the matter as between the Company and the second defendant had not been completely settled. (3) That the railway receipts were not instruments of title within the meaning of sec. 103 of the Indian Contract Act (IX of 1872), and that by endorsing and handing them over, the firm of China Devakaran did not assign them to the second defendant within the meaning of the said section.—I. L. R., 14 Bom. 57.

**104.** The seller may effect stoppage in transit, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other depository in whose possession they are.

Stoppage how effected.

**105.** Such notice may be given, either to the person who has the immediate possession of the goods, or to the principal whose servant has possession. In the latter case, the notice must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

Notice of seller's claim.

**106.** Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

Right of seller on stoppage.

*Illustration.*

A sells to B 100 bales of cotton; 60 bales having come into B's possession and 40 being still in transit. B becomes insolvent, and A, being still unpaid, stops the 40 bales in transit. A is entitled to hold the 40 bales until the price of the 100 bales is paid.



## RE-SALE.

**107.** Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, re-sell them after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit, which may occur on such re-sale.

**Note.**—See 15 B. L. R., 276, noted under sec. 73.

## TITLE.

**108.** No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases :—

*Exception 1.*—When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods, of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary : Provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

*Exception 2.*—If one of several joint-owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them.

*Exception 3.*—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person, who, before the contract is rescinded, buys them in good faith of the person in possession ; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents.

In this case the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract.

*Illustrations.*

(a.) A buys from B, in good faith, a cow which B had stolen from C. The property in the cow is not transferred to A.

(b.) A, a merchant, entrusts B, his agent, with a bill of lading relating to certain goods, and instructs B not to sell the goods for less than a certain price, and not to give credit to D. B sells the goods to D for less than that price, and gives D three months' credit. The property in the goods passes to D.

(c.) A sells to B goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to C, and it has not been endorsed by C. The property is not transferred to B.

(d.) A, B, and C, are joint Hindu brothers, who own certain cattle in common. A is left by B and C in possession of a cow, which he sells to D. D purchases *bona fide*. The property in the cow is transferred to D.

(e.) A, by a misrepresentation not amounting to cheating, induces B to sell and deliver to him a horse. A sells the horse to C before B has rescinded the contract. The property in the horse is transferred to C; and B is entitled to compensation from A for any loss which B has sustained by being prevented from rescinding the contract.

(f.) A compels B by wrongful intimidation, or induces him by cheating or forgery, to sell him a horse, and, before B rescinds the contract, sells the horse to C. The property is not transferred to C.

**Notes.**

The plaintiff let to D a piano on hire on the following terms: "At Rs. 30 per month; if duly paid for and kept three years, shall then become the property of hirer." These terms were embodied in a voucher which was signed by D. The monthly hire was not regularly paid, and the plaintiff sued for and obtained a decree for a portion of the hire up to May 1873. Subsequently, in that month, D sold the piano to the defendant, who obtained delivery of it in June. In a suit by the plaintiff in trover for conversion of the piano, the Judge found that the defendant acted in good faith. *Held* that the possession acquired by D was not possession by consent of the owner within the meaning of sec. 108 of Act IX of 1872, excep. 1, and that he did not, by sale to the defendant, transfer the ownership in the piano to him. Excep. 1 of sec. 108 does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose.—12 B. L. R., 42.

The plaintiff was a broker in cotton and also traded in cotton on his own account. On the 27th January, 1883, he contracted with the defendants to sell to them 100 candies of cotton, at Rs. 200 per candy, *deliverable from the 15th to the 25th April following*. On the 30th January, 1883, in his capacity as broker, he effected a contract for the sale of the same 100 candies of cotton by the defendants to L and Co. at Rs. 202 per candy. L and Co. sold the cotton to D, and D again sold it back to the defendants at Rs. 191 per candy. The defendants then sold it to H, by whom it was sold to K, and K finally sold it to B and Co. at Rs. 191 per

candy. B and Co. obtained possession of the cotton from the plaintiff on or about the 24th April on payment of Rs. 191 per candy, for which they had contracted to buy it from K. The delivery order for the cotton had been sent on the 20th April by the plaintiff to the defendants, who immediately, on receiving it, wrote to the plaintiff as follows:—"We beg to as *pro forma* for survey on 100 bales M.—G. Broach cotton tendered by you to us to-day. As we are handing over the delivery order to a third party please secure payment for the cotton direct, and before parting with the cotton, if necessary." The delivery order was then endorsed by the defendants to their vendees (L & Co.,) who in turn endorsed it to D, by whom it was endorsed to the defendants. By subsequent endorsements it came ultimately to B and Co., who, as above mentioned, got delivery of the cotton from the plaintiff on payment of Rs 191 per candy. The plaintiff, who had sold to the defendants at Rs. 200 per candy, and who received from B and Co. only Rs. 191 per candy, sued the defendants in the Small Cause Court for the difference. The defendants contended that after the receipt of the letter written by them to the plaintiff, he was bound not to deliver the cotton to L and Co., or to any subsequent endorsee of the delivery order, until he had obtained payment of the full price (Rs. 200 per candy) which the defendants had agreed to pay him for it; that the delivery to B and Co. was not a delivery authorized by the defendants; that the payment made by B and Co. to the plaintiff was not a payment made by or on behalf of the defendants; that the plaintiff's cause of action, if any, against the defendants was for the full price of the cotton; and that as that exceeded Rs. 2,000, the Small Cause Court had no jurisdiction. *Held* that the defendants' letter to the plaintiff was ineffectual to control or alter the course of the delivery order, and that the plaintiff was bound to deliver the cotton to B and Co. on payment, by them, of the price of Rs. 191 per candy. The defendants, having repurchased the cotton after it had passed through several hands, sold it for Rs. 191 per candy to H, from whom it ultimately passed to B and Co. The plaintiff's lien, therefore, as regarded H and his sub-vendees, was confined to the price at the above rate, and B and Co. were entitled to the goods as against the defendants on payment of that price. The defendants' letter, therefore, of the 20th April, 1883—however the plaintiff might have been bound to act on it as regarded L and Co., to whom the cotton was sold at Rs. 202 per candy, and the other sub-vendees *prior* to the re-purchase by the defendants—could only, as regards subsequent purchasers, prevent delivery to them before payment of the price at which the defendants had resold the goods, *viz.*, Rs. 191 per candy. That price was actually paid to the plaintiff before he did deliver the goods, and credit was given to the defendants in the account. By the English common law a delivery order is regarded as a mere token of authority to deliver; and before the wharfinger has attorned, it does not, independently of statute or custom enable the purchaser to confer a title upon a vendee or a sub-vendee free from the vendor's lien for the price. The Indian Contract Act (IX of 1872) gives no larger effect, *except by section 108*, to a delivery order than it had by English common law, and under that Act (sec. 90, ill. (c), and secs. 95 and 98) the giving of a delivery order by a vendor to a vendee does not of itself give the vendee such a possession of the goods as to defeat the vendor's lien. The exception to this rule contained in exception (1) to section 108, which provides that a seller may give to a buyer a better title than he had himself where he is, by consent of the owner, in possession of the goods or documents relating thereto, cannot be held to apply to cases where the possession is entirely beyond the control of the owner.—I. L. R., 8 Bom. 501.

The general rule laid down by section 108 of the Contract Act, that no seller can give to a buyer a better title than he has himself, is qualified by Exception 1 to that section. But the possession contemplated by that exception does not extend to every case of detention of chattels with the owner's consent. The exception has particular relation to the cases of persons allowed by owners to have the *indicia* of property, or possession under such circumstances as may naturally induce others to regard them as owners, and constituting some degree of negligence or defect of precaution imputable to the true owners. Where, however, the detention of a chattel is allowed for a particular limited purpose, there is not a possession such as is required by the exception. In the case of a gratuitous bailment of a chattel, the possession remains constructively with the owner. S left with C buffalo and a calf, to be taken care of during his absence from home. C sold the animals to M. S sued to recover them. *Held*, that the bailment by S to C was a gratuitous one, or else a mere custody by C for S; that S was, therefore, at the time of sale in constructive possession of the animals, and C could not transfer to M an ownership that he had not himself.—11 Bom. 704.

### WARRANTY.

**109.** If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.

Establishment of implied warranty of goodness or quality.

**110.** An implied warranty of goodness or quality may be established by the custom of any particular trade.

Warranty of soundness implied on sale of provisions.

**111.** On the sale of provisions, there is an implied warranty that they are sound.

**112.** On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample.\*

Warranty of bulk implied on sale of goods by sample.

**113.** Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.

Warranty implied where goods are sold as being of a certain denomination.

*Explanation.*—But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.

\* See sec. 118, *infra*.

*Illustrations.*

(a.) A, at Calcutta, sells to B twelve bags of "waste silk," then on its way from Murshedabad to Calcutta. There is an implied warranty by A that the silk shall be such as is known in the market under the denomination of "waste silk."

(b.) A buys, by sample, and after having inspected the bulk, 100 bales of "Fair Bengal" Cotton. The cotton proves not to be such as is known in the market as "Fair Bengal." There is a breach of warranty.

**114.** Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.\*

Warranty where goods ordered for a specified purpose.

*Illustration.*

B orders of A, a copper manufacturer, copper for sheathing a vessel. A, on this order supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel.

**115.** Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

Warranty on sale of article of a well-known ascertained kind.

*Illustration.*

B writes to A, the owner of a patent invention for cleaning cotton—"Send me your patent cotton-cleaning machine to clean the cotton at my factory." A sends the machine according to order. There is an implied warranty by A that it is the article known as A's patent cotton-cleaning machine, but none that it is fit for the particular purpose of cleaning the cotton at B's factory.

**116.** In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it.

when not responsible for latent defects.

*Illustration.*

A sells to B a horse. It turns out that the horse had, at the time of the sale, a defect of which A was unaware. A is not responsible for this.

**Notes.**

Under five contracts for the sale of good Burma cutch, to be delivered to a Calcutta firm, in Calcutta, by the vendors, who knew that it was bought for the export market, delivery and acceptance followed upon a searching examination of the cutch by the purchasers. The latter having sent advices of this purchase to a New York firm, with which they were in partnership, parcels of cutch were sold to different buyers in America, to whom under such "forward" contracts, the cutch was shipped in separate shipments by the Calcutta firm. On the arrival of the cutch, objection was taken to its quality by the American buyers, who refused to take delivery. The Calcutta firm, thereupon, sued the vendors under the five contracts above mentioned.

\* See sec. 118, *infra*.

The burden of proof being upon the plaintiffs, who had accepted the catch after full examination in Calcutta, to prove the breach of contract by the vendors by cogent evidence sufficient to rebut the presumption of due performance that arose from such acceptance, *held*, that this presumption was not rebutted in the absence of evidence as to the treatment of the catch on its re-shipment by the plaintiffs, on the voyage from India to America, and at the port of arrival.—I. L. R., 13 Cal. 237.

**117.** Where a specific article, sold with a warranty, has been delivered and accepted, and the warranty is broken, the sale is not thereby rendered voidable; but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

Buyer's right on breach of warranty.

*Illustration.*

A sells and delivers to B a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but B is entitled to compensation from A for loss caused by the unsoundness.

**118.** Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may

Right of buyer on breach of warranty in respect of goods not ascertained.

accept the goods or refuse to accept the goods when tendered,

or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them; provided that, during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial.

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty; but if he accepts the goods, and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty.

*Illustrations.*

(a.) A agrees to sell and, without application on B's part, deliver to B 200 bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to B. B may return it if he has not kept it longer than a reasonable time for the purpose of examination.

(b.) B agrees to buy of A twenty-five sacks of flour by sample. The flour is delivered to B, who pays the price. B, upon examination, finds it not equal to sample; B afterwards uses two sacks, and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from A for any loss caused by the breach of warranty.

(c.) B makes two pairs of shoes for A by A's order. When the shoes are delivered, they do not fit A. A keeps both pairs for a day. He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect of the second pair.

### MISCELLANEOUS.

**119.** When the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

When buyer may refuse to accept, if goods not ordered are sent with goods ordered.

#### *Illustration.*

A orders of B specific articles of China. B sends these articles to A in a hamper with other articles of China which had not been ordered. A may refuse to accept any of the goods sent.

**120.** If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.

Effect of wrongful refusal to accept.

**121.** When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract, on the buyer's failing to pay the price at the time fixed, unless it was stipulated by the contract that he should be so entitled.

Right of seller as to rescission, on failure of buyer to pay price at time fixed.

**122.** Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

Sale and transfer of lots sold by auction.

**123.** If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.

Effect of use, by seller, of pretended biddings to raise price.

## CHAPTER VIII.

### OF INDEMNITY AND GUARANTEE.

**124.** A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indemnity.'

Contract of "indemnity" defined.



*Illustration.*

(a.) A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 Rupees. This is a contract of indemnity.

*Notes.*

The Thakor of Limdi possesses several *talukdari* villages in the Ahmedabad District, for which he pays a lump *jama* to Government. One of these villages was Akru. Disputes arose between the Thakor and the *grassias* of Akru as to the ownership of the village. The Thakor filed a suit against the *grassias*, which was ultimately compromised, and a consent decree was passed in 1883, providing (*inter alia*) that the Thakor should assign to the *grassias* a moiety of the village, that the *grassias* should hold the same free from all liability to pay the *jama*, and that the Thakor should alone be responsible for all Government demands. In accordance with this decree a moiety of the village was made over to the *grassias*. The Collector demanded *jamabandi* for this moiety. The Thakor intervened, and objected to the demand, on the ground that he paid a lump *jama* for the whole of his taluka, including the moiety of the village assigned to the *grassias*. Government, however, passed a resolution, declaring that half of the village belonged to the *grassias*; that from them the Government had a right to levy the *jama*; that the Thakor might, if he chose, pay the same on behalf of the *grassias*; and that if it was not paid, it would be recovered by attachment and sale of the *grassias* half share. The Thakor thereupon paid the *jama* on behalf of the *grassias* for two years, and then filed a suit against Government to recover back the payments he had made, and for a declaration that Government had no right to levy any assessment on any portion of the village beyond the lump *jama* fixed for his taluka. This suit was dismissed on the preliminary ground that the Thakor had no cause of action against Government, in respect of any of the reliefs sought, the Court being of opinion that the payments he had made to Government on account of the *grassias* were voluntary, and that he had no interest whatever in the *grassias* half share of the village. *Held*, reversing the decision of the lower Court, that the suit would lie. Under the consent-decree the Thakor stood in the relation of an insurer to the *grassias* from all exactions of Government dues. The payments of *jama* he made on account of the *grassias* were, therefore, not voluntary, but made under protest, and, as such, were recoverable by suit.—I. L. R., 14 Bom. 299.

One B proposed to take a lease of zamindari property from M for the period of eight years at a rental of Rs. 3,900 per annum. M declined to grant the lease until the payment of rent during the term of eight years was guaranteed by one S, the father of the plaintiff. S on his part required a guarantee or indemnity against any rent which might not be paid by B, and which he might under his proposed guarantee become liable to pay. The defendant's father, G, accordingly gave a guarantee to S in the following terms: "And for your satisfaction, I write that if any money remains due from B on account of the lease for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." S then gave his guarantee to M, and he granted the lease to B. G died on 22nd May, 1880. B failed to pay the rent due for the year 1883. M having died, his representatives sued S on his guarantee and recovered from him the rent due and certain costs and expenses. S then died, and the plaintiff, as his representative, brought this action against defendant, the legal representative

of G, to recover the amount of the decree and costs which S had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of G, and this decree was confirmed in appeal by the District Judge. On second appeal it was contended that under sec. 131 of the Indian Contract Act, the death of G was a complete answer to the claim. *Held*, that assuming that the case was that of a continuing guarantee within the meaning of sec. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that S should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and consequently, even if it were a continuing guarantee, the liability of G was not determined on his death. *Held* further, that neither G, if he were alive, nor on his death the defendant, as his representative, can be made liable for costs and expenses which S had incurred in defending the previous suit against him for rent brought by the lessor, there being no evidence to show that S acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit. *Lloyds v. Harper* was referred to.—10 Al. 531.

Rights and liabilities of indemnity holder when sued.

**125.** The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

**Note.**—See I. L. R., 10 Al. 531, noted under sec. 124.

**126.** A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor';

'Contract of guarantee,'  
'surety,' 'principal debtor,'  
'creditor'.

and the person to whom the guarantee is given is called the 'creditor.' A guarantee may be either oral or written.

**Note.**

Upon the construction of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor:—*Held*, that the loss to be recoverable in a suit against guarantor, must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement. The khezanchi of a District Treasury guaranteed the Government against loss arising from the misconduct of the stamp darogah, appointed at his agent. The latter became a party to frauds by putting off upon the public forged stamps, in addition to the genuine ones issued from the treasury, into which, however, all the proceeds of sales were paid. The darogah, on whose indent the stamps were issued, made the proceeds appear to correspond in his accounts with the value of the stamps issued to him; but, under cover of the above payment, he misappropriated certain genuine stamps:—*Held*, that although the guarantor might not be responsible in respect of the forgery of the stamps, yet he was responsible on his agreement by reason of the misappropriation of the genuine stamps, and the false accounts rendered; and that losses, which in the first instance were caused by the forgery, were brought within the scope of the agreement by the fact of such misappropriation and false accounting.—I. L. R., 12 Cal. 143.

**127.** Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Consideration for guarantee.

*Illustrations.*

(a.) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b.) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them, in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c.) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

**Note.**

Where N advanced money to K on a bond hypothecating K's property and mentioning M as surety for any balance that might remain due after realisation of K's property, M being no party to K's bond, but having signed a separate surety-bond two days subsequent to the advance of the money: *Held* that the subsequent surety-bond was void for want of consideration under sec. 127 of the Indian Contract Act (IX of 1872). *Per* STUART, C. J.—The legal position of the surety considered and determined. *Per* STUART, C. J.—Remarks on the legal character of the "illustrations" attached to Acts of the Indian Legislature, and opinion expressed that they from no part of these Acts.—I. L. R., 1 Al. 487.

**128.** The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

*Surety's liability.*

*Illustration.*

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

**129.** A guarantee which extends to a series of transactions is called a 'continuing guarantee.'

*Illustrations.*

(a.) A, in consideration that B will employ C in collecting the rents of B's zemindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b.) A guarantees payment to B, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of £100, and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.

(c.) A guarantees payment to B of the price of five sacks of flour, to be delivered by B to C, and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

**130.** A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

*Revocation of continuing*

*Illustrations.*

(a.) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b.) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

**131.** The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

*Revocation of continuing guarantee by surety's death.*

**Note.**

In a suit brought to recover money from the estate of a deceased Hindu in the hands of his son on a surety bond executed by the father:—*Held*, that the estate of the son was liable according to the principles of Hindu Law, and that the question was not affected by the provisions of the Contract Act.—I. L. R., 11 Madr. 373.

**132.** Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Liability of two persons primarily liable, not affected by a private arrangement between them as to suretyship.

*Illustration.*

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C, against A, upon the note.

**Note.**

In the years 1870 and 1873, A drew certain bills of exchange upon B, which were accepted by B for the accommodation of A, and endorsed by A to the Bank of Bengal. In May 1876, A, by letter, agreed to execute a mortgage of a certain portion of his property, consisting of a share in a Privy Council decree, to B, and in the meantime to hold such property at the disposal of B, his successors and assigns. In the month of June, 1876, A became unable to meet his liabilities, and in the month of August following executed a conveyance of all his property to the Official Trustee upon trust for the benefit of A's creditors. The Bank assented to and executed this deed after it had been assented to and executed by some of the other creditors. The deed did not contain any composition with or release by the creditors, nor any covenant on their part not to sue A. In a suit by the Bank against B as acceptor of the bills: *Held* that B was not precluded by the provisions of sec. 132 of the Contract Act and sec. 92 of the Evidence Act from pleading that he was an accommodation acceptor only; but *held* that the letter of May 1876 constituted a good equitable mortgage, and that B was not there-after entitled, as against the Bank, to the equitable rights of an accommodation acceptor. *Held* further that the trust-deed did not impair the "eventual remedy" of B, and that therefore he was not discharged from his suretyship under the provisions of sec. 139 of the Contract Act.—I. L. R., 3 Cal. 174.

**133.** Any variance made, without the surety's consent, in the terms of the contract between the principal and the creditor, discharges the surety as to transactions subsequent to the variance.

Discharge of surety by variance in terms of contract.

*Illustrations.*

(a.) A becomes surety to C for B's conduct as a manager in C's Bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b.) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an act of the legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c.) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for monies received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him, and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d.) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e.) C contracts to lend B 5,000 rupees on the first March. A guarantees repayment. C pays the 5,000 rupees to B on the first January. A is discharged from his liability, as the Contract has been varied, inasmuch as C might sue B for the money before the first of March.

**Notes.**

Where a plaintiff sued a principal and a surety for arrears of rent, and it appeared that the principal was dead at the time the suit was instituted, and where the representative of the principal was not made a party till after the right to recover the arrears as against him was barred by limitation:—*Held*, that the surety was still liable, the suit as against him having been instituted within the period allowed. *Hajarimal v. Krishanarav*, I. L. R., Bom., 647, cited and approved.—I. L. R., 12 Cal. 330.

A kabuliyat, whereby a lessee agrees, without the consent of the person guaranteeing the payment of the rent agreed to be paid under a former kabuliyat, that he will pay rent at a higher rate than that agreed to be paid in such former kabuliyat, amounts to a variance of the terms of the contract of guarantee, and discharges the lessee's surety in respect of arrears of rent accruing subsequent to such variance.—3 Al. 9.

**134.** The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.\*

Discharge of surety by release or discharge of principal debtor.

\* See secs. 39, 53, 54, 55, 62, 63, 67, 118, 120, *supra*.



*Illustrations.*

(a.) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed, and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b.) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for the irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c.) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

**Notes.**

In a suit against the principal debtor and the surety, the omission of the creditor to effect service of summons on the principal debtor does not discharge the surety from his liability, under section 134 of the Contract Act IX of 1872.—I. L. R., 14 Bom. 267.

A decree-holder, in execution-proceedings, agreed to accept payment of the decretal amount by the judgment-debtors in annual instalments. He also accepted from certain other persons a surety-bond in the following terms :—“ In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month ; and for the satisfaction of the decree holder we, the executants stand as sureties of the judgment debtors.” The judgment-debtors paid five instalments and then made default. The decree-holder, omitted to apply for execution and the decree became time barred. He then sued the sureties to recover the amount of the decree :—*Held* that the terms of the bond requiring the creditor to execute his decree within one month were peremptory, and imported much more than the usual agreement under such circumstances, that the decree-holder might execute his decree if he pleased, on a default ; that the legal consequence of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under sec. 134 of the Contract Act, stand discharged likewise ; that his action was much more serious than “mere forbearance” in favour of his debtors, in the sense of sec. 137 ; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (sec. 139) ; that he had deprived the sureties of the benefit of the security constituted by the decree ; that they were therefore discharged to the extent of the value of that security (sec. 141) ; and that the suit must consequently be dismissed.—8 Al. 259.

The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under sec. 134. of the Contract Act (IX of 1872), even though the non-suing within such period arose from the creditor's forbearance. Section 137 of the Contract Act does not limit the effect of sec. 134. Its object is to explain and prevent misconception as the meaning of sec. 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence. *Hajarimal v. Krishanarav and Krishto Kishori Chowdhraim*



*v. Radha Romun Munshi*, dissented from. *Hazari v. Chunni Lal*, referred to.—11 Al. 310.

See I. L. R., 3 Cal. 174, noted under section 132 ; 7 Bom. 146, noted under section 137.

**135.** A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

#### Notes.

The drawer of hundis paid advance interest to the holder to obtain time, which he did obtain for payment after due date. *Held* that the liability of an accommodation acceptor of the hundis depended on whether he knew of, and consented to, this arrangement. *Held* on the merits that he knew of, and consented to, advanced interest being taken.—I. L. R., 6 Cal. 241.

See I. L. R., 3 Cal. 174, noted under sec. 132 ; 13 Madr. 172, noted under sec. 37 of the Negotiable Instruments Act.

**136.** Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Surety not discharged when contract made with third person to give time to principal debtor.

#### Illustration.

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

**137.** Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Creditor's forbearance to sue does not discharge surety.

#### Illustration.

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

#### Note.

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal.—I. L. R., 7 Bom. 146.

See I. L. R., 8 Al. 259 and 11 Al. 310, noted under sec. 134.

**138.** Where there are co-sureties, a release by the creditor of one of them does not discharge the others ; neither does it free the surety so released from his responsibility to the other sureties.\*

Release of one co-surety does not discharge others.

\* See sec. 44, *supra*.

**139.** If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

*Illustrations.*

(a.) B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, pre-pays to B the last two instalments. A is discharged by this pre-payment.\*

(b.) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A, as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c.) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

**Note.**

See I. L. R., 3 Cal. 174, noted under sec. 132; 12 Cal. 330, noted under sec. 133; 8 Al. 259, noted under sec. 134.

**140.** Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.†

of surety on payment or performance.

**141.** A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.‡

Surety's right to benefit of creditor's securities.

*Illustrations.*

(a.) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

\* See sec. 133, *supra*.

† *e. g.*, the right to stop in transit.

‡ See sec. 139, *supra*.

(b.) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c.) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

#### Notes.

In August, 1889, one Khimji Jairam was indebted to the Bank of Bengal (the defendants) in the sum of Rs. 3,15,000. The Bank pressed for security or payment, and on the 5th September, 1889, Khimji Jairam executed, in favour of the Bank, two mortgages of certain immoveable properties the value of which was estimated to be Rs. 1,35,000. The mortgages, though stamped to secure this amount only, were drawn to cover the whole liability of Khimji Jairam to the Bank, and recited that he had become largely indebted to the Bank on certain bills, &c., and had agreed to give security in respect of such indebtedness as was thereafter expressed, and they contained covenants by Khimji Jairam to pay to the Bank all sums of money then due, or thereafter to become due, by him in respect of such bills, &c. Besides the said two mortgages, the Bank obtained other securities for a further sum of Rs. 55,000, making the total sum secured Rs. 1,90,000, and leaving a balance of Rs. 1,25,000 unsecured. Under these circumstances the Bank refused to renew certain bills of Khimji Jairam's which fell due on the 9th September, 1889, unless further security were given, and accordingly the plaintiff became surety for Khimji Jairam for the sum of Rs. 1,25,000. This sum he was subsequently obliged to pay, and he then brought this suit claiming to share in the proceeds of the mortgages held as security by the Bank. He contended that these mortgages were given as security for the whole debt (*viz.* Rs. 3,15,000); that of this debt he, as surety, had paid a part, *viz.* Rs. 1,25,000, to the Bank; and that he was, therefore, to that extent entitled to stand in the place of the Bank and to receive a share of the proceeds of the said securities proportioned to the sum which he had paid. *Held*, that the plaintiff was not entitled to the benefit of the securities held by the Bank until the whole of the debt due to the Bank by Khimji Jairam was paid. A surety who has paid the debt which he has guaranteed, has a right to the securities held by the creditor, because as between the principal debtor and surety the principal is under an obligation to indemnify the surety. The equity between the creditor and the surety is that the creditor shall not do anything to deprive the surety of that right. But the creditor's right to hold his securities until his whole debt is paid is paramount to the surety's claim upon such securities, which only arises when the creditor's claim against such securities has been satisfied.—I. L. R., 15 Bom. 48.

See I. L. R., 8 Al. 259, noted under sec. 134; 14 Bom. 299, noted under sec. 124.

**142.** Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

**Notes.**

M was declared the highest bidder at a sale of an abkari farm for three years, and his bid was accepted subject to his furnishing the security required by the conditions of sale. Having failed to furnish security, the farm was re-sold at a loss of Rs. 4,875, and M became indebted to Government in that amount. On the re-sale, M was again declared purchaser, and being unable to furnish the necessary security, N was accepted as his surety for the due fulfilment of the conditions of the lease to be performed by M. N did not inquire, and was not informed by the Collector, as to the debt due by M, when he executed the surety-bond. *Held*, in a suit to enforce this bond (which was executed before the Indian Contract Act, 1872, came into force) against N, that N was not discharged by reason of the fact that the indebtedness of M was not disclosed to him by the Collector.—I. L. R., 6 Madr. 406.

See 14 Bom. 299, noted under sec. 124.

**143.** Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance is invalid.

Guarantee obtained by concealment, invalid.

**Illustrations.**

(a.) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b.) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

**Note.**

In August, 1881, the defendants became sureties to the Bank of Bengal for the due discharge by one Bhau Krishnarav of the duties and liabilities of the office of *khajanchi* of the Bank in Bombay. Chau Krishnarav was the second clerk in the Bank, and it was arranged between him and the Agent that he should still continue to fill that office. He did so after his appointment as *khajanchi*, and he received the same salary as before in respect of it. In 1889, defalcations, for which as *khajanchi* he was responsible, were discovered to the extent of Rs. 1,42,142. The Bank obtained a decree against him for the total amount, and they sued the defendants as securities. The defendants pleaded that they were not liable, inasmuch as the Bank had appointed Bhau Krishnarav to perform the duties of second clerk, in addition to those of *khajanchi*, without their knowledge and consent, and they contended that such appointment amounted to a subsequent variation of the contract, which discharged them, under sec. 143 of the Contract Act (IX of 1872), as to transactions subsequent to the variance. The Court was of opinion that inasmuch as the evidence showed that Bhau Krishnarav was second clerk at the time of his appointment as *khajanchi* and continued afterwards to fill that office by arrangement between him and the Agent of the Bank, the question was not whether there had been a subsequent variation of the contract, but whether, as the surety-bond was silent as to this part of the arrangement between the Bank and Bhau Krishnarav and it was made (as the defendants alleged) with-

out their knowledge and consent, they were discharged from liability on the ground that a material circumstance had been concealed from them. *Held*, that the defendants were not discharged from liability. The expression "keeping silence" in sec. 143 of the Contract Act clearly implies intentional concealment as distinguished from mere not-disclosure. The withholding must be fraudulent, as necessarily is the case when a material circumstance is intentionally concealed. In this case there was not the slightest reason to suppose that there had been any intentional concealment by the Bank of the fact that Bhau Krishnarav was to continue to fill the office of second-clerk, or that, if the defendants had been informed of it, it would have in the least degree affected their readiness to make themselves liable for his faithful discharge of the duties of *khajanchi*. The evidence showed that the duties of the two offices were perfectly distinct, and, therefore, even if Bhau Krishnarav had been re-appointed to the office of second clerk after his appointment to the office of *khajanchi*, (as it was contended for the defendants was the proper way of regarding what occurred), there would have been no material alteration in the duties of *khajanchi* which would have relieved the defendants from their obligation as sureties, but merely the addition of a new office which would not affect the sureties' liability, unless indeed the surety-bond contained an agreement that the principal should not undertake any other business. It was also contended for the defendants that they were discharged from liability, inasmuch as in the year 1883 the names on certain bills discounted with the Bank were found to be forged. The Bank then made a claim upon Krishnarav in respect thereof, and he repudiated his liability. The defendants contended, on the authority of *Phillips v. Foxall* (L. R., 7 Q. B., 666), that it was the duty of the Bank to have informed them of this occurrence at that time. *Held*, (distinguishing *Phillips v. Foxall*), that it could not have been assumed that Krishnarav was infallible in detecting forgeries and the guarantee given by the defendants was not, therefore, founded on that assumption, and, therefore, fair dealing could not require that the Bank should at once have informed the sureties as soon as Krishnarav had proved to be fallible.—I. L. R., 15 Bom. 585.

**144.** Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.\*

**145.** In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

#### *Illustrations.*

(a.) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but he is compelled to pay

\* See sec. 33, *supra*.

the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b.) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A, to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c.) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees, in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

**146.** Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.\*

Co-sureties liable to contribute equally.

*Illustrations.*

(a.) A, B, and C, are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B, and C, are liable, as between themselves, to pay 1,000 rupees each.

(b.) A, B, and C, are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B, and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

**147.** Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.\*

Liability of co-sureties bound in different sums.

*Illustrations.*

(a.) A, B, and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B, and C, are each liable to pay 10,000 rupees.

(b.) A, B, and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c.) A, B, and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that

\* See sec. 43, *supra*.

of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B, and C, have to pay each the full penalty of his bond.

## CHAPTER IX.

### OF BAILMENT.

**148.** A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor.' The person to whom they are delivered is called the 'bailee.'

*Explanation.*—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

**149.** The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

**150.** The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

#### *Illustrations.*

(a.) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b.) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

#### **Note.**

The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases, from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for him to give a *prima facie* explana-



tion in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not *prima facie* improbable, the Court is bound in law to find in his favour, and the mere happening of the accident is not sufficient proof of negligence. S hired a horse from W, and while it was in his custody it died from rupture of the diaphragm, which was proved to have been caused by over-exertion on a full stomach. In a suit by W against S to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding-cane, that it shortly afterwards again became excited, bolted for two miles, and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that, for some time previously, it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was a likely result of the horse running away while its stomach was distended with food. The Court of first instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property, that he must have used his whip freely, or done something else which caused the horse to bolt, and that in so doing he had acted without reasonable care, and had thus caused the animal's death. The Court accordingly decreed the claim. *Held* by EDGE, C.J., that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave and which was neither contradicted nor *prima facie* improbable; and that the decree of the lower Court, being unsupported by any proof, and based on speculation and assumption, was one which that Court had no jurisdiction to pass, and should consequently be set aside in revision under sec. 622 of the Civil Procedure Code. *Per* BRODHURST, J., that as the decree was not only unsupported by proof, but opposed to the evidence on the record, the lower Court had "acted in the exercise of its jurisdiction illegally," within the meaning of sec. 622.—I. L. R., 9 Al. 398.

**151.** In all cases of bailment the bailee is bound to take  
 Care to be taken by as much care of the goods bailed to him  
 bailee. as a man of ordinary prudence would,  
 under similar circumstances, take of his own goods of the same  
 bulk, quality, and value as the goods bailed.\*

#### Notes.

In a suit for damages for loss of passenger's luggage by the wreck of a ship belonging to a foreign company, it appeared that the plaintiff had received a ticket in the French language, which, on its face, stated that it ought to be signed by the passenger, and that it was issued subject to certain conditions on the back. These conditions, among other things, stated that the company would not be responsible for loss or damage arising from accidents or risks of the sea; that the ticket was delivered subject to the conditions that certain articles of a specified nature should be made the subject of a special declaration, in default of which the company would not be liable; that the company would not be answerable for unregistered luggage; and that luggage might be insured at any of the company's offices.

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\* As to railway contracts, see Act IV. of 1879, sec. 10.

It was not stated where registration of luggage might be effected. The ticket was not signed by the plaintiff. The plaintiff alleged that he did not understand the French language, and that the conditions had not been explained to him by any person. *Held* that the company being a foreign company were not common carriers; that the plaintiff was bound by the clauses and conditions on the back of the passage-ticket; that none of the conditions had the effect of relieving the company from the consequences of their own negligence; that, in order to establish a defence, upon the ground that the plaintiff's luggage was not registered, it was necessary for the defendants to prove not only that the plaintiff was bound by the conditions, but also that they were ready and willing to register the plaintiff's luggage, and that the plaintiff did not in fact register it; that, as the contract was made in Calcutta, the defendants were bound by the provisions of sec. 151 of the Indian Contract Act.—I. L. R., 6 Cal. 227.

The plaintiff despatched certain goods by the E. I. Railway Co. for carriage to A, and signed a special contract, in conformity with the form approved by the Governor-General in Council under sec. 10 of Act IV of 1879, holding the company "harmless and free from all responsibility in regard to any loss destruction or deterioration of, or damage to, the said consignment from any cause whatever before, during, and after transit over the said Railway or other Railway lines working in connection therewith." The goods were short delivered and the plaintiff brought a suit to recover their value. *Held*.—*Per* GARTH, C.J., Prinsep, J., and Wilson, J.—That the Railway Company could not be held liable to account to the consignee for any loss from any cause whatever during the whole time that the goods were under their charge, inasmuch as the plaintiff had entered into a special contract to hold them harmless in accordance with sec. 10 of Act IV of 1879. *Held*.—*Per* O'KINEALY, J., that it was doubtful whether secs. 151 and 161 of the Contract Act applied to carriers by rail; but even assuming that these sections did not apply, the Railway Company would be in the position of carriers before the passing of the Carriers Act, and were entitled to protect themselves from liability by special contract.—10 Cal. 210.

See I. L. R., 9 Al. 398, noted under sec. 150; 3 Bom. 109, noted under sec. 152.

**152.** The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Bailee when not liable for loss, ect., of thing bailed.

#### Note.

The English Common-law rule, under which common carriers are held liable as insurers of goods against all risks, except the act of God or the king's enemies, is not now in force in India. In cases not met by the special provisions of the Act relating to railways and carriers, the liability of carriers for loss or damage to goods entrusted to them is prescribed by secs. 151 and 152 of the Indian Contract Act (IX of 1872). The plaintiff's goods were being carried in a train of the defendants from Nandgaon to Egatpuri. During the journey the train was plundered by robbers, and the plaintiff's goods were stolen. *Held* that the defendants were entitled to the benefit of sec. 152 of the Indian Contract Act, and should be permitted to give evidence that the robbers of the plaintiff's goods were not

the servants or agents of the defendants, and that the defendants (by their servants and agents) took as much care of their goods as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods in question.—I. L. R., 3 Bom. 109.

See I. L. R., 9 Al. 398, noted under sec. 150.

**153.** A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Termination of bailment by bailee's act inconsistent with conditions.

*Illustration.*

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

**154.** If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Liability of bailee making unauthorized use of goods bailed.

*Illustrations.*

(a.) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls, and is injured. B is liable to make compensation to A for the injury done to the horse.

(b.) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Katak instead. The horse accidentally falls, and is injured. A is liable to make compensation to B for the injury to the horse.

**155.** If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Effect of mixture, with bailor's consent, of his goods with goods of bailee.

**156.** If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remain in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Effect of mixture, without bailor's consent, when the goods can be separated.

*Illustration.*

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

**157.** If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Effect of mixture, without bailor's consent, when the goods cannot be separated.

*Illustration.*

A bails a barrel of Cape flour, worth Rs. 45, to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

**158.** Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall re-pay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Re-payment, by bailor, of necessary expenses.

**159.** The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.\*

Restoration of goods bailed gratuitously.

It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.†

Return of goods bailed on expiration of time or accomplishment of purpose.

**161.** If, by the fault of the bailee, the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time.‡

Bailee's responsibility when goods are not duly delivered or tendered.

**Note.**—See I. L. R., 10 Cal. 210, noted under sec. 151.

\* See story, *Bailments*, § 258.

† But see secs. 24, 152, *supra*, and 170, *infra*, to the provisions of which this section must be subject.

‡ As to railway contracts, see Act IX. of 1890.

Termination of gratuitous bailment by death.

**162.** A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

**163.** In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Bailor entitled to increase or profit from goods bailed.

*Illustration.*

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

**164.** The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

Bailor's responsibility to bailee.

**165.** If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by several joint owners.

**166.** If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.\*

Bailee not responsible on re-delivery to bailor without title.

**167.** If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Right of third person claiming goods bailed.

**168.** The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.†

Right to finder of goods.

May sue for specific reward offered.

\* See Act I. of 1872, sec. 117.

† See Story, *Bailments*, § 121a.

**169.** When a thing, which is commonly the subject of sale, is lost, if the owner cannot, with reasonable diligence, be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value; or,

(2) when the lawful charges of the finder in respect of the thing found amount to two-thirds of its value.\*

**170.** Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

*Illustrations.*

(a.) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b.) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give A three months' credit for the price. B is not entitled to retain the coat until he is paid.

**Notes.**

S delivered J an organ to repair, J promising to repair it for Rs. 100. J subsequently refused to repair it for that sum, and claimed to be entitled to retain the organ until he received certain remuneration for the work done. *Held*, that as where there is an express contract, it must be performed in its entirety or nothing can be claimed under it, and there is only room for a *quantum meruit* claim where no express contract has been made, J was not entitled to retain the organ until he was paid.—I. L. R., 6 Al. 138.

See I. L. R., 8 Cal. 312, noted under sec. 171.

**171.** Bankers, factors, wharfingers, attorneys, of a High Court, and policy-brokers, may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.†

**Notes.**

Where a person does work under an entire contract with reference to goods delivered at different times such as to establish a lien, he is entitled to

\* New York Civil C. de. § 943.

† As to the lien of an agent, see sec. 221, *infra*. As to the lien of Railway Administrations, see Act IX. of 1890.

that lien on all goods dealt with under that contract. *Chase v. West more* (5 M. & S. 180) followed. The fact that a manufacturer has a wharf upon which he receives goods brought to him by customers does not entitle him to claim a lien as a wharfinger upon such goods.—I. L. R., 8 Cal. 312.

Messrs. E. L. & Co. were the secretaries and treasurers of the above company, which went into liquidation. Messrs. E. L. & Co. claimed to be creditors of the company for Rs. 1,12,000 in respect of advances made to, and expenses incurred and disbursements made on behalf of, the company from time to time and in the conduct of its business. Rupees one lakh of this amount was in respect of sums lent to the company and guaranteed by the claimants. The remainder consisted of money expended in the working of the company's business. Messrs. E. L. & Co. claimed to be in possession generally of all the property of the company, and to be entitled to a lien on such property in respect of the above claim of Rs. 1,12,000. Other creditors disputed the possession and the right to the lien claimed. *Held*, that, even assuming Messrs. E. L. & Co. to be in possession of the property of the company as alleged, they had not the lien that they claimed. A lien is either general or particular. The claimants had not a general lien, because they were neither "bankers, factors, wharfingers, attorneys, or policy-brokers," to whom a general lien is limited by sec. 171 of the Contract Act. Nor had they any particular lien: not under sec. 217 of the Contract Act, because that section was inapplicable, having to do only with a lien on a sum of money of the principal in the hands of the agent: nor under sec. 221 of the Contract Act, because the sums advanced and expended were not, as required by that section, "disbursements and services in respect of" the property on which the lien was claimed, but were loans made on behalf of the company generally and for the purposes of the whole concern.—I. L. R., 13 Bom. 314.

### BAILMENTS OF PLEDGES.

**172.** The bailment of goods as security for payment of 'Pledge,' 'pawnor,' and a debt or performance of a promise is 'pawnee,' defined. called 'pledge.' The bailor is in this case called the pawner. The bailee is called the "pawnee."

The pawnee may retain the goods pledged, not only for payment of the debt, or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

**174.** The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Pawnee not to retain for debt or promise other than that for which goods pledged.

Presumption in case of subsequent advances.



**175.** The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.  
*Pawnee's right as to extraordinary expenses incurred.*

If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit\* against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

**177.** If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them;† but he must, in that case, pay, in addition, any expenses which have arisen from his default.

**178.** A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods, or documents: Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly:

Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.‡

#### Notes.

G went to the plaintiff's place of business in Calcutta, and representing to him that he wanted some jewellery on inspection, and would pur-

\* Within three years from the making of the loan or the breach of the promise—Act No. XV. of 1877, Sch. II. Nos. 57, 115.

† For limitation, see Act XV. of 1877, Sch. II., No. 145.

See 5 & 6 Vic., c. 39, secs. 1 and 3.

chase it if he did not return within ten days, obtained from the plaintiff a quantity of jewellery, depositing as security Rs. 2,000 with the plaintiff. G, having thus obtained the jewellery, took it to K at his residence, which was out of the local limits of the jurisdiction of the Court, and pledged the jewellery to K for Rs. 6,000. In a suit brought against G and K to recover the jewellery or its value, G did not appear, and K alone defended the suit. *Held* that, it being, with reference to sec. 178 of the Contract Act, an essential element in the plaintiff's case that the jewellery had been obtained from the plaintiff by fraud in Calcutta, part of the cause of action against K arose in Calcutta, so as to enable the Court, leave having been obtained under cl. 12 of the chapter, to entertain the suit against him. *Held* also that the plaintiff was entitled to recover the jewellery from K under sec. 178 of the Contract Act, G having obtained it from the plaintiff by an offence or fraud within the meaning of that section.—I. L. R., 3 Cal. 264.

A servant, entrusted by his mistress with the custody of goods, pawned them during her absence. The mistress sued in *trover* for the goods. *Held* that the custody of the servant was not "possession" within the meaning of sec. 178 of the Contract Act, and that, if he was to be regarded as having taken the goods into his possession for the purpose of pawning them, the case came within the second proviso to that section, and that accordingly the action would lie.—4 Cal. 497.

**179.** Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

#### SUITS BY BAILEES OR BAILORS AGAINST WRONG-DOERS.

**180.** If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

**181.** Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

### CHAPTER X.

#### AGENCY.

##### *Appointment and Authority of Agents.*

'Agent' and 'principal' defined.

**182.** An 'agent' is a person employed to do any act for another,\* or to

\* Cf. sec. 225, *infra*. As to the effect of an agent's fraud, see sec. 17, *supra*, and sec. 238, *infra*.

represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal.'

**Note.**—See I. L. R., 3 Cal. 30, noted under sec. 185.

**183.** Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.\*

Who may employ agent.

**184.** As between the principal and third persons, any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

Consideration not necessary.

**185.** No consideration is necessary to create an agency.

**Note.**

one of several co-sharers fraudulently contrived to have an es-  
tor arrears under Act XI of 1859, and purchased it in  
1 : Held that another co-sharer aggrieved by the sale  
t to have the property reconveyed, though the period  
by sec. 33 or Act XI of 1859, and Art. 14 of the Second Schedule  
IX of 1871, for a suit to set aside the sale, had expired.—I. L. R.,  
3 Cal. 30.

Agent's authority may be expressed or implied.

**186.** The authority of an agent may be expressed or implied.†

**187.** An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Definitions of express and implied authority.

*Illustration.*

A owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an authority to order goods from C in the name of A for the purposes of the shop.

An agent, having an authority to do an act, has authority to do any lawful thing which

\* Cf. sec. 11, *supra*.

† But see Act III. of 1877, sec. 33; Act XIV. of 1882, sec. 39

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

*Illustrations.*

(a.) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b.) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

**189.** An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence in his own case under similar circumstances.\*

Agent's authority in an emergency.

*Illustrations.*

(a.) An agent for sale may have goods repaired if it be necessary.

(b.) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Katak. B may sell the provisions at Calcutta, if they will not bear the journey to Katak without spoiling.

SUB-AGENTS.

**190.** An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

When agent cannot dele-

'Sub-agent' defined.

**191.** A 'sub-agent' is a person employed by, and acting under the control of, the original agent in the business of

**192.** Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by, and responsible for, his acts, as if he were an agent originally appointed by the principal.

Representation of principal by sub-agent properly appointed.

Agent's responsibility for

The agent is responsible to the principal for the acts of the sub-agent.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong.

Sub-agent's responsibility.

\* But see sec. 214, *infra*.

**193.** Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed,\* nor is that person responsible to the principal.

Agent's responsibility for sub-agent appointed without authority.

**194.** Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent, of the principal for such part of the business of the agency as is entrusted to him.

Relation between principal and person duly appointed by agent to act in business of agency.

#### *Illustrations.*

(a.) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b.) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

**195.** In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty in naming such person.

#### *Illustrations.*

(a.) A instructs B, a merchant, to buy a ship for him. B employs a ship-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy, and is lost. B is not, but the surveyor is, responsible to A.

(b.) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

### RATIFICATION.

of person as to acts done for him without authority.  
Effect of ratification.

**196.** Where acts† are done by one person on behalf of another, but without his knowledge or authority, he

\* Unless, of course, he ratifies them, see sec. 196, *infra*.

† i. e., lawful acts.

may elect to ratify or to disown such act. If he ratify them, the same effects will follow as if they had been performed by his authority.

**197.** Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Ratification may be expressed or implied.

*Illustrations.*

(a.) A, without authority, buys goods for B. Afterwards B sells them to C on his own account. B's conduct implies a ratification of the purchase made for him by A.

(b.) A, 'without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

**198.** No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Knowledge requisite to valid ratification.

Effect of ratifying unauthorized act forming part of a transaction.

**199.** A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction which such act formed a part.

**200.** An act done by one person on behalf of another without such other person's authority, which, if done with authority, have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Ratification of unauthorized act cannot injure third person.

*Illustrations.*

(a.) A, not being authorized thereto by B, demands, on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b.) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

REVOCATION OF AUTHORITY.

**201.** An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

Termination of agency.

**202.** Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Termination of agency where agent has an interest in subject-matter.

*Illustrations.*

(a.) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b.) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

**Note.**—See I. L. R., 5 Bom. 253, noted under sec. 205.

**203.** The principal may, save as is otherwise provided by the last proceeding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal may revoke agent's authority.

**Note.**—See I. L. R., 5 Bom. 253, noted under sec. 205.

**204.** The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation where authority has been partly exercised.

*Illustrations.*

(a.) A, authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's monies remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b.) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's monies remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

**205.** Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation\* to the agent, or the agent or the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation for revocation by principal, or renunciation by agent.

**Note.**

The defendant, by an agreement in the nature of a letter of attorney, constituted the plaintiff and his descendants the hereditary agents of the

\* See sec. 73, *supra*.



defendant, give him authority to collect the rents of his share in an inam village, and promised to pay him an annual salary out of the rents. *Held* that as between the parties and during their life-time the appointment was valid and binding, whether or not any valuable consideration passed,—the mere acceptance of the office by the plaintiff being a sufficient consideration for the appointment. But, independently of the terms of the agreement, and whether or not the agency had been created for valuable, consideration the defendant had, under the general provisions of sec. 203 of the Indian Contract Act (IX of 1872), a right to revoke the authority, as the mere arrangement that the plaintiff's salary should be paid out of the rents could not be regarded as giving to the plaintiff an interest in the property, the subject-matter of the agency, within the meaning of sec. 202. If the defendant had revoked the agency improperly, the remedy lay, under ordinary circumstances, in a suit by the plaintiff for damages for breach of contract. Where, however, the plaintiff chose to sue for specific performance, and demanded arrears of salary; *Held* that, without a valuable consideration for the defendant's promise, the agreement passed by him to the plaintiff would be *nudum pactum*, and the plaintiff would not be entitled to recover, except for work and services actually rendered.—I. L. R., 5 Bom. 253.

**206.** Reasonable notice must be given of such revocation of revocation or tion or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Revocation and renunciation may be expressed or implied.

**207.** Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

*Illustration.*

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

**208.** The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

When termination of agent's authority takes effect as to agent and as to third persons.

*Illustrations.*

(a.) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b.) A, at Madras, by letter, directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first

letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c.) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

**209.** When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's duty on termination of agency by principal's death or insanity.

**210.** The termination of the authority of an agent causes the termination, (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Termination of sub-agent's authority.

#### AGENT'S DUTY TO PRINCIPAL.

**211.** An agent is bound to conduct the business of his principal according to the directions given by the principal,\* or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

duty in conduct of principal's business.

#### *Illustrations.*

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.

(b.) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

**212.** An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in res-

Skill and diligence required from agent.

\* But see sec. 189, *supra*.

pect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

*Illustrations.*

(a.) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e. g., by variation of rate of exchange—but not further.

(b.) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c.) A, an insurance-broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d.) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Agent's accounts.

**213.** An agent is bound to render proper accounts to his principal on demand.

**214.** It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.\*

Agent's duty to communicate with principal.

**215.** If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal, and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Right of principal when agent deals on his own account in business of agency without principal's consent.

*Illustrations.*

(a.) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b.) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

**216.** If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

*Illustration.*

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

**217.** An agent may retain,\* out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's right of retainer out of sums received on principal's account.

**Note.**—See I. L. R., 13 Bom. 314, noted under sec. 171.

**218.** Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Agent's duty to pay sums received for principal.

**219.** In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

When agent's remuneration becomes due.

**220.** An agent, who is guilty of misconduct in the business of the agency,† is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Agent not entitled to remuneration for business misconducted.

\* See sec. 221, *infra*.

† See secs. 195, 211, 212, 213, 214, 218, *supra*.

*Illustrations.*

(a.) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees, and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B.

(b.) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

**221.** In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether moveable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same, has been paid or accounted for to him.\*

Agent's lien on principal's goods and papers.

*Principal's Duty to Agent.*

**222.** The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Agent to be indemnified against consequences of lawful acts.

*Illustrations.*

(a.) B, at Singapur, under instructions from A, of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs, and expenses.

(b.) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B † B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs, and expenses.

**Note.**—See I. L. R., 13 Bom. 314, noted under sec. 171.

**223.** Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Agent to be indemnified against consequences of acts done in good faith.

\* As to the general lien of an agent who is a banker, factor, attorney, or policy-broker, see sec. 171, *supra*.

† It must be assumed that the disclosed principal could not be sued, see sec. 230, *infra*.

*Illustrations.*

(a.) A, a decree-holder, and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C in consequence of obeying A's directions.

(b.) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B, and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C, and for B's own expenses.

**224.** Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise to indemnify him against the consequences of that act.\*

Non-liability of employer of agent to do a criminal act.

*Illustrations.*

(a.) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b.) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C, and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

**225.** The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of

Compensation to agent for injury caused by principal's neglect.

*Illustration.*

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

*Effect of Agency on Contracts with third Persons.*

**226.** Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Enforcement and consequences of agent's contracts.

*Illustrations.*

(a.) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled

\* See sec. 24, *supra*.

to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

(b.) A, being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

**227.** When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Principal how far bound, when agent exceeds authority.

*Illustration.*

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

**228.** Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Principal not bound when excess of agent's authority is not separable.

*Illustration.*

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

**229.** Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Consequences of notice given to agent.

*Illustrations.*

(a.) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.

(b.) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

**230.** In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Agent cannot personally enforce, nor be bound by, on behalf of



Presumption of contract  
to contrary.

Such a contract shall be presumed  
to exist in the following cases :—

- (1.) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :
- (2.) Where the agent does not disclose the name of his principal :
- (3.) Where the principal, though disclosed, cannot be sued.

#### Notes.

The defendants let a steam-ship to the plaintiff for a certain term, and signed a charter-party "by and on behalf of the owners of the steam-ship A." The charter-party was a time-charter, to commence on arrival at Calcutta, and to terminate at one of certain ports; the steamer in the interim to ply to and from any port the charterers pleased: It was agreed that the steamer should be provided "with a proper and sufficient crew of seamen, engineers, stokers, firemen, and other necessary persons for working cargo with all dispatch;" and that in taking and discharging cargo, "the master and his crew with his boats shall be aiding and assisting to the utmost of their power;" and that "the owners or agents of the said steam-ship shall be held responsible to the said charterers for any incapacity, want of skill, insobriety, or negligence on the part of master, officers, engineers, stokers, firemen, or crew of the said steam-ship." The names of the principals were not disclosed in the charter-party, but were verbally disclosed before the charter-party was signed. In an action against the agents for damages for refusing to supply stevedores and other persons, in addition to the crew, when loading and discharging cargo, *held* that the presumption created by the second clause of sec. 230 of the Contract Act is merely a *prima facie* one, and may be rebutted, and that the contract was not personally binding on the agents, because the *prima facie* presumption of an intention to contract personally was rebutted by the language of the contract itself. *Held* also that the terms of the charter-party showed that the crew only were to assist in loading and discharging cargo; and that the plaintiffs were not entitled to call on those responsible for the steamer to load and discharge cargo by stevedores instead of by the crew. Reading the second part of sec. 230 of the Contract Act with sec. 92 of the Evidence Act: *Semble*.—That if, on the face of a written contract, an agent appears to be personally liable, he cannot escape liability by evidence of any disclosure of his principal's name apart from the contract.—I.L.R., 5 Cal. 71.

The plaintiffs by charter-party contracted to let the steam-ship *Oakdale* to the defendants upon certain terms. The first clause of the charter-party stated that the plaintiffs "agreed as agents for owners of the said steam-ship," and subsequent clauses provided that the owners should bind themselves to receive the cargo on board, and that the master on behalf of the owners should have a lien on the cargo for freight, &c. The charter-party was signed by the plaintiffs and defendants in their own names. The plaintiffs sued the defendants for breach of the charter-party in refusing to load the said steam-ship. *Held* that the plaintiffs had contracted as agents, and were, therefore, not entitled to sue. If a contract made by a person who is an agent is worded so as, when taken as a whole, to convey to the other contracting party the notion that the agent is contracting in that character, he cannot sue or be sued on the contract. Where one contract-

ing party knows that the other is contracting as an agent for a third person whose name he also knows, the presumption laid down in clause 2 of sec. 230 of the Indian Contract Act (IX of 1872) does not arise, although at the time of making the contract the agent does not disclose the name of his principal. The essential point is the knowledge, and actual knowledge is equivalent to disclosure, the whole object of which would be to convey such knowledge.—5 Bom. 584.

See I. L. R., 6 Bom. 326, noted under sec. 234.

**231.** If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

Rights of parties to a contract made by agent not disclosed.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

#### Note.

The defendant, who resided in Dholera, employed the firm of S K as his agents in Bombay. A running account was kept, in which the defendant was debited with the price of goods purchased on his account by S. K, and was credited with the price of goods sold by S K on his account, and with the amount of the remittances which he made from time to time. In fulfilment of orders received from the defendant on 16th March, 1879, S K, on the 23rd March, 1879, bought from the plaintiff 20,000 cocoanuts (out of a cargo of 42,000 then lately arrived at Bombay); on the 24th March, 1879, 10,160 cocoanuts (out of a cargo of 23,000); and on the 27th March, 26,626 cocoanuts (out of a cargo of 71,250). By each of these three contracts it was agreed that the purchase-money should be paid on delivery. At the time of making these contracts the plaintiff did not know, nor had he any reason to suspect, that S K was an agent and not principal in the transactions. On the 27th and 28th March, 1879, the 30,160 cocoanuts (the subject-matter of the first two contracts) were transhipped into the vessel "Lakhmiprasad," and on the 29th March, 1879, the 26,626 cocoanuts (the subject-matter of the third contract) were transhipped into the vessel "Lalsari" for conveyance to Dholera. The "Lalsari" sailed from Bombay on the 31st March, and on her arrival at Dholera the defendant obtained possession of the 3rd lot of 26,626 cocoanuts which had been shipped on board. On the 1st April S K received from the defendant remittances sufficient to pay for all the cocoanuts, and to leave a balance of Rs. 1,727 to the credit of the defendant in his account with S K. These remittances were made by the defendant in good faith, and were received by S K at a time when the plaintiff gave credit to S K, and did not know of any one else to be charged with the price of the cocoanuts. On the 2nd April the firm of S K stopped payment, and on the 23rd April, 1871, the plaintiff, in consequence of the failure of S K and the non-payment of the price of the

cocoanuts, transhipped the 30,160 cocoanuts (the subject of the first two contracts) from the "Lakhmiprasad" into the "Ramprasad." These cocoanuts, were subsequently sold, and the proceeds of the sale deposited in the Bank of Bombay to abide the result of this suit. On the 4th April the plaintiff discovered that the defendant was the principal in the cocoanut transaction, and brought this suit against him to recover the price of the three lots of cocoanuts. The defendant denied that S K had authority to pledge his (defendant's) credit in making purchases, and contended that, having in good faith paid his agent S K for the cocoanuts prior to the institution of the suit, he (the defendant) was not liable to the plaintiff. *Held* that the plaintiff was entitled to recover. The rule of English law, which makes the liability of an undisclosed principal subject to the qualification that he has not *bona fide* paid the agent, or that the state of accounts has not been altered, is not adopted in the Indian Contract Act. Sec. 232 is to be read as a qualification of the first portion of para. 1 of sec. 231, which gives a principal a general right to enforce a contract entered into by his agent. Sec. 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party. The second clause of para. 1 of sec. 231 gives a party contracting with an agent the same rights against the principal only as he would have had against the agent; and sec. 234 adds a further qualification to his rights as against the principal. Sec. 232 of the Indian Contract Act adopts the qualification imposed by English law upon the right of the principal to enforce a contract, viz., that he must take the contract subject to all the equities, in the same way as if the agent were the real principal; but it does not impose upon the right of the other contracting party the qualification laid down by the cases of *Thompson v. Davenport* (Smith's L. R., 7th edn., 364) and *Armstrong v. Stokes* (L. R., 7 Q. B. 598), namely, that the principal has not paid the agent, or that the state of the account between the principal and agent has not been altered to the prejudice of the principal. The only qualification to the right of the other contracting party against the principal is that imposed by sec. 234, namely, that he has not induced the principal to act upon the belief that the agent only will be held liable. A transhipment-permit issued under sec. 128 of the Indian Sea Customs Act (VIII of 1878) does not, like a bill of lading, represent the goods mentioned in it, or give any lien upon or control over them.—I. L. R., 4 Bom. 447.

**232.** Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

*Illustration.*

A, who owes 500 rupees to B, sells 1,000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

I. L. R., 4 Bom. 447, noted under sec. 231.

**233.** In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Right of person dealing  
with agent personally liable.

*Illustration.*

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

**Notes.**

The obligee under a hypothecation bond brought a suit thereon against one who, upon the face of the instrument, contracted as obligor, but whom when the suit was instituted, the plaintiff knew to have acted as agent in the transaction for a third person. Having obtained a decree he satisfied it in part by attachment of a sum of money, and next caused the hypothecated property to be sold, and purchased it himself. Upon attempting to obtain possession, he was successfully resisted by the principal debtor under the hypothecation bond, on the ground that the latter was the real owner of the property, and that the decree-holder had derived no title thereto from his judgment-debtor. He then sued the principal debtor to recover the balance remaining due upon the bond, after giving credit for the amount recovered by attachment in the suit against the agent. *Held* that the plaintiff having elected to hold the agent responsible upon the contract, and having obtained judgment and decree against him and written up full satisfaction of the decree, could not afterwards maintain a suit against the principal in respect of the same subject-matter. *Priestly v. Fernie* referred to.—I. L. R., 9 Al. 681.

See I. L. R., 6 Bom. 326, noted under sec. 234.

**234.** When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Consequence of inducing  
or principal to act on  
belief that principal or  
will be held exclu-  
sively.

**Note.**

By the Memorandum and Articles of Association of the New Fleming Spinning and Weaving Company, N K was appointed secretary, treasurer, and agent of the company with power to raise or borrow from time to time, in the name or otherwise on behalf of the company, such sums of money as he might think expedient by bonds, debentures, or promissory notes, or in such other manner as he might deem best ; and for the purpose of securing the repayment of any money so borrowed to make any arrangement which he might deem expedient by conveying or assigning away property of the company to trustees or otherwise. N K was also secretary, treasurer, and agent of four other mill-companies in Bombay. On the 31st October, 1878, the directors passed the following resolution: " That the unallotted shares be filled up in the name of Nursey Kessowji, Esquire, secretary, treasurer, and agent, who is empowered to mortgage them at a fair rate of interest to enable him to obtain funds for the use of the company." On the 11th November, 1878, P advanced a sum of Rs. 1,00,500 upon the terms

contained in a Guzerati writing of that date, and signed by N K. In this document N K acknowledged the receipt of the money for which 335 shares in the New Fleming Spinning and Weaving Company were duly handed over as security, and he agreed to repay it within three months. The last clause in the agreement stated that it was "duly agreed to and approved by him (N K) and his heirs and representatives." As an additional security, P, when advancing the loan, obtained from K N (father of N K) a guarantee in the following terms: "To Thuker Parmanundass Jivandass. Written by Sha Kessowji Naik. To wit: This day Sha Nursey Kessowji has received from you Rs. 1,00,500, namely, one lakh and five hundred, having deposited, by way of security, 335 (namely, three hundred and thirty-five) 'shares' of 'The New Fleming Spinning and Weaving Company, Limited.' If your said money cannot be paid with interest by the expiration of the time, and you should sustain any kind of loss in (respect of) that, I am duly to pay the same. As to that I am not to raise any obstacle or objection. In case it should be necessary, I am to fill up and duly deliver to you an "indemnity-bond" on stamped paper through your Vakeel (Solicitor). This writing is duly agreed to and approved by me and my heirs and representatives. Bombay, the 11th of November in the English year 1878." On the evening of the day on which the loan was made, viz., 11th November, 1878, but without the knowledge of K N, it was agreed between N, K, and P, that the time for the repayment of the loan should be extended to six months. In December, 1878, N K became insolvent, and on 28th December, 1878, a petition was presented in the High Court to wind up the New Fleming Spinning and Weaving Company. On the 30th December, P, through his solicitors, wrote a letter to the company, stating that N K had obtained a loan from him of Rs. 1,00,500 on behalf of the company, and inquiring whether the fact appeared in the company's books. To this letter he received a reply signed by "K N, director," stating that the loan appeared in the books in P's name. On the 17th January, 1879, an order was made for the winding-up of the New Fleming Spinning and Weaving Company, and on the 4th February, 1879, P gave notice to the official liquidators of the company of his claim against the company for the money advanced by him on the 11th November, 1878. In March, 1879, he filed a suit against K N to enforce his guarantee, but was unsuccessful, the Court holding that, by extending the period of the loan to six months, the agreement of the 11th November, 1878, had been materially varied without K N's knowledge, and that K N was consequently discharged. On the 24th April, 1879, P filed his affidavit in support of his claim against the company. The company resisted the claim. *Held* (1) that the directors had power, under the Memorandum and Articles of Association, to authorize N K to borrow money on behalf of the company, and that they had done so, and with that object had entrusted him with the unallotted shares. (2) That when P advanced the loan to N K, he was led to believe that N K was obtaining it on behalf of the four mill-companies of which he was secretary, treasurer, and agent, but that P was not aware and was not informed for which of the said companies the loan was obtained, and that the money was, in fact, advanced to N, as to an agent acting on behalf of an undisclosed principal. (3) That P, when he discovered that the money was obtained for the New Fleming Spinning and Weaving Company, was entitled to claim against the company and to rank as creditor of the company the amount advanced to N K with interest from the date of the loan, viz., 11th November, 1878, to the date of the presentation of the petition to the company.—I. L. R., 6 Bom. 326.

**235.** A person untruly\* representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

**236.** A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

**237.** When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has, by his words or conduct, induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

*Illustrations.*

(a.) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b.) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

**238.** Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals;† but misrepresentations made, or frauds committed, by agents in matters which do not fall within their authority do not affect their principals.

*Illustrations.*

(a.) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b.) A, the Captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.



## CHAPTER XI. OF PARTNERSHIP.

**239.** 'Partnership' is the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them.\*

'Partnership' defined.

'Firm' defined.

Persons who have entered into partnership with one another are called collectively a 'firm.'

### *Illustrations.*

(a.) A and B buy 100 bales of cotton, which they agree to sell for their joint account. A and B are partners in respect of such cotton.

(b.) A and B buy 100 bales of cotton, agreeing to share it between them. A and B are not partners.

(c.) A agrees with B, a goldsmith, to buy and furnish gold to B, to be worked up by him and sold, and that they shall share in the resulting profits or loss. A and B are partners.

(d.) A and B agree to work together as carpenters, but that A shall receive all profits and shall pay wages to B. A and B are not partners.

(e.) A and B are joint owners of a ship. This circumstance does not make them partners.

**240.** A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.

Lender not a partner by advancing money for share of profits.

**241.** In the absence of any contract to the contrary, property left by a retiring partner, or the representative of a deceased partner to be used in the business, is to be considered a loan within the meaning of the last preceding section.

Property left in business by retiring partner, or deceased partner's representative.

**242.** No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

Servant or agent remunerated by share of profits, not partner.

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\* This would apply to members of joint-stock companies: but the law applicable to them is saved by sec. 206, *infra*.



**243.** No person, being a widow or child of a deceased partner of a trader, and receiving, by way of annuity, a proportion of the fits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

Widow or child of deceased partner receiving annuity out of profits, not a partner.

**244.** No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.\*

Person receiving portion of profits for sale of good-will, not a partner.

**245.** A person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm.

Responsibility of person leading another to believe him a partner.

**246.** Any one consenting to allow himself to be represented as a partner is liable, as such, to third persons who, on the faith thereof, give credit to the partnership.†

Any person permitting himself to be represented as a partner.

**247.** A person, who is under the age of majority according to the law to which he is subject,‡ may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

Minor partner not personally liable, but his share is.

**248.** A person who has been admitted to the benefits of partnership under the age of majority ‡ becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.

Liability of minor partner on attaining majority.

**249.** Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the

Partner's liability for debts of partnership.

\* 28 and 29 Vic, c. 86.

† See Act I. of 1872, sec. 109.

‡ See Act IX. of 1875.

creditors of such firm for anything done before he became a partner.

#### Notes.

The firm of Sowerby and Co., the partners of which were W. Sowerby and Framji Edulji, took a contract from Government on 12th November 1877 to construct a barrel-house at the Gunpowder Manufactory at Kirkee, and on the 28th November 1877 the plaintiff agreed to advance monies "up to Rs. 15,000" for the purpose of enabling the firm to carry out the contract. Under the agreement the plaintiff was to receive all sums to become due from the Government on the contractor's bills and to pay the balance to the firm after repaying himself all advances with interest. On the same day the firm executed a power of attorney to the plaintiff, authorizing him to receive from the Government Engineer all such sums to become due to the firm under the contract, which power of attorney was deposited by plaintiff in the office of the Executive Engineer at Poona. In March or April 1878 Sowerby left for England, up to which time Rupees 34,900 had been advanced by the plaintiff and a balance of Rs. 14,9425-10 still remained due to him after giving credit for the sums received on the bills passed by the Executive Engineer. On 24th July 1878 the plaintiff entered into a fresh agreement with Framji Edulji, similar to the former one, to make further advances to the firm up to Rs. 16,000 in addition to Rs. 15,000 on the same terms as those mentioned in the previous agreement, and by means of these advances the contract was completed at the end of 1879. In 1878 the defendant obtained a decree against Sowerby and attached the right, title, and interest of Sowerby in a sum of Rs. 5,034-11-9 in the hands of the Executive Engineer, which was then due to the firm on the contract. The plaintiff, who alleged that Rs. 13,700-1-11 were due to him from the firm, applied to have the attachment removed which application was refused on the 30th September 1879 and the sum attached was paid to the defendant. The plaintiff sued the defendant to recover from him Rs. 5,034-11-9 :—*Held*, that although the plaintiff might be a member of an undivided Hindu family, still as the contract was entered into with the plaintiff in his individual capacity and as there was nothing on the face of the contract to show that the plaintiff was acting on behalf of the family, the plaintiff was entitled to sue alone :—*Held* also, that the first agreement of 28th November 1877, coupled with the execution of the power of attorney to him of the same date, amounted to an assignment to the plaintiff of the sums to become due to Sowerby and Co., on the bills passed by the Executive Engineer :—*Held* also, that the second agreement although made by one member only of the firm of Sowerby and Co., with the plaintiff, was under the circumstances both necessary to the carrying out of the partnership business and in accordance with the ordinary practice of such partnerships as that of Sowerby and Co., and was therefore binding on the firm, and that the two agreements accompanied by the power of attorney operated as an assignment of all the monies to become due on the contractor's bills as a security for the plaintiff's advances with interest, and that the plaintiff was therefore entitled to recover the sum claimed from the defendant.—I. L. R., 9 Bom. 311.

In a suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending business, the plaintiff stated in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as "maliks." *Held* that, under

the circumstances, the plaintiff could not maintain the suit in his individual capacity, and without joining his sons as plaintiffs with him, his sons being his partners in the ancestral business, and he not being the managing member or proprietor.--8 Al. 264.

**250.** Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

Partner's liability to third person for neglect or fraud of co-partner.

**251.** Each partner, who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose.

Partner's power to bind co-partners.

*Exception.*—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

*Illustrations.*

(a.) A and B trade in partnership, A residing in England, and B in India. A draws a bill of exchange in the name of the firm. B has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn.

(b.) A, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill.

(c.) A and B carry on business in partnership as bankers. A sum of money is received by A on behalf of the firm. A does not inform B of such receipt, and afterwards A appropriates the money to his own use. The partnership is liable to make good the money.

(d.) A and B are partners. A, with the intention of cheating B, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership business, and converts them to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.

**252.** Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all\* of them, which consent must either be expressed or be implied from a uniform course of dealing.

Annulment of contract defining partners' rights and obligations.

\* Cf. sec. 253, cl. 5, *infra*.

*Illustration.*

A, B and C, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the nett profits arising from the partnership-business shall be equally divided between them. Afterwards they carry on the partnership business for many years, A receiving one-half of the nett profits, and the other half being divided equally between B and C. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

Rules determining partners mutual relations, where no contract to contrary.

**253.** In the absence of any contract to the contrary, the relations of partners to each other are determined by the following rules:—

(1.) All partners are joint owners of all property originally brought into the partnership-stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called partnership-property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss :

(2.) All partners are entitled to share equally in the profits of the partnership-business, and must contribute equally towards the losses sustained by the partnership :

(3.) Each partner has a right to take part in the management of the partnership-business :

(4.) Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business :

(5.) When differences arise as to ordinary matters connected with the partnership-business, the decision shall be according to the opinion of the majority of the partners ; but no change in the nature of the business of the partnership can be made, except with the consent of all the partners : \*

(6.) No person can introduce a new partner into a firm without the consent of all the partners :

(7.) If, from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members :

(8.) Unless the partnership has been entered into for a fixed term, any partner may retire from it at any time :

(9.) Where a partnership has been entered into for a fixed term, no partner can, during such term, retire, except with the consent of all the partners, nor can he be expelled

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\* See sec. 252, *supra*.

by his partners for any cause whatever, except by order of Court:

(10.) Partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

**254.** At the suit of a partner the Court may dissolve the partnership in the following cases:—

(1) When a partner becomes of unsound mind:

(2) When a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors:

(3) When a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person:

(4) When any partner becomes incapable of performing his part of the partnership contract:

(5) When a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners:

(6) When the business of the partnership can only be carried on at a loss.

**Note.**—See I. L. R., 5 Bom. 56, noted under section 265.

Dissolution of partnership by prohibition of business.

**255.** A partnership is in all cases dissolved by its business being prohibited by law.

**256.** If a partnership, entered into for a fixed term, be continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner.

**257.** Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

Account to firm of benefit derived from transaction affecting partnership.

**258.** A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

*Illustrations.*

(a.) A, B, and, C are partners in trade. C, without the knowledge of A and B, obtains for his own sole benefit a lease of the house in which the partnership-business is carried on. A and B are entitled to participate, if they please, in the benefit of the lease.

(b.) A, B, and C, carry on business together in partnership as merchants trading between Bombay and London. D, a merchant in London, to whom they make their consignments, secretly allows C a share of the commission which he receives upon such consignments, in consideration of C's using his influence to obtain the consignments for him. C is liable to account to the firm for the money so received by him.

**259.** If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

**260.** A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given.\*

**261.** The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm

**262.** Where there are joint debts due from the partnership and also separate debts due from any partner, the partnership-property must be applied in the first instance in payment of the debts of the firm; and if there is any surplus, then the share of each partner must be applied in payment of his separate debts, or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

**263.** After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding-up the business of the partnership.

\* 19 & 20 Vic., c. 97, sec. 4.

**264.** Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

Notice of dissolution.

**Notes.**

Sec. 264 of the Contract Act is not intended to be an exhaustive exposition on the question of notice of a dissolution of partnership. The mode of notification of dissolution required in the case of old customers, who are known to the firm as having dealt with it, is an express or specific notice by circular or otherwise. But in the case of the general public the most effectual public notice which can reasonably be given is requisite.—I. L. R. 8 Cal. 681 overruled.—I. L. R., 8 Cal. 678.

A, B and C traded together in partnership as B, C and Co., A being a sleeping partner. After the partnership was dissolved, B and C continued to trade together under the same name and incurred debts to the plaintiff, who sued to recover the amounts from A, B and C. The plaintiffs had not dealt with the old partnership nor received notice of its dissolution, and it was not alleged that they knew of A's previous connection with it:—*Held* that the suits did not lie against A.—9 Madr. 492.

**265.\*** Where a partner is entitled to claim a dissolution of partnership, or where a partnership has terminated, the Court may, in the absence of any contract to the contrary, wind up the business of the partnership, provide for the payment of its debts, and distribute the surplus according to the shares of the partners respectively.

Winding-up by Court on dissolution or after termination.

**Notes.**

Sec. 265 of the Contract Act, while it enables a partner, after the termination of a partnership, to apply to the District Court to wind up the business, does not take away the ordinary right of suit in any Civil Court having jurisdiction to have the accounts of the partnership taken.—I. L. R., 6 Cal. 521.

The Court of a Subordinate Judge is inferior to the Court of a District Judge within the meaning of sec. 11 of the Civil Courts' Act. The word 'may' in sec. 265 of the Contract Act has a somewhat similar force to the words 'it shall be lawful' in a Statute which merely makes that legal and possible which there would otherwise be no right or authority to do. And the words 'may apply' in the section create a new jurisdiction, which must be exercised strictly in accordance with the Statute which creates it,—that is to say, the jurisdiction created by the section must be exercised exclusively by a Court not inferior to the Court of a District Judge, within the local limit of whose jurisdiction the place or principal place of business of the firm which it is sought to wind up is situated. It was the intention of the Legislature, in enacting sec. 265 of the Contract Act, to create a new jurisdiction to be exercised exclusively by the Court of the District Judge; and in the absence of a contract to the contrary, the members of a partnership, or their representatives cannot obtain the relief mentioned in the

\* This section has been substituted by Act IV. for 1886 sec. 1, for the one originally enacted.



section except by resorting to that Court. The presumption that the existing jurisdiction of a Court is not intended to be taken away unless express words have been used for that purpose, usually applies only to the jurisdiction of the superior Courts. Unless the jurisdiction of a superior Court is expressly and clearly taken away, such jurisdiction will be presumed to continue.—7 Cal. 157.

The fact that several persons are co-owners of a ship does not make them partners, and it is not necessary that a suit by one co-owner against the managing owner or ship's husband, for his share of the profits made by the ship before she has been sold, should be brought in the Court of the District Judge under sec. 265 of the Contract Act, but such suit may be brought in the Court of the lowest grade competent to try it.—8 Cal. 1011.

A suit to wind up a partnership and to distribute the profits is not cognizable by a Court subordinate to a District Court by virtue of sec. 265 of the Indian Contract Act.—5 Madr. 256.

A suit to compel the defendant to account for and pay over a share of a sum realised on a joint speculation or to provide for the plaintiff's share out of another fund realised under the joint orders of the parties is not affected by the provisions of sec. 265 of the Indian Contract Act.—7 Madr. 246.

A previous dissolution of partnership is necessary in order to give jurisdiction to the District Court under sec. 265 of the Indian Contract Act. Accordingly, where a suit was instituted in the District Court of Ahmedabad by some members of a partnership (which, however, was not dissolved at the date of the suit) for the winding up of the business of a ginning factory, and for distributing among the share-holders any surplus that might remain, after providing for the payment of its debts under sec. 265 of Act IX of 1872, and the Assistant Judge, to whom it was referred for trial by the District Judge, directed the dissolution of the partnership and the winding up of its business, the High Court on appeal reversed the decree of the Assistant Judge, and returned the plaint to the plaintiffs for its presentation to the proper Court. *Quære*—Whether the District Judge had power, under the Bombay Civil Courts' Act (XIV of 1869), to refer to the Assistant Judge a case falling under sec. 265 of Act IX of 1872.—5 Bom. 65.

The stamp-duty payable on an appeal from an order made by a District Judge on an application under sec. 265 of the Indian Contract Act (IX of 1872) should be an *ad valorem* fee, as in a suit for accounts, under sec. 7, cl. iv. (f) of the Court Fees' Act (VII of 1870).—6 Bom. 143.

The stamp-duty payable on an application to the District Court under sec. 265 of the Indian Contract Act (IX of 1872) for an account and winding up of partnership should be an *ad-valorem* fee under sec. 7, cl. iv. (f) of the Court Fees' Act (VII of 1870).—7 Bom. 125.

An application for the winding up, by the Court, of the business of a firm after the termination of partnership, under sec. 265 of the Indian Contract Act (IX of 1872), whatever it be called, is essentially a plaint, and must be paid for in fees at the same rate as any other plaint for an account extending to a like amount of valuation.—7 Bom. 535.

Where in a suit a cause of action appears which in itself is cognizable by an inferior Court, such a Court is not justified in rejecting the suit, merely because it is one in which the District Court might have jurisdiction under sec. 265 of the Contract Act.—8 Bom. 272.

A suit for winding up an expired partnership can be brought in the District Court under sec. 265 of the Contract Act (IX of 1872) and sec.

213 of the Civil Procedure Code (Act XIV of 1882). But the jurisdiction of ordinary Courts is not annulled by the special jurisdiction assigned to the District Court by sec. 265 of the Contract Act. Any one having a cause of action arising out of partnership transactions may sue the person liable in the ordinary Court. The jurisdiction of such Court, however, does not extend to the case of a winding up of an expired partnership. This jurisdiction is given to the District Court by sec. 265 of the Contract Act, and when, along with a new mode of relief, particular jurisdiction is constituted to administer it, the Court specified and no other, is to be understood as vested with authority.—8 Bom. 272

Where an application under sec. 265 of the Contract Act is presented to the District Court, that Court should determine whether it is (1) a mere case of administration, or (2) of administration sought as a cloak for strictly litigious claim, or (3) of administration *plus* claims involving litigation of the ordinary means. In the second case it may properly decline a function that properly belongs to an ordinary Court. In the last case it may either assume the administration of the estate of the firm, or decline to do so, according to circumstances subject to appeal, and in the former case it may either itself deal with all questions arising between the expartners, or if these be of such a kind as to form separable subjects of adjudication, it can direct the party in each case interested to proceed on the particular alleged cause of action in the Court having ordinary jurisdiction, and itself use the result as an element of its administration.—8 Bom. 272.

Section 265 of the Indian Contract Act (IX of 1872) assumes that there has been a partnership, and enables the District Court to wind it up, but does not deprive the ordinary Courts of their jurisdiction in cases seriously contested as to the existence of partnership. Such contests ought to be decided as in ordinary cases.—8 Bom. 494.

Vunmalidass Jiva, Jagjivan Hemji and Shamji Jadowji, being large shareholders in The Great Eastern Spinning and Weaving Mills, Limited, entered into an agreement in October, 1873, to cause the said company to be wound up and to form a new company to take over its assets and liabilities, and to cause themselves to be appointed agents of the new company under the firm of Vunmalidass, Jagjivan, Shamji and Company, and under that name to act as agents of the new company—subject to the terms of the agreement. The agreement provided that the firm of Vunmalidass, Jagjivan, Shamji and Company should take the agency of the new company for a period of thirty years; that of the profits to be derived by the said firm out of the agency Vunmalidass, should receive 39 cents, Jagjivan 31 cents, and Shamji 30 cents; that, in case of a vacancy in the firm of Vunmalidass, Jagjivan, Shamji and Company caused by the death or retirement of any of the partners, the nominee of the dying or retiring partner should be admitted into partnership, and should receive the share of such partner, and should exercise all his authority. In pursuance of this agreement The Great Eastern Spinning and Weaving Mills, Limited, was wound up, and a new company, called "The New Great Eastern Spinning and Weaving Company, Limited," was formed and registered. Both the memorandum and articles of association of the said new company contained clauses providing that the firm of Vunmalidass, Jagjivan, Shamji and Company, or whatever member or members that firm for the time consist of, should be agents of the company so long as the said firm should carry on business in Bombay, or until they should resign. The firm of Vunmalidass, Jagjivan, Shamji and Company having been constituted under the said agreement, became the agents of the said company, and continued to

act as such down to the date of the present suit. No other business was done by the firm, and the three partners divided the profits realized by the firm out of the agency business in the shares specified in the agreement as above mentioned. Vunmalidass died in 1874, leaving a will whereby, in exercise of the right vested in him by the agreement, he nominated and appointed his wife Kessar as his successor in the firm, and she accordingly became and was recognized as a partner therein. In August, 1875, she assigned her interest in the firm to Hormasji Nowroji Sakalatwalla, and he thereupon became a partner, and received 39 cents of the profits. In November, 1876, Jagjivan assigned his interest in the firm (31 cents) to Hormasji Nowroji Sakalatwalla and Shamji Jadowji of which 21 cents became the property of Hormasji Nowroji Sakalatwalla and 10 cents the property of Shamji Jadowji, the firm henceforth consisting only of these two partners of whom the former received, in all, 60 cents of the profits and the latter 40 cents. In November, 1882, Hormasji Nowroji Sakalatwalla died, leaving a will whereby he appointed his wife, the plaintiff Bachubai, his executrix, and left all his property to her for life, and after her death to his son. The will did not refer to the firm, or nominate any successor in the partnership.

In the present suit Bachubai as executrix claimed to be entitled to 60 cents or shares in the firm of Vunmalidass, Jagjivan, Shamji and Company up to the date of the testator's death, and to a like share in the profits earned subsequently to his death, or to be earned by the firm so long as it continued to carry on the said agency business of the company. The defendant admitted the right of the plaintiff to the share claimed in the profits earned prior to the testator's death, but resisted her claim to any portion of the subsequent profits:—*Held* (1) on the authority of *Beamish v. Beamish* that the testator's will did not operate as an exercise of the power of nominating a successor in the firm so as to make the plaintiff a partner.

That, having regard to the nature of the duties of the firm as agents and to the language of the agreement constituting the firm, coupled with the fact that there was no capital employed in the business, it must have been intended that, in default of nomination of a successor by a retiring or deceased partner, the agency should be carried on by the continuing or surviving partners in the name of the firm, and that the interest of the testator in the firm upon his death therefore survived to the defendant:—*Held*, also, that, although the plaintiff was entitled to an account up to the date of the testator's death, she was not entitled to a share of the good-will as an asset of the firm. The good-will of a firm is attached to the name, and in the present case, by the partnership agreement itself, the name was to be used by the surviving partners or partner for their own benefit. That arrangement took away all value from the good-will, if, indeed, it was consistent with its being asset at all. The testator's estate had proved insolvent; and previously to the filing of this suit an administration suit had been filed by creditors. By a decree made in that suit on the 23rd January, 1883, a receiver (Watkins) had been appointed, who was made a co-plaintiff with the executrix in the present suit. It was contended on behalf of the defendant that there was a misjoinder, the receiver being only entitled to sue for what might be due to the testator's estate up to the date of his death:—*Held*, that there was no misjoinder. The receiver might have sued for every thing that was due to the estate, but for greater safety the executrix was added as a plaintiff.—9 Bom. 536.

A suit for dissolution of a partnership, taking the accounts of the firm, and a declaration of the plaintiff's right to a certain share in the debts due to the firm, was, with reference to the value of the subject-matter of the

suit, instituted in the Court of a Munsif. The matters in difference in the suit were eventually referred to arbitration under chap. xxxvii of the Code of Civil Procedure, and an award was given declaring the plaintiff entitled to recover a certain sum from the defendant. Judgment and a decree were given in accordance with the award. *Held* that the award, notwithstanding the question whether the suit was cognizable in the Munsif's Court, was entertainable.—*Bhagirath v. Ram Ghulam* (I. L. R., 4 Al. 283) referred to. *Held* also that the suit was not an application of the nature mentioned in sec. 215 of the Contract Act, 1872, but a suit of the nature mentioned in sec. 205 of the Civil Procedure Code, and was, therefore, not cognizable in the District Court, but in the Court of the Munsiff. *Prosad Doss Mullick v. Russick Lall Mullick* (I. L. R., 7 Cal. 157) and *Ram Chunder Shaha v. Manick Chunder Banikya* (I. L. R., 7 Cal. 428) dissented from.—5 Al. 500.

**266.** Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships, and joint-stock companies, shall be regulated by the law for the time being in force relating thereto.\*

Limited liability partnerships, incorporated partnerships, and joint-stock companies.

## SCHEDULE. ENACTMENTS REPEALED.

### *Statutes.*

No. and Year of Statute.	Title.	Extent of repeal.
State. 29 Car. 2., cap. 3.	An Act for the prevention of Frauds and Perjuries.	Secs. 1, 2, 3, 4, & 17.
Stat. 11 and 12, Vic., cap. 21.	To consolidate and amend the law relating to insolvent debtors in India.	Section 42.

### *Acts.*

No. and year of Act.	Title.	Extent of repeal.
Act XIII. of 1840.	An Act for the amendment of the law regarding factors, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Stat. 4, Geo. iv., chap. 83, as altered and amended by the Stat. 6 Geo. iv., chap. 94.	The whole.

\* See Act VI. of 1882 and the following special Acts ; V. of 1838, amended by V. of 1854 (Bengal Bonded Warehouse) ; V. of 1857, amended by XI. of 1867 (Oriental Gas Company) ; XI. of 1876 (Presidency Banks) ; Madras Act VI. of 1869 (Madras Equitable Assurance Society).

**SCHEDULE.**—(*continued.*)

No. and year of Act.	Title.	Extent of repeal.
Act XIV. of 1840.	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Stat. 9 Geo. iv., chap. 14.	The whole.
Act XX. of 1844.	An Act to amend the law relating to advances <i>bona fide</i> made to agents intrusted with goods, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 5 & 6 Victoria, c. 39, as altered by this Act.	The whole.
Act XXI. of 1848.	An Act for avoiding wagers.	The whole.
Act V. of 1866.	An Act to provide a summary procedure on bills of exchange, and to amend in certain respects the commercial law of British India.	Sections 9 & 10.
Act XV. of 1866.	An Act to amend the law of Partnership in India.	The whole.
Act VIII. of 1867,	An Act to amend the law relating to Horse-racing in India.	The whole.

# NEGOTIABLE INSTRUMENTS.

## ACT No. XXVI. OF 1881.

RECEIVED THE G.-G.'S ASSENT ON THE 9TH DECEMBER 1881.

(*As amended up to date.*)

*An Act to define and amend the law relating to Promissory Notes, Bills of Exchange, and Cheques.*

WHEREAS it is expedient to define and amend the law relating to promissory notes, bills of exchange and cheques; It is hereby enacted as follows:—

Preamble.

### CHAPTER I.

#### PRELIMINARY.

1. This Act may be called “The Negotiable Instruments Act, 1881:”

Short title.

It extends to the whole of British India; but nothing herein contained affects the Indian Paper Currency Act, 1882, section twenty-five,\*

Local extent.

Saving of usages relating to hundis, &c.

or affects any local usage relating to any instrument in an oriental language: Provided that such usages may be excluded by any words in the body of the instrument, which indicate an intention that the legal relations of the parties thereto shall be governed by this Act; and it shall come into force on the first day of March 1882.

Commencement.

2. [*Repealed by Act XII. of 1891.*]

Interpretation-clause.

3. In this Act—

“Banker.”

“Banker” includes also persons or a corporation or company acting as bankers; and

“Notary public.”

“Notary public” includes also any person appointed by the Governor-General in Council to perform the functions of a Notary public under this Act.

\* See Act XX. of 1882, sec. 2.

## CHAPTER II.

## OF NOTES, BILLS, AND CHEQUES.

4. A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

"Promissory note."

*Illustrations.*

A signs instruments in the following terms:—

(a.) "I promise to pay B or order Rupees 500."

(b.) "I acknowledge myself to be indebted to B in Rupees 1,000, to be paid on demand for value received."

(c.) "Mr. B, I O U Rupees 1,000."

(d.) "I promise to pay B Rupees 500 and all other sums which shall be due to him."

(e.) "I promise to pay B Rupees 500, first deducting thereout any money which he may owe me."

(f.) "I promise to pay B Rupees 500 seven days after my marriage with C."

(g.) "I promise to pay B Rupees 500 on D's death, provided D leaves me enough to pay that sum."

(h.) "I promise to pay B Rupees 500, and to deliver to him my black horse on 1st January next."

The instruments respectively marked (a) and (b) are promissory notes. The instruments respectively marked (c), (d), (e), (f), (g), and (h), are not promissory notes.

**Notes.**

The plaintiffs brought a suit on an alleged promissory note of the defendants for Rs. 2,125. The note was in Gujarati, in the form of an account, on a loose sheet of paper. After reciting that the defendant had borrowed the said sum of Rs. 2,125 on personal security, and that interest was to run thereon at a specified rate, the document continued as follows:—"The same (i. e., the sum borrowed with interest) are payable whenever *dhani* (the owner or lender) may demand payment thereof. The defendant contended that the note in question was in form one payable to "bearer on demand," and as such illegal and void, as being in contravention of the provisions of sec. 25 of the Paper Currency Act (XX of 1882). *Held*, that *dhani* was not in the ordinary or the commercial language of this Presidency equivalent to "bearer" in the sense that word was employed in the Paper Currency and Negotiable Instruments Acts, and that the document in question was not, therefore, a negotiable instrument, nor obnoxious to the provisions of the former Act, and there was no objection to a suit founded upon it.—I. L. R., 16 Bom. 689.

*Held* that the following instrument was so vague and indefinite in its terms that it could not be regarded as a promissory note. "I, J. M. C., do hereby promise to pay at Allahabad to the manager of the Agra Savings' Bank, Limited, the sum of Rs. 10 on or before the 15th day of October, 1876, and a similar sum monthly every succeeding month, for full value consideration received: dated the 9th September, 1876."—5 Al. 562.



**5.** A “bill of exchange” is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

“Bill of exchange.”

A promise or order to pay is not “conditional,” within the meaning of this section and section four by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.

The sum payable may be “certain” within the meaning of this section and section four, although it includes future interest, or is payable at an indicated rate of exchange, or is according to the course of exchange, and although the instrument provides that, on default of payment of an instalment, the balance unpaid shall become due.

The person to whom it is clear that the direction is given, or that payment is to be made, may be a “certain person” within the meaning of this section and section four, although he is mis-named or designated by description only.

#### Notes.

Where a promissory note is payable by instalments, a suit to recover the whole amount on default made in payment of the first instalment cannot be brought under Act V of 1866.—I. L. R., 1 Cal. 130.

N. & Co., the Managing Agents of the Baree Tea Company, had a general banking account with the Oriental Bank Corporation, which account they were allowed to overdraw on having the overdraft properly secured. Under the Articles of Association of the Baree Tea Company, N. & Co. had power to “draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, drafts &c., as should be necessary for enabling them to carry on the business of the Company.” Purporting to act under this power N. & Co., drew a bill of exchange on the Managing Agents of the Company, which was accepted by the latter, and endorsed by N. & Co. to the Oriental Corporation, who credited the amount to N. & Co.’s general account. The account was drawn out by cheques drawn by N. & Co. personally, without reference to the Baree Tea Company, and there was no proof that the money had been applied for the purposes of the Baree Tea Company.

*Held*, in an action by the Oriental Bank against the Baree Tea Company, that the latter were not liable on the bills as acceptors.—9 Cal. 880.

Bill of Exchange—Suit on bill by indorsee for value against acceptor—Sale by indorsee of goods against which bill drawn—Acceptor entitled to credit for amount of proceeds of sale.—6 Bom. 1.

On the 3rd March 1881 N drew a bill in English at Cawnpore in

favour of F on a Calcutta firm and gave it to F's agent, who did not understand English. F's agent kept the bill till the 10th March 1881 without ascertaining its nature. On that date the Calcutta firm on which the bill was drawn became insolvent. F subsequently sued N for the money he had paid for the bill.

*Held*, that assuming that the sale of the bill was void by reason of both parties being under a mistake as to the bill, yet, F could not recover the amount of the bill from N, because his agent had been guilty of gross negligence in taking the bill and keeping it so long without ascertaining its nature and applying for redress.—4 Al. 334.

**6.** A “cheque” is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand.

“Cheque.”

**Note.**

On the 29th April, 1889, the plaintiff's brother-in-law, Mahomed Ebrahim, purchased from the defendants' branch at Mauritius a bill of exchange drawn on their Bank of Bombay payable on demand to the plaintiff's order in Bombay. The bill was in the following terms:—

*“The New Oriental Bank Corporation, Limited,  
Mauritius, 29th April, 1889.”*

“On demand pay this first of exchange (second of same tenor and date being unpaid) to the order of Sallemann Hussein six hundred and forty Rupees for value received. For the New Oriental Bank Corporation, Limited.

“To

The New Oriental Bank Corporation, Limited, Bombay.”

Mahomed Ebrahim sent the bill by registered post to Bombay addressed to the plaintiff. During its transmission it was stolen. On the 18th May it was presented by some person to the defendant's Bank in Bombay bearing a forged endorsement in blank of the plaintiff, and it was paid by the Bank. The plaintiff as soon as he heard of the loss of the bill made inquiry at the Bank and was told that the bill had been paid. On being shown the endorsement, the plaintiff pronounced it to be a forgery and demanded payment of the bill, which the Bank refused. He thereupon filed this suit against the Bank as drawers of the bill.

*Held*—(1) That the document was an “ambiguous instrument” within the meaning of sec. 17 of the Negotiable Instruments Act (XXVI of 1881), and that the plaintiff had elected to treat it as a bill of exchange. (2) That treating the document as a bill of exchange the defendants, as drawers, were discharged by the payment to the *de facto* holder who presented it for payment. Where the point sought to be raised in review had not been raised or argued by either party, but was first taken by the Court itself in giving its opinion upon the case referred to it, the Court granted a review, observing as follows:—“The question arising in this case is not a question merely between two parties, but is one of great general commercial importance, and under the circumstances, and on the very special grounds I have mentioned, we think that the review ought to be granted.—I. L. R., 15 Bom. 267.

**7.** The maker of a bill of exchange or cheque is called the “drawer;” the person thereby directed to pay is called the “drawee.”

“Drawer.” “Drawee.”

When in the bill or in any indorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need, such person is called a “drawee in case of need.”

After the drawee of a bill has signed his assent upon the bill, or, if there are more parts thereof than one, upon one of such parts, and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the “acceptor.”

“When a bill of exchange has been noted or protested for non-acceptance or for better security,”\* and any person accepts it *supra protest* for honour of the drawer or of any one of the indorsers, such person is called an “acceptor for honour.”

The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the “payee.”

8. The “holder” of a promissory note, bill of exchange, or cheque means any person entitled in his own name to the possession thereof, and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill, or cheque, is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

#### Notes.

K executed a promissory note on demand for Rs. 6,000 in favor of S in 1882. In 1884 S, by an agreement in writing assigned all her property, including the promissory note, to M., but did not endorse over the promissory note to M. M assigned his rights in the promissory note to a bank in payment of a debt. In a suit by M, and the bank against K and S to recover the principal and interest due under the note :—*Held*, that the plaintiffs could not maintain the suit.—I. L. R., 11 Madr. 290.

See I. L. R., 15 Bom. 267, noted under sec. 6.

9. “Holder in due course” means any person who for consideration became the possessor of a promissory note, bill of exchange, or cheque, if payable to bearer, or the payee or indorsee thereof, if payable to, or to the order of, a payee,

\* The words quoted have been substituted by Act II. of 1885, sec. 2, for the following: “When acceptance is refused, and the bill is protested for non-acceptance.”

before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

**Note.**—See I. L. R., 11 Madr. 290, noted under sec. 8.

**10.** “Payment in due course” means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned.

**11.** A promissory note, bill of exchange, or cheque, drawn or made in British India, and made payable in, or drawn upon any person resident in, British India, shall be deemed to be an inland instrument.

**12.** Any such instrument, not so drawn, made, or made payable, shall be deemed to be a foreign instrument.

**13.** A “negotiable instrument” means a promissory note, bill of exchange, or cheque, expressed to be payable to a specified person or his order, or to the order of a specified person or to the bearer thereof, or to a specified person or the bearer thereof.

**Note.**

Defendant borrowed money from the Bank (plaintiffs) on the security of some Government Pro. Notes. One of the Pro. Notes sent to the Public Debt Office for enforcement was detained as being stolen Note. The Bank sued for money lent to defendant.

**Plea**—Plaintiffs are not entitled to payment without delivering all the securities. *Held*, that the defendant was not justified in refusing payment until the stolen note was given up to him.

When an instrument such as the note in question has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but as against any person who subsequently becomes the holder unless such person can prove that the instrument had become negotiable at the time it was stolen, and that he obtained it *bona fide* for value without notice of the theft.—I. L. R., 5 Cal. 654.

See I. L. R., 16 Bom. 689, noted under sec. 4.

When a promissory note, bill of exchange, or cheque, is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated.

**15.** When the maker or holder of a negotiable instrument signs the same otherwise than as such maker, for the purpose of negotiation, on the back or face thereof, or on a slip of paper annexed thereto, or so signs for the same purpose a stamped paper intended to be completed as a negotiable instrument, he is said to indorse the same, and is called the "indorser."

**16.** If the indorser signs his name only, the indorsement is said to be "in blank," and, if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the indorsement is said to be "in full;" and the person so specified is called the "indorsee" of the instrument.

**17.** Where an instrument may be construed either as a promissory note or bill of exchange, the holder may, at his election, treat it as either, and the instrument shall be thence forward treated accordingly.

**Note.**—See I. L. R., 15 Bom. 267, noted under sec. 6.

**18.** If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

**19.** A promissory note or bill of exchange, in which no time for payment is specified, and a cheque, are payable on demand.

**20.** Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein, and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount: Provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder.

In a promissory note or bill of exchange the expressions “at sight” and “on presentment” mean on demand. The expression “after sight” means, in a promissory note, after presentment for sight, and, in a bill of exchange after acceptance, or noting for non-acceptance, or protest for non-acceptance.

“At sight.”  
 “On presentment.”  
 “After sight.”

**22.** The maturity of a promissory note or bill of exchange is the date at which it falls due.

“Maturity.”

Every promissory note or bill of exchange which is not expressed to be payable on demand, at sight, or on presentment, is at maturity on the third day after the day on which it is expressed to be payable.

Days of grace.

**23.** In calculating the date at which a promissory note or bill of exchange, made payable a stated number of months after date or after sight, or after a certain event, is at maturity, the period stated shall be held to terminate on the day of the month which corresponds with the day on which the instrument is dated or presented for acceptance or sight, or noted for non-acceptance, or protested for non-acceptance, or the event happens, or, where the instrument is a bill of exchange made payable a stated number of months after sight, and has been accepted for honour, with the day on which it was so accepted. If the month in which the period would terminate has no corresponding day, the period shall be held to terminate on the last day of such month.

Calculating maturity of bill or note payable so many months after date or sight.

(a.) A negotiable instrument, dated 29th January 1878, is made payable at one month after date. The instrument is at maturity on the third day after the 28th February 1878.

(b.) A negotiable instrument, dated 30th August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December 1878.

(c.) A promissory note or bill of exchange, dated 31st August, 1878, is made payable three months after date. The instrument is at maturity on the 3rd December 1878.

**24.** In calculating the date at which a promissory note or bill of exchange made payable a certain number of days after date or after sight, or after a certain event, is at maturity, the day of the date, or of present-

Calculating maturity of bill or note payable so many days after date or sight.

ment for acceptance or sight, or of protest for non-acceptance, or on which the event happens, shall be excluded.

**25.** When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business-day.

When day of maturity is a holiday.

*Explanation.*—The expression “public holiday” includes Sundays : New-Year’s day, Christmas day : if either of such days falls on a Sunday, the next following Monday : Good Friday ; and any other day declared by the Local Government, by notification in the official Gazette, to be a public holiday.

### CHAPTER III.

#### PARTIES TO NOTES, BILLS, AND CHEQUES.

**26.** Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery, and negotiation of a promissory note, bill of exchange, or cheque.

Capacity to make, &c., promissory notes, &c.

A minor may draw, indorse, deliver, and negotiate such instruments so as to bind all parties except himself.

Nothing herein contained shall be deemed to empower a corporation to make, indorse, or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered.

**27.** Every person capable of binding himself or of being bound, as mentioned in section twenty-six, may so bind himself or be bound by a duly authorized agent acting in his name.

Agency.

A general authority to transact business, and to receive and discharge debts, does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal.

An authority to draw bills of exchange does not of itself import an authority to indorse.

**28.** An agent who signs his name to a promissory note, bill of exchange, or cheque, without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsi-

Liability of agent signing.



bility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

**29.** A legal representative of a deceased person, who signs his name to a promissory note, bill of exchange, or cheque, is liable personally thereon, unless he expressly limits his liability to the extent of the assets received by him as such.

Liability of legal representative signing.

**30.** The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provided.

Liability of drawer.

**Note.**—See I. L. R., 15 Bom. 267, noted under sec. 6.

**31.** The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.

Liability of drawee of cheque.

**32.** In the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

Liability of maker of note and acceptor of bill.

In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default.

**Note.**—See I. L. R., 15 Bom. 267, noted under sec. 6.

**33.** No person except the drawee of a bill of exchange, or all or some of several drawees, or a person named therein as a drawee in case of need, or an acceptor for honour, can bind himself by an acceptance.

Only drawee can be acceptor except in need or for honour.

**34.** Where there are several drawees of a bill of exchange who are not partners, each of them can accept it for himself, but none of them can accept it for another without his authority.

Acceptance by several drawees not partners.

**35.** In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor, or maker, to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such indorser as hereinafter provided.

Liability of indorser.

Every indorser after dishonour is liable as upon an instrument payable on demand.

#### Notes.

A plaintiff suing on a bill of exchange the drawer, acceptor, and endorser, where the endorsement has been made before maturity and without restriction, is entitled to a decree against all three defendants; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal.—I. L. R., 16 Cal. 804.

A cheque was indorsed in blank by a European British subject who, at that time, was under twenty years of age, and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured, and a suit was then brought by the Bank which had cashed the cheque, to recover the amount from the indorser and the drawer. The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was a mere matter of form, and he would not be liable for the amount, and that the Bank would only cash the cheque when indorsed by him, and in consequence he consented to indorse it, but that he did so without any intention of incurring liability as indorser, that he received no consideration, and that his indorsement was in blank, and not in favour of the Bank, and was converted into a special indorsement without his knowledge and consent. The Court held that at the time of indorsement, the indorser was a minor under English Law, and dismissed the suit on the ground of minority:—*Held* that if the Court was satisfied of the fact of the defendant's minority, it should have complied with the provisions of sec. 443 of the Civil Procedure Code:—*Held* that, assuming the indorser to have been *sui juris*, the indorsement, taken in conjunction with the facts proved, established a contract by which the indorser was bound to pay the cheque.

*Per Straight, Offg. C. J. and Duthoit, J.*—That it was by no means clear or certain that there was any rule of international law recognising the *lex loci contractus* as governing the capacity of the person to contract but that assuming such a rule to be established, the specific limitation of the Indian Majority Act (IX of 1875) to "domiciled persons" necessarily excluded its application to European British subjects not domiciled in British India; that sec. 11 of the Contract Act must be interpreted as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law, wherever such law was to be found; that this rule was not affected by the Majority Act, so far as concerned persons temporarily residing but not domiciled in British India whose contractual capacity was still left to be governed by the per-

sonal law of their personal domicile ; and that such law in the case of European British subjects, was the common law of England, which recognized twenty-one as the age of majority.

*Per Oldfield, J.*—That by the rule of the *jus gentium* as hitherto understood and recognized in England, the *lex loci* would govern in respect to the capacity to contract, but that in framing the Indian Majority Act which was the *lex loci* on the subject in India, the Legislature would appear not to have adopted that rule, but, by limiting the operation of the Act to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile.

*Per Brodhurst, J.*—That Act IX of 1875 was intended by the Legislature to be applicable, and in fact was applicable, only to European British subjects domiciled in these parts of India referred to in sec. 1, and that to any other European British subject whose domicile was in England, but who was temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attached until he had attained the age of twenty-one years.—I. L. R., 7 Al. 490.

**36.** Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied.

Liability of prior parties to holder in due course.

**37.** The maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor, are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer, or acceptor, as the case may be.

Maker, drawer, and acceptor principals.

#### Note.

Suit by the endorsee against the maker of a promissory note, dated 9th August 1886. The plaintiff was aware that the note was made by the defendant for the accommodation of the acceptor, Watson and Co., with whom the plaintiff had large dealings. On the 4th August 1887, Watson and Co. executed in favour of the plaintiff and another creditor a mortgage of certain property to secure the amount then due by Watson and Co., including the amount due to the plaintiff on the promissory note: the mortgage contained a personal covenant by Watson and Co. to pay the sums due, together with interest, on the 4th August 1888; and the mortgagees practically took over the whole business of the mortgagor and it was intended that they should work it for his benefit up to that date. The promissory note fell due in June 1887, but was not presented to the defendant for payment:—*Held*, that plaintiff, by accepting the mortgage, promised to give time to Watson and Co., and thus rendered it impossible for him to sue Watson and Co. had the defendant as surety called on him to do so, and that the defendant was accordingly discharged. *Pogose v. Bank of Bengal*, I. L. R., 3 Cal. 174, distinguished. *Semble*.—The maker of a promissory note is not discharged by the holder's failure to present it at due date.—I. L. R., 13 Madr. 172.

Prior party a principal in respect of each subsequent party.

**38.** As between the parties so liable as sureties, each prior party is, in

the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party.

*Illustration.*

A draws a bill payable to his own order on B, who accepts. A afterwards indorses the bill to C, C to D, and D to E. As between E and B, B is the principal debtor, and A, C, and D, are his sureties. As between E and A, A is the principal debtor, and C and D are his sureties. As between E and C, C is the principal debtor, and D is his surety.

**39.** When the holder of an accepted bill of exchange enters into any contract with the acceptor which, under section 134 or 135 of the Indian Contract Act, 1872, would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged.

*Suretyship.*

**Note.**—See I. L. R., 13 Madr. 172, noted under sec. 37.

**40.** Where the holder of a negotiable instrument, without the consent of the indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity.

*Discharge of indorser's liability.*

*Illustration.*

A is the holder of a bill of exchange made payable to the order of B, which contains the following indorsements in blank :

First indorsement, "B."

Second indorsement, "Peter Williams."

Third indorsement, "Wright & Co."

Fourth indorsement, "John Rozario."

This bill A puts in suit against John Rozario, and strikes out, without John Rozario's consent, the indorsements by Peter Williams and Wright & Co. A is not entitled to recover anything from John Rozario.

**41.** An acceptor of a bill of exchange already indorsed is not relieved from liability by reason that such indorsement is forged, if he knew or had reason to believe the indorsement to be forged when he accepted the bill.

*Acceptor bound, although indorsement forged.*

**42.** An acceptor of a bill of exchange drawn in a fictitious name, and payable to the drawer's order, is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an indorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

*Acceptance of bill drawn in fictitious name.*

*Negotiable instrument made, &c., without condition.*

**43.** A negotiable instrument made, drawn, accepted, indorsed, or transferred

without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But, if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

*Exception I.*—No party for whose accommodation a negotiable instrument has been made, drawn, accepted, or indorsed, can, if he have paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

*Exception II.*—No party to the instrument, who has induced any other party to make, draw, accept, indorse, or transfer the same to him for a consideration which he has failed to pay or perform in full, shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.

**44.** When the consideration for which a person signed a promissory note, bill of exchange, or cheque, consisted of money, and was originally absent in part, or has subsequently failed in part, the sum which a holder standing in immediate relation with such signer is entitled to receive from him is proportionally reduced.

*Explanation.*—The drawer of a bill of exchange stands in immediate relation with the acceptor. The maker of a promissory note, bill of exchange, or cheque, stands in immediate relation with the payee, and the indorser with his indorsee. Other signers may by agreement stand in immediate relation with a holder.

*Illustration.*

A draws a bill on B for Rs. 500, payable to the order of A. B accepts the bill, but subsequently dishonours it by non-payment. A sues B on the bill. B proves that it was accepted for value as to Rs. 400, and as an accommodation to the plaintiff as to the residue. A can only recover Rs. 400.

**45.** Where a part of the consideration for which a person signed a promissory note, bill of exchange, or cheque, though not consisting of money, is ascertainable in money without collateral enquiry, and there has been a failure of that part, the sum which a holder standing in immediate relation

with such signer is entitled to receive from him is proportionally reduced.

**45A.\*** Where a bill of exchange has been lost before it is over-due, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so.

## CHAPTER IV.

### OF NEGOTIATION.

**46.** The making, acceptance, or indorsement of a promissory note, bill of exchange, or cheque, is completed by delivery, actual or constructive.

As between parties standing in immediate relation, delivery to be effectual must be made by the party making, accepting, or indorsing the instrument, or by a person authorized by him in that behalf.

As between such parties and any holder of the instrument other than a holder in due course, it may be shown that the instrument was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein.

A promissory note, bill of exchange, or cheque payable to bearer, is negotiable by the delivery thereof.

A promissory note, bill of exchange, or cheque payable to order, is negotiable by the holder by indorsement and delivery thereof.

**47.** Subject to the provisions of section fifty-eight, a promissory note, bill of exchange, or cheque payable to bearer, is negotiable by delivery thereof.

*Exception.*—A promissory note, bill of exchange, or cheque delivered on condition that it is not to take effect except in a certain event, is not negotiable (except in the hands of a holder for value without notice of the condition), unless such event happens.

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\* Sec. 45A has been inserted by Act 11. of 1885, sec. 3.

*Illustrations.*

(a.) A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep for B. The instrument has been negotiated.

(b.) A, the holder of a negotiable instrument payable to bearer, which is in the hands of A's banker, who is at the time the banker of B, directs the banker to transfer the instrument to B's credit in the banker's account with B. The banker does so, and accordingly now possesses the instrument as B's agent. The instrument has been negotiated, and B has become the holder of it.

**48.** Subject to the provisions of section fifty-eight, a promissory note, bill of exchange, or cheque payable to the order of a specified person, or to a specified person or order, is negotiable by the holder by indorsement and delivery thereof.

**49.** The holder of a negotiable instrument indorsed in blank may, without signing his own name, by writing above the indorser's signature a direction to pay to any other person as indorsee, convert the indorsement in blank into an indorsement in full; and the holder does not thereby incur the responsibility of an indorser.

**50.** The indorsement of a negotiable instrument followed by delivery transfers to the indorsee the property therein with the right of further negotiation; but the indorsement may, by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser, or for some other specified person.

*Illustrations.*

B signs the following indorsements on different negotiable instruments payable to bearer :—

(a.) "Pay the contents to C only."

(b.) "Pay C for my use."

(c.) "Pay C or order for the account of B."

(d.) "The within must be credited to C."

These indorsements exclude the right of further negotiation by C."

(e.) "Pay C."

(f.) "Pay C value in account with the Oriental Bank."

(g.) "Pay the contents to C, being part of the consideration in a certain deed of assignment executed by C to the indorser and others."

These indorsements do not exclude the right of further negotiation by C.

Who may negotiate.

**51.** Every sole maker, drawer, payee, or indorsee, or all of several joint



makers, drawers, payees, or indorsees of a negotiable instrument, may, if the negotiability of such instrument has not been restricted or excluded as mentioned in section fifty, indorse and negotiate the same.

*Explanation.*—Nothing in this section enables a maker or drawer to indorse or negotiate an instrument, unless he is in lawful possession or is holder thereof ; or enables a payee or indorsee to indorse or negotiate an instrument unless he is holder thereof.

*Illustration.*

A bill is drawn payable to A or order. A indorses it to B, the indorsement not containing the words “or order” or any equivalent words. B may negotiate the instrument.

**52.** The indorser of a negotiable instrument may, by express words in the indorsement, exclude his own liability thereon, or make such liability or the right of the indorsee to receive the amount due thereon depend upon the happening of a specified event, although such event may never happen.

Indorser who excludes his own liability or makes it conditional.

Where an indorser so excludes his liability, and afterwards becomes the holder of the instrument, all intermediate indorsers are liable to him.

*Illustrations.*

(a) The indorser of a negotiable instrument signs his name, adding the words—“Without recourse.”

Upon this indorsement he incurs no liability.

(b.) A is the payee and holder of a negotiable instrument. Excluding personal liability by an indorsement “without recourse,” he transfers the instrument to B, and B indorses it to C, who indorses it to A. A is not only reinstated in his former rights, but has the rights of an indorsee against B and C.

**53.** A holder of a negotiable instrument, who derives title from a holder in due course, has the rights thereon of that holder in due course.

Holder deriving title from holder in due course.

**54.** Subject to the provisions hereinafter contained as to crossed cheques, a negotiable instrument indorsed in blank is payable to the bearer thereof, even although originally payable to order.

Instrument indorsed in blank.

**55.** If a negotiable instrument, after having been indorsed in blank, is indorsed in full, the amount of it cannot be claimed from the indorser in full except by the person to

Conversion of indorsement in blank into indorsement in full.

whom it has been indorsed in full, or by one who derives title through such person.

**56.** No writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but, where such amount has been partly paid, a note to that effect may be indorsed on the instrument, which may then be negotiated for the balance.

**57.** The legal representative of a deceased person cannot negotiate, by delivery only, a promissory note, bill of exchange, or cheque payable to order, and indorsed by the deceased, but not delivered.

**58.** When a negotiable instrument has been lost, or has been obtained from any maker, acceptor, or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor, or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course.

**59.** The holder of a negotiable instrument, who has acquired it after dishonor, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transferor :

Provided that any person who, in good faith and for consideration, becomes the holder, after maturity, of a promissory note or bill of exchange made, drawn, or accepted without consideration, for the purpose of enabling some party thereto to raise money thereon, may recover the amount of the note or bill from any prior party.

*Illustration.*

The acceptor of a bill of exchange, when he accepted it, deposited with the drawer certain goods as a collateral security for the payment of the bill, with power to the drawer to sell the goods and apply the proceeds in discharge of the bill if it were not paid at maturity. The bill not having been paid at maturity, the drawer sold the goods and retained the proceeds,

but indorsed the bill to A. A's title is subject to the same objection as the drawer's title.

**60.** A negotiable instrument may be negotiated (except by the maker, drawee, or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee, or acceptor at or after maturity, but not after such payment or satisfaction.

Instrument negotiable  
till payment or satisfac-  
tion.

## CHAPTER V.

### OF PRESENTMENT.

**61.** A bill of exchange payable after sight must, if no time or place is specified therein for presentment, be presented to the drawee thereof for acceptance, if he can, after reasonable search, be found, by a person entitled to demand acceptance, within a reasonable time after it is drawn, and in business-hours on a business-day. In default of such presentment, no party thereto is liable thereon to the person making such default.

If the drawee cannot, after reasonable search, be found, the bill is dishonoured.

If the bill is directed to the drawee at a particular place, it must be presented at that place; and, if at the due date for presentment he cannot, after reasonable search, be found there, the bill is dishonoured.

Where authorised by agreement or usage, a presentment through the post-office by means of a registered letter is sufficient.\*

#### Notes.

A *hundi* was drawn in Calcutta upon a firm at Jeypore, and made payable on arrival at the place. The *hundi* reached Jeypore, on the 5th April; but was not presented for payment until the 29th of that month, when it was dishonoured, and soon after drawee's firm became insolvent:—*Held*, that the *hundi* was presented within *reasonable time*, and the delay which occurred in its presentation did not absolve the drawers from liability. In considering the question whether a *hundi* has been presented within *reasonable time*, regard should be had to the situation and interests of both drawer and payee, and to the distance of the place where the *hundi* is drawn from that where it is to be accepted.—I. L. R., 11 Cal. 344.

Presentation for acceptance within reasonable time is a condition precedent to a right of action on a bill or *hundi* payable after sight. Where the drawer had not assets in the hands of the drawee at or subsequent to the date of the *hundi*:—*Held*, that the question of presentation within reasonable time was immaterial.—10 Bom. 346.

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\* This para has been added by Act II. of 1885, sec. 4.

In a suit on an indemnity bond executed by way of collateral security by the maker of six hundies, it appeared that three of the hundies were paid and when three which were unpaid were presented to the maker, he did not at once insist upon want of notice of dishonour or on non-presentment as a ground of discharge:—*Held*, that since the defendant did not prove that the drawee had effects of his to meet the hundies on presentment, or that he had sustained damage by reason of the want of notice of dishonour, the plaintiff was entitled to a decree.—14 Madr. 470.

**62.** A promissory note, payable at a certain period after sight, must be presented to the maker thereof for sight (if he can, after reasonable search, be found) by a person entitled to demand payment, within a reasonable time, after it is made, and in business-hours on a business-day. In default of such presentment, no party thereto is liable thereon to the person making such default.

The holder must, if so required by the drawee of a bill of exchange presented to him for acceptance, allow the drawee twenty-four hours (exclusive of public holidays) to consider whether he will accept it.

**64.** Promissory notes, bills of exchange, and cheques, must be presented for payment to the maker, acceptor, or drawee thereof, respectively, by or on behalf of the holder as hereinafter provided.

Where authorized by agreement or usage, a presentment through the post-office by means of a registered letter is sufficient.\*

*Exception.*—Where a promissory note is payable on demand, and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof.

**65.** Presentment for payment must be made during the usual hours of business, and, if at a banker's, within banking hours.

A promissory note or bill of exchange, made payable at a specified period after date or sight thereof, must be presented for payment at maturity.

**Note.**—See I. L. R., 13 Madr. 172, noted under sec. 37.

Presentment for payment of promissory note payable by instalments.

**67.** A promissory note payable by instalments must be presented for pay-

\* This para has been added by Act II. of 1885, sec. 4.

ment on the third day after the date fixed for payment of each instalment; and non-payment on such presentment has the same effect as non-payment of a note at maturity.

**68.** A promissory note, bill of exchange, or cheque, made, drawn, or accepted payable at a specified place, and not elsewhere, must, in order to charge any party thereto, be presented for payment at that place.

Presentment for payment of instrument payable at specified place, and not elsewhere.

**69.** A promissory note or bill of exchange made, drawn, or accepted payable at a specified place, must, in order to charge the maker or drawer thereof, be presented for payment at that place.

Instrument payable at specified place.

**70.** A promissory note or bill of exchange, not made payable as mentioned in sections sixty-eight and sixty-nine, must be presented for payment at the place of business (if any), or at the usual residence, of the maker, drawee, or acceptor thereof, as the case may be.

Presentment where no exclusive place specified.

**71.** If the maker, drawee, or acceptor of a negotiable instrument, has no known place of business or fixed residence, and no place is specified in the instrument for presentment for acceptance or payment, such presentment may be made to him in person wherever he can be found.

Presentment when maker, &c., has no known place of business or residence.

**72.** A cheque must, in order to charge the drawer, be presented at the bank upon which it is drawn before the relation between the drawer and his banker has been altered to the prejudice of the drawer.

Presentment of cheque to charge drawer.

**73.** A cheque must, in order to charge any person except the drawer, be presented within a reasonable time after delivery thereof by such person.

Presentment of cheque to charge any other person.

**74.** Subject to the provisions of section thirty-one, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder.

Presentment of instrument payable on demand.

**75.** Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker, or acceptor, as the

Presentment by or to representative of

deceased, or assignee of insolvent.

case may be, or, where the drawee, maker, or acceptor has died, to his legal representative, or, where he has been declared an insolvent, to his assignee.

**76.** No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment in any of the following cases:—

When presentment unnecessary.

(a) if the maker, drawee, or acceptor, intentionally prevents the presentment of the instrument, or,

if, the instrument being payable at his place of business, he closes such place on a business-day during the usual business hours, or,

if, the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours, or,

if, the instrument not being payable at any specified place, he cannot, after due search, be found;

(b) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment;

(c) as against any party if, after maturity, with knowledge that the instrument has not been presented—

he makes a part-payment on account of the amount due on the instrument,

or promises to pay the amount due thereon in whole or in part,

or otherwise waives his right to take advantage of any default in presentment for payment;

(d) as against the drawer, if the drawer could not suffer damage from the want of such presentment.

**77.** When a bill of exchange, accepted payable at a specified bank, has been duly presented there for payment and dishonored, if the banker so negligently or improperly keeps, deals with, or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss.

Liability of banker for negligently dealing with bill presented for payment.

## CHAPTER VI.

### OF PAYMENT AND INTEREST.

**78.** Subject to the provisions of section eighty-two, clause (c), payment of the amount due on a promissory note, bill of exchange,

To whom payment should made.

or cheque, must, in order to discharge the maker or acceptor, be made to the holder of the instrument.

**Note.**—See I. L. R., 15 Bom. 267, noted under sec. 6.

**79.** When interest at a specified rate is expressly made payable on a promissory note or bill of exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realization of such amount, or until such date after the institution of a suit to recover such amount as the Court directs.

**80.** When no rate of interest is specified in the instrument, interest on the amount due thereon shall, except in cases provided for by the Code of Civil Procedure, section 532,\* be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

*Explanation.*—When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonor.

**81.** Any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, bill of exchange, or cheque, is, before payment, entitled to have it shown, and is, on payment, entitled to have it delivered up to him, or, if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him.

## CHAPTER VII.

OF DISCHARGE FROM LIABILITY ON NOTES, BILLS, AND CHEQUES.

**82.** The maker, acceptor, or indorser, respectively, of a negotiable instrument, is discharged from liability thereon—

(a) to a holder thereof who cancels such acceptor's or indorser's name with intent to discharge him, and to all parties claiming under such holder ;

by cancellation ;

\* See Act XIV. of 1882, sec. 3.



(b) to a holder thereof who otherwise discharges such maker, acceptor, or indorser, and to all parties deriving title under such holder by release ;  
after notice of such discharge ;

(c) to all parties thereto, if the instrument is payable to bearer, or has been indorsed in blank, and such maker, acceptor, or indorser, by payment.  
makes payment in due course of the amount due thereon.

**83.** If the holder of a bill of exchange allows the drawee more than twenty-four hours, exclusive of public holidays, to consider whether he will accept the same, all previous parties not consenting to such allowance are thereby discharged from liability to such holder.  
Discharge by allowing drawee more than twenty-four hours to accept.

**84.** When the holder of a cheque fails to present it for payment within a reasonable time, and the drawer thereof sustains loss or damage from such failure, he is discharged from liability to the holder.  
When cheque not duly presented and drawer damaged thereby.

**85.** Where a cheque payable to order purports to be indorsed by or on behalf of the payee, the drawee is discharged by payment in due course.  
Cheque payable to order.

**Note.**—See I. L. R., 15 Bom. 267, noted under sec. 6.

**86.** If the holder of a bill of exchange acquiesces in a qualified acceptance, or one limited to part of the sum mentioned in the bill, or which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by all the drawees, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him, unless, on notice given by the holder, they assent to such acceptance.  
Parties not consenting discharged by qualified or limited acceptance.

*Explanation.*—An acceptance is qualified—

(a) where it is conditional, declaring the payment to be dependent on the happening of an event therein stated ;

(b) where it undertakes the payment of part only of the sum ordered to be paid ;

(c) where, no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere ; or where, a place of payment being

specified in the order, it undertakes the payment at some other place, and not otherwise or elsewhere ;

(d) where it undertakes the payment at a time other than that at which, under the order, it would be legally due.

**87.** Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration, and does not consent thereto, unless it was made in order to carry out the common intention of the original parties ;

Effect of material alteration.

and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

Alteration by indorsee.

The provisions of this section are subject to those of Sections twenty, forty-nine, eighty-six, and one-hundred and twenty-five.

**88.** An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement, notwithstanding any previous alteration of the instrument.

Acceptor or indorser bound notwithstanding previous alteration.

**89.** Where a promissory note, bill of exchange, or cheque, has been materially altered, but does not appear to have been so altered,

Payment of instrument on which alteration is not apparent.

or where a cheque is presented for payment which does not, at the time of presentation, appear to be crossed, or to have had a crossing which has been obliterated,

payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon ; and such payment shall not be questioned by reason of the instrument having been altered, or the cheque crossed.

**90.** If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.

Extinguishment of rights of action on bill in acceptor's hands.

## CHAPTER VIII.

## OF NOTICE OF DISHONOUR.

**91.** A bill of exchange is said to be dishonoured by non-acceptance when the drawee, or one of several drawees not being partners, makes default in acceptance upon being duly required to accept the bill, or where presentment is excused, and the bill is not accepted.

Where the drawee is incompetent to contract, or the acceptance is qualified, the bill may be treated as dishonoured.

**92.** A promissory note, bill of exchange, or cheque, is said to be dishonoured by non-payment, when the maker of the note, acceptor of the bill, or drawee of the cheque, makes default in payment upon being duly required to pay the same.

**Note.**—See I. L. R., 15 Bom. 267, noted under sec. 6.

**93.** When a promissory note, bill of exchange, or cheque, is dishonoured by non-acceptance or non-payment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.

Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note, or the drawee or acceptor of the dishonoured bill of exchange or cheque.

**Note.**

In the absence of any local usage to the contrary it is just and equitable that the doctrine of notice of dishonour propounded in the Negotiable Instruments Act (XXVI of 1881) should be applied to *hundi* in the vernacular, the "reasonable time" within which such notice is to be given being determined according to the circumstances of the case. *Held*, therefore, that where the holder of such a *hundi*, which had been dishonoured, sued the prior indorsers on it, without having given them such notice, and did not prove that they could not suffer damage for want of such notice, the suit must fail.—I. L. R., 6 Al. 78.

**94.** Notice of dishonour may be given to a duly authorized agent of the person to whom it is required to be given, or, where he has died, to his legal representative, or, where he has been declared an insolvent, to his assignee; may be oral or written; may, if written, be sent by post; and may be in any form; but it

must inform the party to whom it is given, either in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and that he will be held liable thereon; and it must be given within a reasonable time after dishonour, at the place of business or (in case such party has no place of business) at the residence of the party for whom it is intended.

If the notice is duly directed and sent by post and miscarries, such miscarriage does not render the notice invalid.

**Note.**

A *hundi* was drawn in Calcutta upon a firm at Jeypore, and made payable on arrival at the place. The *hundi* reached Jeypore on the 5th April; but was not presented for payment until the 29th April, when it was dishonoured, and soon after the drawee's firm became insolvent:

*Held*, that the *hundi* was presented within reasonable time, and the delay which occurred in its presentation did not absolve the drawers from liability.

In considering the question whether a *hundi* has been presented within reasonable time, regard should be had to the situation and interests of both drawer and payee, and to the distance of the place where the *hundi* is drawn from that where it is to be accepted.—I. L. R., 11 Cal. 344.

See I. L. R., 6 Al. 78, noted under sec. 93.

**95.** Any party receiving notice of dishonour must, in order to render any prior party liable to himself, give notice of dishonour to such party within a reasonable time, unless such party otherwise receives due notice as provided by Section ninety-three.

**96.** When the instrument is deposited with an agent for presentment, the agent is entitled to the same time to give notice to his principal as if he were the holder giving notice of dishonour, and the principal is entitled to a further like period to give notice of dishonour.

**97.** When the party to whom notice of dishonour is despatched is dead, but the party despatching the notice is ignorant of his death, the notice is sufficient.

**Note.**—See I. L. R., 6 Al. 78, noted under sec. 93.

**98.** No notice of dishonour is necessary.

(a) when it is dispensed with by the party entitled thereto;

(b) in order to charge the drawer, when he has countermanded payment;

(c) when the party charged could not suffer damage for want of notice ;

(d) when the party entitled to notice cannot, after due search, be found ; or the party bound to give notice is, for any other reason, unable, without any fault of his own, to give it ;

(e) to charge the drawers, when the acceptor is also a drawer ;

(f) in the case of a promissory note which is not negotiable ;

(g) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

#### Notes.

Previous formal written notice of dishonor of *hundi* is not necessary before suit brought, unless it can be shewn that the parties charged have been prejudiced by such omission.—I. L. R., 3 Cal. 339.

See I. L. R., 6 Al. 78, noted under sec 93.

## CHAPTER IX.

### OF NOTING AND PROTEST.

**99.** When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument, or upon a paper attached thereto, or partly upon each.

Noting.

Such note must be made within a reasonable time after dishonour, and must specify the date of dishonour, the reason (if any) assigned for such dishonour, or, if the instrument has not been expressly dishonoured, the reason why the holder treats it as dishonoured, and the notary's charges.

**100.** When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may, within a reasonable time, cause such dishonour to be noted and certified by a notary public. Such certificate is called a protest.

Protest.

When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor, and, on its

Protest for better security.

being refused, may, within a reasonable time, cause such facts to be noted and certified as aforesaid. Such certificate is called a protest for better security.

Contents of protest.

**101.** A protest under section one-hundred must contain—

(a) either the instrument itself, or a literal transcript of the instrument and of everything written or printed thereupon ;

(b) the name of the person for whom and against whom the instrument has been protested ;

(c) a statement that payment or acceptance, or better security, as the case may be, has been demanded of such person by the notary public ; the terms of his answer (if any), or a statement that he gave no answer, or that he could not be found ;

(d) when the note or bill has been dishonoured, the place and time of dishonour, and, when better security has been refused, the place and time of refusal ;

(e) the subscription of the notary public making the protest ;

(f) in the event of an acceptance for honour or of a payment for honour, the name of the person by whom, of the person for whom, and the manner in which, such acceptance or payment was offered and effected.

A notary public may make the demand mentioned in clause (c) of this section either in person or by his clerk, or, where authorized by agreement or usage, by registered letter.\*

**102.** When a promissory note or bill of exchange is required by law to be protested, notice of such protest must be given instead of

notice of dishonour, in the same manner and subject to the same conditions ; but the notice may be given by the notary public who makes the protest.

**103.** All bills of exchange drawn payable at some other place than the place mentioned as the residence of the drawee, and which are dishonoured by non-acceptance, may, without further presentment to the drawee, be protested for non-payment, in the place specified for payment, unless paid before or at maturity.

Protest for non-payment after dishonour by non-acceptance.

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\* This para, has been added by Act II. of 1885, sec. 5.

**104.** Foreign bills of exchange must be protested for dishonour when such protest is required by the law of the place where they are drawn.

*Protest of foreign bills.*

**104A.\*** For the purposes of this Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting.\*

*When noting equivalent to protest.*

## CHAPTER X. OF REASONABLE TIME.

**105.** In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour, and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments; and, in calculating such time, public holidays shall be excluded.

*Reasonable time.*

**Note.**—See I. L. R., 11 Cal. 344, noted under sec. 61.

**106.** If the holder and the party to whom notice of dishonour is given carry on business or live (as the case may be) in different places, such notice is given within a reasonable time if it is despatched by the next post or on the day next after the day of dishonour.

*Reasonable time of giving notice of dishonour.*

If the said parties carry on business or live in the same place, such notice is given within a reasonable time if it is despatched in time to reach its destination on the day next after the day of dishonour.

**Note.**—See I. L. R., 11 Cal. 344, noted under sec. 61.

**107.** A party receiving notice of dishonour, who seeks to enforce his right against a prior party, transmits the notice within a reasonable time if he transmits it within the same time after its receipt as he would have had to give notice if he had been the holder.

*Reasonable time for transmitting such notice.*

**Note.**—See I. L. R., 11 Cal. 344, noted under sec. 61.

\* Sec. 104A has been inserted by Act II, of 1885, sec. 6.



## CHAPTER XI.

OF ACCEPTANCE AND PAYMENT FOR HONOUR AND REFERENCE  
IN CASE OF NEED.

**108.** When a bill of exchange has been noted or protested for non-acceptance or for better security, any person not being a party already liable thereon may, with the consent of the holder, by writing on the bill, accept the same for the honour of any party thereto.\*

**109.** A person desiring to accept for honour must, by writing on the bill under his hand, declare that he accepts under protest the protested bill for the honour of the drawer or of a particular indorser whom he names, or generally for honour.†

**110.** Where the acceptance does not express for whose honour it is made, it shall be deemed to be made for the honour of the drawer.

**111.** An acceptor for honour binds himself to all parties subsequent to the party for whose honour he accepts to pay the amount of the bill if the drawee do not; and such party and all prior parties are liable in their respective capacities to compensate the acceptor for honour for all loss or damage sustained by him in consequence of such acceptance.

But an acceptor for honour is not liable to the holder of the bill unless it is presented, or (in case the address given by such acceptor on the bill is a place other than the place where the bill is made payable) forwarded for presentment, not later than the day next after the day of its maturity.

**112.** An acceptor for honour cannot be charged unless the bill has, at its maturity, been presented to the drawee for payment, and has been dishonoured by him, and noted or protested for such dishonour.

**113.** When a bill of exchange has been noted or protested for non-payment, any person may pay the same for the honour of any party liable to pay the same, provided that the person so paying, "or

\* The second sentence of this section has been repealed by Act II. of 1885, sec. 7, and has therefore been omitted.

† As amended by Act II. of 1885, sec. 8.

his agent in that behalf"\* has previously declared before a notary public the party for whose honour he pays, and that such declaration has been recorded by such notary public.

**114.** Any person so paying is entitled to all the rights, in respect of the bill, of the holder at the time of such payment, and may recover from the party for whose honour he pays all sums so paid, with interest thereon, and with all expenses properly incurred in making such payment.

**115.** Where a drawee in case of need is named in a bill of exchange or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

**116.** A drawee in case of need may accept and pay the bill of exchange without previous protest.

## CHAPTER XII.

### OF COMPENSATION.

**117.** The compensation payable in case of dishonour of a promissory note, bill of exchange, or cheque, by any party liable to the holder or any indorsee, shall (except in cases provided for by the Code of Civil Procedure, section 532†) be determined by the following rules:—

(a) the holder is entitled to the amount due upon the instrument, together with the expenses properly incurred in presenting, noting, and protesting it;

(b) When the person charged resides at a place different from that at which the instrument was payable, the holder is entitled to receive such sum at the current rate of exchange between the two places;

(c) an indorser who, being liable, has paid the amount due on the same, is entitled to the amount so paid, with interest at six per centum per annum from the date of payment until tender or realization thereof, together with all expenses caused by the dishonour and payment;

(d) when the person charged and such indorser reside at different places, the indorser is entitled to receive such sum at the current rate of exchange between the two places;

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\* The words quoted have been inserted by Act II. of 1885, sec. 9.

Act XIV. of 1882, sec. 3.

(e) the party entitled to compensation may draw a bill upon the party liable to compensate him, payable at sight or on demand, for the amount due to him, together with all expenses properly incurred by him. Such bill must be accompanied by the instrument dishonoured and the protest thereof (if any). If such bill is dishonoured, the party dishonouring the same is liable to make compensation thereof in the same manner as in the case of the original bill.

### CHAPTER XIII.

#### SPECIAL RULES OF EVIDENCE.

**118.** Until the contrary is proved, the following presumptions shall be made:—

Presumptions as to negotiable instruments—

(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated, or transferred, was accepted, indorsed, negotiated, or transferred, for consideration;

(b) that every negotiable instrument bearing a date was as to date; made or drawn on such date;

(c) that every accepted bill of exchange was accepted as to time of acceptance; within a reasonable time after its date and before its maturity;

(d) that every transfer of a negotiable instrument was as to time of transfer; made before its maturity;

(e) that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) that a lost promissory note, bill of exchange, or cheque, as to stamp; was duly stamped;

(g) that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burthen of proving that the holder is a holder in due course lies upon him.

In a suit upon an instrument which has been dishonoured, the Court shall, on proof of protest, presume the fact of dishonour, unless and until such fact is disproved.

**120.** No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn.

**121.** No maker of a promissory note, and no acceptor of a bill of exchange payable to, or to the order of, a specified person, shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same.

**122.** No indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument.

## CHAPTER XIV.

### OF CROSSED CHEQUES.

**123.** Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

**124.** Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

**125.** Where a cheque is uncrossed, the holder may cross it generally or specially.

Where a cheque is crossed generally, the holder may cross it specially.

Where a cheque is crossed generally or specially, the holder may add the words "not negotiable."

Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker, his agent, for collection.

**126.** Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker.

Payment of cheque crossed generally.

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent, for collection.

Payment of cheque crossed specially.

**127.** Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof.

Payment of cheque crossed specially more than once.

**128.** Where the banker on whom a crossed cheque is drawn has paid the same in due course, the banker paying the cheque, and (in case such cheque has come to the hands of the payee) the drawer thereof, shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively be entitled to and placed in if the amount of the cheque had been paid to and received by the true owner thereof.

**129.** Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent, for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

**130.** A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable," shall not have, and shall not be capable of giving, a better title to the cheque than that which the person from whom he took it had.

Cheque bearing "not negotiable."

**131.** A banker who has, in good faith, and without negligence, received payment, for a customer, of a cheque crossed generally or specially to himself, shall not, in case the

Non-liability of banker receiving payment of cheque.

title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

## CHAPTER XV.

### OF BILLS IN SETS.

**132.** Bills of exchange may be drawn in parts, each part being numbered, and containing a provision that it shall continue payable only so long as the others remain unpaid. All the parts together make a set; but the whole set constitutes only one bill, and is extinguished when one of the parts, if a separate bill, would be extinguished.

*Set of bills.*

*Exception.* When a person accepts or indorses different parts of the bill in favour of different persons, he and the subsequent indorsers of each part are liable on such part as if it were a separate bill.

**133.** As between holders in due course of different parts of the same set, he who first acquired title to his part is entitled to the other parts and the money represented by the bill.

*Holder of first acquired part entitled to all.*

## CHAPTER XVI.

### OF INTERNATIONAL LAW.

**134.** In the absence of a contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange, or cheque, is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable.

*Law governing liability of maker, acceptor, or indorser of foreign instrument.*

#### *Illustration.*

A bill of exchange was drawn by A in California where the rate of interest is 25 per cent, and accepted by B, payable in Washington, where the rate of interest is 6 per cent. The bill is endorsed in British India, and is dishonored. An action on the bill is brought against B in British India. He is liable to pay interest at the rate of 6 per cent. only; but, if A is charged as drawer, A is liable to pay interest at the rate of 25 per cent.

**135.** Where a promissory note, bill of exchange, or cheque, is made payable in a different place from that in which it is made or indorsed, the law of the place where it is made payable de-

*Law of place of payment governs dishonour.*

termines what constitutes dishonour, and what notice of dishonour is sufficient.

*Illustration.*

A bill of exchange drawn and indorsed in British India, but accepted payable in France, is dishonoured. The indorsee causes it to be protested for such dishonour, and gives notice thereof in accordance with the law of France, though not in accordance with the rules herein contained in respect of bills, which are not foreign. The notice is sufficient.

**136.** If a negotiable instrument is made, drawn, accepted, or indorsed out of British India, but in accordance with the law of British India, the circumstance that any agreement evidenced by such instrument is invalid according to the law of the country wherein it was entered into does not invalidate any subsequent acceptance or indorsement made thereon in British India.

**137.** The law of any foreign country regarding promissory notes, bills of exchange, and cheques, shall be presumed to be the same as that of British India, unless and until the contrary is proved.

## CHAPTER XVII.\*

### NOTARIES PUBLIC.

**138.** The Governor-General in Council may, from time to time, by notification in the official Gazette, appoint any person, by name or by virtue of his office, to be a notary public under this Act, and to exercise his functions as such within any local area, and may, by like notification, remove from office any notary public appointed under this Act.

**139.** The Governor-General in Council may, from time to time, by notification in the official Gazette, make rules consistent with this Act for the guidance and control of notaries public appointed under this Act, and may, by such rules (among other matters) fix the fees payable to such notaries.

## SCHEDULE.

*[Repealed by Act XII. of 1891.]*





# SPECIFIC RELIEF.

## ACT No. I. OF 1877.

RECEIVED THE G.-G.'S ASSENT ON THE 7TH FEBRUARY 1877.

*An Act to define and amend the law relating to certain kinds of Specific Relief.*

WHEREAS it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits ; It is hereby enacted as follows :—

Preamble.

### PART I.—PRELIMINARY.

Short title.

1. This Act may be called “ The Specific Relief Act, 1877 :”

Local extent.

It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874.

Commencement.

And it shall come into force on the 1st day of

2. [*Repealed by Act XII. of 1891.*]

Interpretation-clause.

3. In this Act, unless there be something repugnant in the subject or context, ‘ obligation ’ includes every duty enforceable by law :

‘ obligation.’

‘ trust ’ includes every species of express, implied, or constructive fiduciary ownership :

‘ trust.’

‘ trustee ’ includes every person holding, expressly, by implication, or constructively, a fiduciary character ;

‘ trustee.’

### *Illustrations.*

(a.) Z bequeaths land to A, ‘ not doubting that he will pay thereout an annuity of rupees 1,000 to B for his life. A accepts the bequest. A is a trustee within the meaning of this Act, for B, to the extent of the annuity.

(b.) A is the legal, medical, or spiritual adviser of B. By availing himself of his situation as such adviser, A gains some pecuniary advantage which might otherwise have accrued to B. A is a trustee for B, within the meaning of this Act, of such advantage.

(c.) A, being B’s banker, discloses for his own purpose the state of B’s account. A is a trustee, within the meaning of this Act, for B, of the benefit gained by him by means of such disclosure.

(d.) A, the mortgagee of certain leaseholds, renews the lease in his own name. A is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.

(e.) A, one of several partners, is employed to purchase goods for the firm. A unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A is a trustee, for his co-partners, within the meaning of this Act, of the profit so made.

(f.) A, the manager of B's indigo-factory, becomes agent for C, a vendor of indigo seed, and receives, without B's assent, commission on the seed purchased from C for the factory. A is a trustee, within the meaning of this Act, for B, of the commission so received.

(g.) A buys certain land with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Act, for B, of the land so bought.

(h.) A buys land from B, having notice that C is in occupation of the land. A omits to make any inquiry as to the nature of C's interest therein. A is a trustee, within the meaning of this Act, for C, to the extent of that interest.

'settlement' means any instrument (other than a will or codicil as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in moveable or immoveable property is disposed of or is agreed to be disposed of :

'settlement.'

and all words occurring in this Act, which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act.

Words defined in Contract Act.

4. Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed—

(a) to give any right to relief in respect of any agreement which is not a contract ;

(b) to deprive any person of any right to relief, other than specific performance, which he may have under any contract ; or

(c) to affect the operation of the Indian Registration Act\* on documents.

Specific relief how given.

5. Specific relief is given—

(a) by taking possession of certain property and delivering it to a claimant;

(b) by ordering a party to do the very act which he is under an obligation to do ;

\* See Act III. of 1877, sec. 2.

by preventing a party from doing that which he is under an obligation not to do ;

(d) by determining and declaring the rights of parties otherwise than by an award of compensation ; or

(e) by appointing a Receiver.

Preventive relief.

6. Specific relief granted under Clause (c) of Section 5 is called preventive relief.

not granted to  
penal law.

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law.

## PART II.—OF SPECIFIC RELIEF.

### CHAPTER I.

#### OF RECOVERING POSSESSION OF PROPERTY.

##### (a).—*Possession of Immoveable Property.*

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.\*

Recovery of specific im-  
moveable property.

9. If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit,† recover possession thereof, notwithstanding any other title that may be set up in such suit.

Suit by person dispos-  
of immoveable pro-

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

#### Notes.

The mere discontinuance of payment of rent by tenants does not constitute a dispossession within the meaning of sec. 9 of the Specific Relief Act. The object of that section is to provide a speedy remedy for that class of cases where a person in physical possession of property is forcibly dispossessed from it against his will and consent.—I. L. R., 14 Cal. 649.

\* See Act XIV. of 1882, sec. 3.

Here certain words, repealed by Act XII. of 1891, have been omitted.

Mere previous possession will not entitle a plaintiff to a decree for the recovery of possession except in a suit under sec. 9 of the Specific Relief Act, 1877, which must be brought within six months from the date of dispossession. *Khajah Enaetollah Chowdhry v. Kishen Soondur Srma*, 8 W. R., 389, *Ertaza Hossein v. Bany Mistry*, I. L. R., 9 Cal. 130, *Debi Churn Boido v. Issur Chunder Manjee*, I. L. R., 9 Cal. 39, *Kawa Manjee v. Khowaz Nussio*, 5 C. L. R., 278, *Wise v. Ameerunnissa Khatoon*, L. R., 7 I. A., 73, *Krishnarav Yashvant v. Vasudev Apaji Ghotikar*, I. L. R., Bom. 371, *Pemraj Bhavaniram v. Narayan Shivaram Khisti*, I. L. R., 6 Bom. 215, *Mohabeer Pershad v. Mohabeer Singh*, I. L. R., 7 Cal. 591: 9 C. L. R., 164, referred to and explained.—17 Cal. 256.

*Held* by the Full Bench (PRINSEP and PIGOT, JJ., dissenting).—A suit for the possession of a right to fish in a khal, the soil of which does not belong to the plaintiff, does not come within the provisions of sec. 9 of the Specific Relief Act. The right to refer to the "Objects and Reasons" of a Bill discussed.—19 Cal.

The plaintiff sued, under sec. 9 of the Specific Relief Act (I of 1877), to recover possession of certain lands which they alleged had been in their possession since 1856. They alleged that while retaining possession of the said land through caretakers appointed by them, they had been in the habit of yearly selling the grass of the land to purchasers who themselves cut the grass so purchased; that in 1878 the grass of the land for the ensuing year was sold to T; that in the month of August, 1879, the defendant forcibly dispossessed the plaintiffs of said land and prevented them and their servants and T from entering the same. Defendant No. 2 denied the dispossession, and disclaimed any interest in the land. Defendants Nos. 1 and 3 denied that the land in question belonged to the plaintiffs, and alleged that it was the property of A, of whom defendant No. 1 was manager, and No. 3 the lessee of the said land. They also alleged that the plaintiffs had tried to take forcible possession of the said land, and that defendant No. 1, acting on A's behalf, prevented them. They submitted that A was a necessary party to the suit. *Held* that the three defendants were properly made parties to the suit, and that A was not a necessary party. Defendant No. 1 (the lessee) had the physical occupation of the land sued for; but all three defendants not having made any declaration, in taking possession, that it was taken for one or two of their number, acquired it jointly, and handed on a derivative possession to the actual occupant which as against third parties ranked as their own. If it was properly assumed, they all had a right to defend it; if not, they might all be called on for restitution. As to A, he was not actually in possession, and had taken no personal part in the dispossession. He was said to be owner, but that did not imply that he committed the alleged acts of defendants, or insisted on his ownership. As he had not the physical possession of the land, it could not be assumed that he had the jural possession merely on the assertion of the defendants. He, therefore, having done no palpable wrong, was not a necessary party. *Held*, also, the defendant No. 2 was properly made a defendant, and that, in case the dispossession should be established, he should be retained as a defendant notwithstanding his disclaimer. It was possible that No. 3 held the land on terms beneficial to No. 2, and the disclaimer in the present suit would not estop No. 2 from enforcing these terms in a subsequent suit against No. 3. Where, under a contract between A and B, an exclusive occupation of immoveable property is given to A, he is the proper plaintiff in a suit for possession brought under sec.

9 of the Specific Relief Act (1 of 1877). If B desires to sue immediately on the possessory right, he should sue in A's name, though for an injury to the reversion he (B) may properly sue in his own name. The intention of the Specific Relief Act (1 of 1877), sec. 9, is not to be frustrated by any private arrangement under which the ejector has acted, or by which he may consent to hold on behalf of some other person. As between him and that person, his possession may be that of an agent, but to the former holder, he is the dispossessor: possession derived from him cannot be superior to his, and (the right of suit being given in general terms) is equally subject, as his, to the result of proceedings taken within the prescribed six months. A person who has been ejected from his property, in suing to recover it under sec. 9 of the Specific Relief Act (1 of 1877), may sue the actual ejector or the person under whose orders or by whose authority the actual ejector has acted, or he may sue both; but the wrong-doer who has taken possession is the one from whom primarily it is to be reclaimed. If a third party desire to maintain the expulsion as an act done on his behalf, it is for him to come forward and avow it. He may claim to be admitted as a defendant; but if he had himself a right to do what his agent has done, his right and his authority may be pleaded by the agent, and will be an effectual answer. The alleged owner or principal, therefore, is not a necessary party for the protection of the agent. The suit against the latter will fail if he acted on due authority, where that authority is shown. In a suit for ejectment a mere misstatement of the area of the land sought to be recovered, ought not to be regarded as anything more than a "false demonstration." If the space is precisely defined by other description, the statement of its measurement in square yards may be treated as surplusage, and of no consequence.—5 Bom. 208.

It is no answer to a suit for possession under sec. 9 of the Specific Relief Act, brought against a mortgagor by a mortgagee who has been forcibly dispossessed by the mortgagor, to allege that the mortgage and possession under it were obtained by the fraud of the mortgagee. The mortgagor's proper remedy was by way of a suit to set aside the mortgage and recover possession.—5 Bom. 446.

A trespasser who has been dispossessed is not entitled to bring a suit under sec. 9 of the Specific Relief Act 1 of 1879 or under Bombay Act III of 1876 to recover possession. *Dadabhai Narsidas v. The Sub-Collector of Broach* (7 Bom. H. C. Rep., 82, A. C. J.), *Krishnarav Yashavant v. Vasudev Apaji Ghotikar* (I. L. R., 8 Bom. 371) and *Virjivandas Madhavdas v. Mahomed Alikhan Ibrahimkhan* (I. L. R., 5 Bom., 208) referred to.—15 Bom. 685.

A possessory suit lies under sec. 9 of the Specific Relief Act when plaintiff's possession has been partially as well as when it has been wholly disturbed.—3 Madr. 250.

A right of ferry is immoveable property or an interest therein within the meaning of Specific Relief Act, sec. 9.—13 Madr. 54.

*Per* EDGE, C. J., STRAIGHT and TYRRELL, J. J., (MAHMOOD, J., *dissentiente*.) Section 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who, being, whatever his title, in possession of immovable property, is ousted therefrom. That section does not debar a person who has been ousted by a trespasser from the possession of immovable property to which he has merely a possessory title from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession. *Davison v. Gent*, *Asher v. Whitlock*,

*Wise v. Ameer-unnessa Khatoon, Pemraj Bhavaniram v. Narayan Shivararam Khisti, Krishnarav Yashvant v. Vasudev Apaji Ghotikar and Muhammad Yusuf v. Sukh Nath* referred to. *Per* MAHMOOD J. A person who is suing upon a merely possessory title to recover possession of immovable property against a person who has ousted him, must bring his suit, if at all, under sec. 9 of Act I of 1877, and therefore within six months from the date of his dispossession.—13 AL. 537.

See I. L. R., 4 Madr. 217, noted under sec. 622 of the Civil Procedure Code; 3 Madr. 104, noted under sec. 331 of the Civil Procedure Code.

(b).—*Possession of Moveable Property.*

- 10.** A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure.\*

*Explanation I.*—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

*Explanation II.*—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

*Illustrations.*

(a.) A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title-deeds. B may recover them from C.

(b.) A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody.

(c.) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B.

(d.) A deposits books and papers for safe custody with B. B loses them, and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under sec. 168 of the Indian Contract Act, 1872.

(e.) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

- 11.** Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.

\* See Act XIV. of 1882, Sec. 3.



when the thing claimed is held by the defendant as the agent or trustee of the claimant;

(b) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed;

(c) when it would be extremely difficult to ascertain the actual damage caused by its loss;

(d) when the possession of the thing claimed has been wrongfully transferred from the claimant.

*Illustrations.*

of clause (a).—A, proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B, without A's authority, pledges the furniture to C, and C, knowing that B had no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

of clause (b).—Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

of clause (c).—A is entitled to a picture by a dead painter and a pair of rare china vases. B has possession of them. The articles are of too special a character to bear an ascertainable market-value. B may be compelled to deliver them to A.

## CHAPTER II.

### OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

#### (a) *Contracts which may be specifically enforced.*

**12.** Except as otherwise provided in this chapter, the specific performance of any contract may, in the discretion of the Court, be enforced—

Cases in which specific performance enforceable.

(a) when the act agreed to be done is in the performance, wholly or partly, of a trust;

(b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;

(c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or

(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

*Explanation.*—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by

compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.

*Illustrations.*

of clause (a).—A holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same quantity of stock to B, and B may enforce specific performance of this obligation.\*

of clause (b).—A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

of clause (c).—A contracts with B to sell him a house for Rs. 1,000. B is entitled to a decree directing A to convey the house to him, he paying the purchase-money.

In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway-company contract with Z to make an archway through their railway to connect lands of Z severed by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. Z is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the Court may appoint a proper person to superintend the construction of the archway, road, siding, and wharf.

A contracts to sell, and B contracts to buy, a certain number of railway-shares of a particular description. A refuses to complete the sale. B may compel A specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

A contracts with B to paint a picture for B, who agrees to pay therefor Rs. 1,000. The picture is painted. B is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

of clause (d).—A transfers without endorsement, but for valuable consideration, a promissory note to B. A becomes insolvent, and C is appointed his assignee. B may compel C to endorse the note, for C has succeeded to A's liabilities, and a decree for pecuniary compensation for not endorsing the note would be fruitless.

**Note.**

The plaintiffs, alleging that the defendants, having executed in their favour and delivered to them a bond, the consideration for which was money due to them for rent of land and on a former bond, had received it back for registration, and, refusing to register it, had retained it, sued the defendants to have a similar bond executed and registered. *Per MAHMOOD, J.*—That it was doubtful whether the suit could be regarded as a suit for

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\* The first illustration is repealed by Act II. of 1882 (The Indian Trusts Act) as to the territories respectively administered by the Governor of Madras in Council, the Lieutenant-Governors of the North-Western Provinces and the Panjab, and the Chief Commissioners of Oudh, the Central Provinces, Coorg, and Assam. The said illustration will, when the said Act II. of 1882 is extended to other territories, be repealed in such territories.

specific performance of a contract, and whether the only remedy open to the plaintiffs was not a suit for the money. It was only on the hypothesis that the mere writing of the original bond, in the absence of the registration and final delivery, did not amount to a performance of the contract, that the suit was entertainable at all. That, assuming the suit to be one for specific performance of a contract, the plaintiffs were not entitled to the specific relief which they sought, since they could obtain their full remedy by suing for the money in respect of which the fresh bond was sought to be executed; and they had failed to prove the exact terms of the original bond. Observations on the nature of the evidence required to prove a contract of which specific performance is sought. *Per* STUART, C. J.—That the suit was bad in form and substance, and there was no ground for the remedy by specific performance of a contract. If the alleged bond were in existence, a suit simply and directly for the recovery of the money claimed by the plaintiffs would have sufficed, for in such a suit facts relating to the loss or concealment of the bond might have been proved, and under the circumstances secondary evidence at least of the terms of the bond might have been admissible, or the plaintiffs might have found themselves in a position to make out their claim by other evidence; but if the plaintiffs considered it material to their case to have their claim on the bond, the loss or destruction of which could not be doubted, their proper course of proceeding was by a suit to restore the terms of the lost bond, or, as it was said in Courts of Equity in England, by a suit to obtain the benefit of the lost deed or instrument; and that, if the suit could be taken to be one affording such a remedy, it contained no sufficient materials to warrant it being held that the bond was of the tenor and in the terms alleged by the plaintiffs.—I. L. R., 5 Al. 44.

**13.** Notwithstanding anything contained in section 56 of the Indian Contract Act, a contract of which the subject has partially ceased to exist is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

*Illustrations.*

(a.) A contracts to sell a house to B for a lakh of Rupees. The day after the contract is made the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase-money.

(b.) In consideration of a sum of money payable by B, A contracts to grant an annuity to B for B's life. The day after the contract has been made, B is thrown from his horse and killed. B's representative may be compelled to pay the purchase-money.

**14.** Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

*Illustrations.*

(a.) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 98 bighas of the land belong to A, and the two remaining bighas to a stranger who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money. A may be directed, at the suit of B, to convey to B the 98 bighas, and to make compensation to him for not conveying the two remaining bighas; or B may be directed, at the suit of A, to pay to A, on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

(b.) In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken at a valuation. The Court may direct specific performance of the contract, notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

**15.** Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

Specific performance of  
part of contract where  
unperformed is

*Illustrations.*

(a.) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A, and the other 50 bighas to a stranger, who refuses to part with them. A cannot obtain a decree against B for the specific performance of the contract; but, if B is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase-money.

(b.) A contracts to sell to B an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A is unable to convey the garden. A cannot obtain a decree against B for the specific performance of the contract; but, if B is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect or default, B is entitled to a decree directing A to convey the house to him on payment of the purchase-money.

**16.** When a part of a contract, which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.

Specific performance of independent part of a contract.

**17.** The Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections.

Bar in other cases of specific performance of part of contract.

**Note.**

See I. L. R., 6 Cal. 328, noted under section 44 of the Civil Procedure Code.

**18.** Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights:—

Purchaser's rights against vendor with imperfect title.

(a) if the vendor or lessor has, subsequently to the sale or lease, acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest ;

(b) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence ;

(c) where the vendor professes to sell unincumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has, in fact, only a right to redeem it, the purchaser may compel him to redeem the mortgage, and to obtain a conveyance from the mortgagee ;

(d) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest, and costs on the interest of the vendor or lessor in the property agreed to be sold or let.

**Note.**

A member of an undivided Hindu family, consisting of himself, his adoptive son and his uncle, sold certain land belonging to the family to the plaintiff. In a suit by the plaintiff for a declaration of his title to, and

for possession of, the land, it appeared that the sale was not justified by any circumstances of family necessity ; and that the above-mentioned adoptive son was the son of the paternal uncle of the adoptive father. During the pendency of the suit the undivided uncle died, having made a gift of his property to his daughter-in-law :—*Held*, (1) that the adoption was not invalid by reason of the above-mentioned circumstance ; (2) that the gift by the undivided uncle to his daughter-in-law was invalid ; (3) that the plaintiff was entitled to a moiety of the land sold to him.—I. L. R., 14 Madr. 459.

**19.** Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

*Explanation.*—The circumstance that the contract has become incapable of specific performance, does not preclude the Court from exercising the jurisdiction conferred by this section.

#### *Illustrations.*

of the second paragraph :—A contracts to sell a hundred maunds of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The Court is of opinion that A has made a valid contract, and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

of the third paragraph :—A contracts with B to sell him a house for Rupees 1,000, the price to be paid and the possession given on the 1st January 1877. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour on the 1st January 1878. The decree may, besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

of the Explanation :—A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit, the patent expires. The Court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint

A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award A compensation for the non-performance.

**Note.**—See I. L. R., 8 Cal. 963, noted under sec. 28 of the Civil Pro. Code.

**20.** A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Liquidation of damages not a bar to specific performance.

*Illustration.*

A contracts to grant B an underlease of property held by A under C, and that he will apply to C for a license necessary to the validity of the underlease, and that, if the license is not procured, A will pay B Rs. 10,000. A refuses to apply for the license, and offers to pay B the Rs. 10,000. B is nevertheless entitled to have the contract specifically enforced if C consents to give the license.

**Note.**

The defendant signed an agreement in England with a Railway Company, whereby he contracted to serve the company exclusively for four years in India under a penalty of £100. The defendant having come to India at the expense of the company and served it for two years, left its service for that of another employer, alleging that he had not been fairly treated by a locomotive superintendent:—*Held*, (1) that the instrument executed by the defendant was an agreement merely and did not require to be stamped as a bond; (2) that the defendant had no right to rescind the agreement and the plaintiff company was entitled to an interlocutory injunction restraining defendant from serving others on the terms that the plaintiff company should consent to retain him in its employ.—I. L. R., 14 Madr. 18.

*Contracts which cannot be specifically enforced.*

Contracts not specifically enforceable.

**21.** The following contracts cannot be specifically enforced:—

(a) a contract for the non-performance of which compensation in money is an adequate relief;

(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms;

(c) a contract the terms of which the Court cannot find with reasonable certainty;

(d) a contract which is in its nature revocable;

(e) a contract made by trustees either in excess of their powers or in breach of their trust;



(*f*) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers ;

(*g*) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date ;

(*h*) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And, save as provided by the Code of Civil Procedure,\* no contract to refer a controversy to arbitration shall be specifically enforced ; but if any person who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

*Illustrations.*

to (*a*).—A contracts to sell, and B contracts to buy, a lakh of rupees in the four per cent. loan of the Government of India :

A contracts to sell, and B contracts to buy, 40 chests of Indigo at Rupees 1,000 per chest :

In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs. 10,000, and to honour A's drafts to that amount.

The above contracts cannot be specifically enforced, for, in the first and the second, both A and B, and in the third A, would be reimbursed by compensation in money.

to (*b*).—A contracts to render personal service to B :

A contracts to employ B on personal service :

A, an author, contracts with B, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A, and the other by B. A and B each name a valuer, but, before the valuation is made, A instructs his valuer not to proceed :

By a charter-party entered into in Calcutta between A, the owner of a ship, and B, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London :

A lets land to B, and B contracts to cultivate it in a particular manner for three years next after the date of the lease :

A and B contract that, in consideration of annual advances to be made by A, B will, for three years next after the date of the contract, grow par-

\* See Act XIV. of 1882, sec. 3.

ticular crops on the land in his possession, and deliver them to A when cut and ready for delivery :

A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B, he will paint a picture for B :

A contracts with B to execute certain works which the Court cannot superintend :

A contracts to supply B with all the goods of a certain class which B may require :

A contracts with B to take from B a lease of a certain house for a specified term, at a specified rent, " if the drawing-room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach :

A contracts to marry B :

The above contracts cannot be specifically enforced. .

to (c).—A the owner of a refreshment-room, contracts with B to give him accommodation there for the sale of his goods, and to furnish him with the necessary appliances. A refuses to perform his contract. The case is one for compensation, and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

to (d).—A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed, either A or B might at once dissolve the partnership.

to (e).—A is a trustee of land with power to lease it for seven years. He enters into a contract with B to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contract to sell it without any such sanction. This contract cannot be specifically enforced.

The trustees, A and B, empowered to sell trust-property worth a lakh of rupees, contract to sell it to C for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C cannot enforce its specific performance.

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

to (f).—A company, existing for the sole purpose of making and working a railway, contracts for the purchase of a piece of land for the purpose of erecting a cotton-mill thereon. This contract cannot be specifically enforced.

to (g).—A contracts to let for twenty-one years to B the right to use such part of a certain railway made by A as was upon B's land, and that B should have a right of running carriages over the whole line on certain terms, and might require A to supply the necessary engine-power, and that A should, during the term, keep the whole railway in good repair. Specific performance of this contract must be refused to B.

(h).—A contracts to pay an annuity to B for the lives of C and D. It turns out that, at the date of the contract, C, though supposed by A and B to be alive, was dead. The contract cannot be specifically performed.

#### Notes.

A contract to sell goods contained the following clause:—"That any dispute arising hereafter shall be settled by the selling broker, whose decision shall be final." In a suit to recover damages for breach of the contract, the defendant pleaded, that the dispute should have been referred to the decision of the selling broker, and that the suit was, therefore, barred under sec. 21 of the Specific Relief Act, the latter clause of which provides that "save as provided by the Code of Civil Procedure no contract to refer a controversy to arbitration shall be specifically enforced; but if any person, who has made such a contract, and has refused to perform it, sues in respect of any subject which he has contract to refer, the existence of such contract shall bar the suit." *Held*, that before that section could be relied upon, it must be shown that the plaintiff had refused to refer to arbitration; and that the filing of the plaint was not such a refusal.—I. L. R., 5 Cal. 498.

The plaintiff was the widow of one Pitambar Nathu, who was the son of one Nathu Jadowji. Nathu Jadowji had three sons, *viz.*, Morarji, Pitambar, and the defendant, Cursandas, and all lived together as a joint family. The plaintiff was married to Pitambar about thirty years previously to this suit, she being then eleven years of age. Pitambar died when he was fourteen years old, before the plaintiff had attained puberty, and while she was still living with her parents. After her husband's death she went to the house of her father-in-law, Nathu Jadowji, and was residing there at the time of his death. He died intestate in 1881, leaving moveable and immoveable property of the value of Rs. 1,50,000, all of which was admittedly self-acquired property. His widow (Lalvahu) and two sons, *viz.*, Morarji and the defendant, Cursandas, survived him. Morarji died in 1883. After Nathu's death, the plaintiff continued for a time to reside in the family house with Cursandas. Disputes, however, arose, and she left the house, and went to reside with her brother. She now sued her brother-in-law, Cursandas, for maintenance, alleging that she had been obliged to leave his house in consequence of ill-treatment. She claimed Rs. 1,000 *per* month by way of maintenance, and also prayed for the delivery of certain ornaments belonging to her, which she said were in the defendant's possession. The defendant denied possession of the plaintiff's ornaments; and, as to her claim for maintenance, he contended that all the property of his father, Nathu Jadowji, was self-acquired, and that, as such, the plaintiff's husband, Pitambar, had never any interest in it, having pre-deceased Nathu, and that she was, therefore, not entitled to maintenance out of it. He stated, however, that he was willing to maintain her if she would return to his house, and live with his family.

*Held*, that the plaintiff being, as Pitambar's widow, a member of her husband's undivided family, was entitled to maintenance from the defendant. Upon Nathu's death, intestate, his property devolved upon his sons (Morarji and Cursandas) as ancestral property for the benefit of the undivided family, of which he (Nathu) was in his life-time the head; or, in other words, subject to the incidents to which ancestral property is liable. If one of such sons had been disqualified from inheriting by reason of idiocy, &c., he, though a member of the undivided family, would only be entitled to maintenance. The plaintiff, by reason of her sex, was disqualified

from inheriting in competition with males, but none the less was she entitled to maintenance out of the ancestral estate which had devolved upon the males, with whom she constituted an undivided family.

Where a widowed sister-in-law claims maintenance from a brother-in-law, the only question for the Court to consider is, whether the brother-in-law has ancestral property in his hands.

*Held*, also, that the plaintiff being legally entitled to claim maintenance from the defendant, she was entitled to separate maintenance, and that the defendant, could not insist upon her living in his house.

The property left by Nathu at his death was of the value of Rupees 1,50,000.

*Held*, that an allowance of Rs. 40 *per* month should be paid to the plaintiff by the defendant as maintenance. If Pitambar, (the plaintiff's husband), had survived his father Nathu, the share of Nathu's property, (deducting one-fourth for Lalvahu, the widow of Nathu), which would have devolved on him would have been a little less than Rs. 40,000, or Rs. 1,600 *per annum* at 4 *per cent.*,—that is, Rs. 133 *per* month. The plaintiff could not be allowed more than the interest on that sum. By analogy to the case of a deserted wife's claim for maintenance against her husband, the plaintiff ought not to be allowed less than one-third of such interest, her husband having left no sons.

The defendant alleged that, after the plaintiff had left his house, an agreement had been made between them to refer their dispute to arbitration, that the agreement of reference had been actually signed, but that, on the day fixed by the arbitrators for making their award, the plaintiff had given notice to them not to make an award, and, accordingly, they had not done so. The defendant contended that, by reason of this agreement, the plaintiff's suit was barred by sec. 21 of the Specific Relief Act I of 1877.

The alleged agreement to refer was in the following terms :—

“The Bhai Dossa Morarji and Dwarkadas Damodar. We, the undersigned two persons, give in writing to you as follows :—We used to reside and act in the house together in peace and harmony. Lately, a few days ago, in consequence of a disagreement amongst the women, Vahu Kuvervahu resided separately. Upon persuasion having been used towards her, Vahu Kuvervahu again resides in the house together with the rest : so now all are residing in the house in peace and harmony. If any occasion should arise, and if any disagreement should take place amongst the women, in order to find a remedy for that, we, the undersigned two persons, give in writing to you as follows :—As to whatever award or settlement you, two persons, together will make in accordance therewith, we agree to receive or pay. As to that, we are truly to act on our true religious faith ; and we have written and delivered this writing of our free will and pleasure. The same is agreed to and approved of by our heirs and representatives, all ; the 11th *Jyesth Vadya*, *Samvat* 1939, the day of the event, Friday, the 1st June, 1883. And as to this, you are truly to make and deliver a settlement within fifteen days' time.”

*Held*, that the plaintiff's suit was not barred. The agreement did not indicate what was the subject-matter to be referred, and there was no evidence to show that the plaintiff's claim to maintenance had been laid before the arbitrators, or that the plaintiff had refused to perform her agreement to refer in reference to that claim. Nor was there any evidence to show the time at which the plaintiff withdrew from the arbitration—whether be-

fore or after the time allowed to the arbitrators to make and publish their award, *viz.*, fifteen days. If the latter, her withdrawal could not, in any view of the section, be held to be a refusal on her part to perform her agreement to refer. Even if the plaintiff's withdrawal was unjustifiable, it appeared that the defendant had taken no steps, under sec. 523 of the Civil Procedure Code (Act XIV of 1882), to have the agreement filed in Court, and thus render her withdrawal of no effect. There was nothing to show that the defendant did not acquiesce in it.

*Quære*, whether the above agreement was not void by reason of uncertainty.

*Quære*, whether the actual submission of a subject in dispute to named arbitrators, followed by the attempt of one of the parties to such submission, to withdraw from or to prevent an award being made upon the submission, falls within the concluding paragraph of sec. 21 of the Specific Relief Act I of 1877.—11 Bom. 199.

The parties to a suit applied for an adjournment of it on the ground that they had agreed to refer the matters in difference between them in such suit to arbitration. The Court accordingly adjourned the suit, and the matters in difference therein were referred to arbitration by the parties, and an award was made thereon disallowing the plaintiff's claim. *Held* that, under these circumstances, the further hearing of such suit was barred.—4 Al. 546.

The wording of sec. 21 of the Specific Relief Act (I of 1877) is wide enough to cover contracts to refer and matter which can legally be referred to arbitration, and one of such matters is a suit which is proceeding in Court. The parties to a suit, while it was pending, agreed to refer the matters in difference between them to arbitration, and for this purpose applied to the Court for an order of reference under sec. 506 of the Civil Procedure Code. The application was granted, arbitrators were appointed, and it was ordered that they should make their award within one week. Before the week had expired, and before any award had been made, one of the parties made an *ex-parte* application under sec. 373 of the Code for leave to withdraw from the suit with liberty to bring a fresh suit in respect of the same subject-matter. The application was granted, the suit struck off, and a fresh suit instituted in pursuance of the permission thus given by the court. In defence to this suit it was pleaded that the suit was barred by sec. 21 of the Specific Relief Act (I of 1877). *Held* that the Court in the former proceedings had no power to revoke the order of reference prior to award except as provided by sec. 510 of the Code; that consequently the Courts order under sec. 373 was *ultra vires* if involving such revocation, or, if not involving it, left the order of reference still in force; that in either alternative the suit was barred by sec. 21 of the Specific Relief Act; and that it was immaterial that the period within which the award was to be made expired before the bringing of the second action. *Per* TYRRELL J., that the suit was barred by the second clause of sec. 373 the Court having had no jurisdiction to pass the order under that section, or, having referred the suit to arbitration, to restore the suit to its file and treat it as awaiting the Court's decision.—9 Al. 168.

See I. L. R., 5 Al. 44, noted under sec. 12.

(c).—*Of the Discretion of the Court.*

Discretion as to decree specific performance.

**22.** The jurisdiction to decree specific performance is discretionary, and the

Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

*Illustrations.*

—A, a tenant for life of certain property, assigns his interest therein to B. C contracts to buy, and B contracts to sell, that interest. Before the contract is completed, A receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact, and C did not, specific performance of the contract should be refused to B.

(b).—A contracts to sell to B the interest of C in certain stock-in-trade. It is stipulated that the sale shall stand good, even though it should turn out that C's interest is worth nothing. In fact, the value of C's interest depends on the result of certain partnership accounts, on which he is heavily in debt to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

(c).—A contracts to sell, and B contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance, and A conceals it from him. Specific performance of the contract should be refused to A.

(d).—A's property is put up to auction. B requests C, A's attorney, to bid for him. C does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer, and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

*Illustrations.*

(e).—A is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase-money shall go to B. A, forgetting the condition, contracts, before the expiration of the twenty-five years, to sell the land to C. Here the enforcement of the contract would operate so harshly on A that the Court will not compel its specific performance in favour of C.

(f).—A and B, trustees, join their beneficiary, C, in a contract to sell the trust-estate to D, and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not



nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

(g).—A, the owner of an estate, contracts to sell it to B, and stipulates that he, A, shall not be obliged to define its boundary. The estate really comprises a valuable property not known to either to be part of it. Specific performance of the contract should be refused to B, unless he waives his claim to be unknown property.

(h).—A contracts with B to sell him certain land, and to make a road to it from a certain railway-station. It is found afterwards that A cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(i).—A, a lessee of mines, contracts with B, his lessor, that at any time during the continuance of the lease B may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(j).—A contracts to buy certain land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

(k).—A contracts with B to buy from B's manufactory, and not elsewhere, all the goods of a certain class used by A in his trade. The Court cannot compel B to supply the goods; but, if he does not supply them, A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

The following is a case in which the Court may properly exercise a discretion to decree specific performance:—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

*Illustration.*

A sells land to a railway-company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

**Note.**

See I. L. R., 5 Al. 44, noted under sec. 12; 6 Cal. 328, noted under sec. 44 of the Civil Procedure Code.

(d).—*For whom Contracts may be specifically enforced.*

**23.** Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by—

Who may obtain specific performance.

(a) any party thereto;

(b) the representative in interest, or the principal, of any party thereto: provided that, where the learning, skill, sol-



vency, or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;

(d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainderman ;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title, and the reversioner is entitled to the benefit of such covenant ;

(f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof, and will sustain material injury by reason of its breach ;

(g) when a public company has entered into a contract, and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

(h) when the promoters of a public company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, the company.

**Note.**

See I. L. R., 13 Bom. 415, noted under sec. 45 of the Indian Companies Act. (VI of 1882.)

*—For whom Contracts cannot be specifically enforced.*

Personal bars to the re-

**24.** Specific performance of a contract cannot be enforced in favour of a person—

(a) who could not recover compensation for its breach ;

(b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed ;

(c) who has already chosen his remedy, and obtained satisfaction for the alleged breach of contract ; or

(d) who, previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.

*Illustrations.*

to clause (a).—A, in the character of agent for B, enters in to an agreement with C to buy C's house. A is, in reality, acting, not as agent for B, but on his own account. A cannot enforce specific performance of this contract.

to clause (b).—A contracts to sell B a house, and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. A becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

A contracts to sell B a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. A, without B's consent, fells the trees. A cannot enforce specific performance of the contract.

A, holding land under a contract with B for a lease, commits waste, or treats the land in an unhusbandlike manner. A cannot enforce specific performance of the contract.

A contracts to let, and B contracts to take, an unfinished house, B contracting to finish the house, and the lease to contain covenants on the part of A to keep the house in repair. B finishes the house in a very defective manner; he cannot enforce the contract specifically, though A and B may sue each other for compensation for breach of it.

to clause (c).—A contracts to let, and B contracts to take, a house for a specified term at a specified rent. B refuses to perform the contract. A thereupon sues for, and obtains, compensation for the breach. A cannot obtain specific performance of the contract.

Contracts to sell property by one who has no title, or who is a voluntary settler.

**25.** A contract for the sale or letting of property, whether moveable or immoveable, cannot be specifically enforced in favour of a vendor or lessor—

(a) who, knowing himself not to have any title to the property, has contracted to sell or let the same ;

(b) who, though he entered into the contract, believing that he had a good title to the property, cannot, at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt ;

(c) who, previous to entering into the contract, has made a settlement (though not founded on any valuable consideration) of the subject-matter of the contract.

*Illustrations.*

(a.) A, without C's authority, contracts to sell to B an estate which A knows to belong to C. A cannot enforce specific performance of this contract, even though C is willing to perform it.

(b.) A bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B. B gives a general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out

contract. The trustees cannot specifically enforce this contract, as, in the absence of B's consent to the particular sale to C, the title which they can give C is, as the law stands, not free from reasonable doubt.

(c.) A, being in possession of certain land, contracts to sell it to Z. On enquiry it turns out that A claims the land as heir of B, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract.

(d.) A, out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement, and thus prejudice the interests of the persons claiming under it.

(f).—*For whom Contracts cannot be specifically enforced except with a variation.*

**26.** Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely):—

(a) where by fraud or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it;

(b) where by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff;

(c) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part which adds to the contract, but which he refuses to fulfil;

(d) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce;

(e) where the parties have, subsequently to the execution of the contract, contracted to vary it.

#### *Illustrations.*

(a.) A, B, and C, sign a writing, by which they purport to contract each to enter into a bond to D for Rs. 1,000. In a suit by D, to make A, B, and C separately liable each to the extent of Rs. 1,000, they prove that the word 'each' was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. D can obtain the performance sought only with the variation thus set up.

(b.) A sues B to compel specific performance of a contract in writing to buy a dwelling-house. B proves that he assumed that the contract in-

cluded an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by B.

(c.) A contracts in writing to let to B a wharf, together with a strip of A's land delineated in a map. Before signing the contract, B proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A's land of the same dimensions, and to this A expressly assented. B then signed the written contract. A cannot obtain specific performance of the written contract, except with the variation set up by B.

(d.) A and B enter into negotiations for the purpose of securing land to B for his life, with remainder to his issue. They execute a contract, the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

(e.) A contracts in writing to let a house to B, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing; so, with B's consent, A pulls it down and erects a new house in its place; B contracting orally to pay rent at Rs. 120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

#### Note.

A certificated guardian of certain minors entered into an agreement with the plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary, being obtained to the transaction, and a portion of the purchase-money was paid by the plaintiff. The Court sanctioned the sale but at a higher price than that agreed on between the plaintiff and the guardian, and the latter sold to a third party. The plaintiff, thereupon, sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement:—*Held*, that the contract was not one which could be specifically enforced, and that sec. 26 of the Act did not only apply. The contract as it stood was never a complete contract at any time as it was contingent upon the permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties.—I. L. R., 12 Cal. 152.

#### —Against whom Contracts may be specifically enforced.

Relief against parties and persons claiming under them by subsequent title.

**27.** Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—

(a) either party thereto ;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract ;

(c) any person claiming under a title which, though prior to the contract, and known to the plaintiff, might have been displaced by the defendant ;

when a public company has entered into a contract, and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

(e) when the promoters of a public company have, before its incorporation, entered into a contract, the company : provided that the company has ratified and adopted the contract, and the contract is warranted by the terms of the incorporation.

*Illustrations.*

to clause (b).—A contracts to convey certain land to B by a particular day. A dies intestate before that day without having conveyed the land. B may compel A's heir or other representative in interest to perform the contract specifically.

A contracts to sell certain land to B for Rs. 5,000. A afterwards conveys the land for Rs. 6,000 to C, who has notice of the original contract. B may enforce specific performance of the contract as against C.

A contracts to sell land to B for Rs. 5,000. B takes possession of the land. Afterwards A sells it to C for Rs. 6,000. C makes no enquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C.

A contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to B. Immediately after the contract A dies intestate, and C takes out administration to his estate. B may enforce specific performance of the contract against C.

A contracts to sell certain land to B. Before the completion of the contract A becomes a lunatic, and C is appointed his committee. B may specifically enforce the contract against C.

to clause (c).—A, the tenant for life of an estate, with remainder to B, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed, A dies. C may enforce specific performance of the contract against B.

A and B are joint tenants of land, his undivided moiety of which either may alien in his lifetime, but which, subject to that right, devolves on the survivor. A contracts to sell his moiety to C, and dies. C may enforce specific performance of the contract against B.

**Notes.**

The plaintiffs sued to enforce an agreement for the execution of a conveyance of certain immoveable property, and for the possession of such property, making the party to such agreement and the persons who had, subsequently to the date of the same, purchased such property in execution of decree, defendants in the suit, on the allegation that such persons had purchased in bad faith and with notice of the agreement. *Held*, with reference to sec. 27 of Act I of 1877, that, under such circumstances, there was not necessarily a misjoinder of causes of action.—I. L. R., 1 Al. 555.

On the 7th February, 1873, F mortgaged the equity of redemption of a certain estate to B and G. On the 7th August, 1877, he mortgaged such estate to P, agreeing that, if he failed to pay the mortgage-money within the time fixed, he would convey such estate to P, and that, if he failed to

execute such conveyance, P should be competent to bring a suit "to get a sale effected and a deed of absolute sale executed." On the 6th October, 1877, F mortgaged such estate to B and D. By this mortgage the lien created by the mortgage of the 7th February, 1873, was extinguished. In December, 1877, B and D obtained a decree against F on the mortgage of the 6th October, 1877, and in June, 1878, in execution of that decree, such estate was put up for sale and was purchased by D. In February, 1880, P sued F and D for the execution of a conveyance of such estate to him in accordance with F's agreement of the 7th August, 1877. *Held* that the mortgage of the 7th August, 1877, was not in the nature of a mortgage by conditional sale and there was no necessity for P to take proceedings to foreclose the mortgage, and the suit was maintainable. Also that, assuming that D had no notice of the agreement of the 7th August 1877, it was very doubtful whether under sec. 27 (b) of Act I of 1877 D could claim that specific performance of that agreement should not be granted, inasmuch as the contest lay between a prior and subsequent lien created upon the same property, which had passed to the transferee under a sale in execution of a decree for the enforcement of the subsequent lien.—3 Al. 706.

See I. L. R., 13 Madr. 324, noted under sec. 54 of the Transfer of Property Act; 13 Bom. 415, noted under sec. 45 of the Indian Companies Act.

—*Against whom Contracts cannot be specifically enforced.*

**28.** Specific performance of a contract cannot be enforced against a party thereto in any of the following cases :—

parties cannot be compelled to perform.

(a) if the consideration to be received by him is so grossly inadequate with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances, evidence of fraud, or of undue advantage taken by the plaintiff;

(b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled;

(c) if his assent was given under the influence of mistake of fact, misapprehension, or surprise: provided that, when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.

*Illustrations.*

to clause (c). A, one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to B of his testator's property. B cannot insist on the sale being completed.

A directs an auctioneer to sell certain land. A afterwards revokes the auctioneer's authority as to 20 bighas of this land, but the auctioneer inadvertently sells the whole to B, who has not notice of the revocation. B cannot enforce specific performance of the agreement.

(i).—*The Effect of dismissing a Suit for Specific Performance.*

**29.** The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part as the case may be.

Bar of suit for breach after dismissal.

(j).—*Awards and directions to execute settlements.*

Applications of preceding sections to awards and testamentary directions to execute settlements.

**30.** The provisions of this chapter as to contract shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

#### Note.

A suit for money, based on an award, which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced; and, as by sec. 30 of the Specific Relief Act, 1877, awards are placed on the same footing as contracts, No. 113, sch. ii of the Limitation Act, 1877, is applicable to such a suit.—I. L. R., 5 Al. 263.

## CHAPTER III.

### OF THE RECTIFICATION OF INSTRUMENTS.

**31.** When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party or his representative in interest may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may, in its discretion, rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

When instrument may be rectified.

#### Illustrations.

(a.) A, intending to sell to B his house and one of three godowns adjacent to it, executes a conveyance prepared by B, in which, through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C, and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C, be rectified so as to exclude from it the godown given to C; but it cannot be rectified so as to affect D's lease.



(b.) By a marriage-settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators and assigns, during A's life, an annuity of Rs. 5,000. C dies insolvent, and the official assignee claims the annuity from A. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement, and decree that the assignee has no right to any part of the annuity.

#### Notes.

Three plots of land were let to A under one kabuliat. A relinquished two plots, but admitted to being in possession of one, alleging that the kabuliat had been obtained by fraud and misrepresentation. *Held*, that as the lease was an entire contract, one portion only could not be repudiated on the ground of fraud: but that, if the tenancy was to be avoided on the ground of fraud, it must be avoided *in toto*. Where a party to a contract of tenancy desires to have it rectified or altered, the suit should be brought under sec. 31 of the Specific Relief Act.—I. L. R., 8 Cal. 118.

A mortgagor alleged that a sum in excess of his debt to the mortgagee had been inserted in the instrument; but, on the facts, there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit, under sec. 31 of Act I of 1877 (the Specific Relief Act), to have the instrument rectified was held to have been rightly dismissed.—14 Cal. 303.

**32.** For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Presumption as to intent of parties.

**33.** In rectifying a written instrument, the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

Principles of rectification.

**34.** A contract in writing may be first rectified, and then, if the plaintiff has so prayed in his plaint, and the Court thinks fit, specifically enforced.

Specific enforcement of rectified contract.

#### Illustration.

A contracts in writing to pay his attorney, B, a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B from all rights under it. B is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

## CHAPTER IV.

### OF THE RESCISSION OF CONTRACTS.

Note.—See I. L. R., 7 Cal. 474, noted under sec. 56 of the Contract Act.

**35.\*** Any person interested in a contract in writing may  
When rescission may be sue to have it rescinded, and such rescis-  
adjudged. sion may be adjudged by the Court in  
 any of the following cases, namely :—

(a) where the contract is voidable or terminable by the plaintiff ;

(b) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff ;

(c) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase-money or other sums, which the Court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract either so far as regards the party in default, or altogether as the justice of the case may require.

*Illustrations.*

to (a).—A sells a field to B. There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.

to (b).—A, an attorney, induces his client B, a Hindu widow, to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled to have the instrument of transfer rescinded.

**Note.**—See I. L. R., 3 Madr. 215, noted under sec. 65 of the Contract Act.

**36.\*** Rescission of a contract in writing cannot be ad-  
Rescission for mistake. judged for mere mistake, unless the party  
 against whom it is adjudged can be res-  
 tored to substantially the same position as if the contract had  
 not been made.

**37.** A plaintiff instituting a suit for the specific per-  
Alternative prayer for formance of a contract in writing may  
rescission in suit for pray in the alternative that, if the contract  
specific performance. cannot be specifically enforced, it may  
 be rescinded and delivered up to be cancelled ; and the Court,

\* In secs. 35 and 36 the words "in writing" have been repealed by Act IV. of 1882 (Transfer of Property) in territories in which this Act is in force.

if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

**38.** On adjudging the rescission of a contract, the Court  
Court may require party rescinding to do equity. may require the party to whom such relief is granted to make any compensation to the other which justice may require.

## CHAPTER V.

### OF THE CANCELLATION OF INSTRUMENTS.

**Note.**—See I. L. R., 7 Cal. 474, noted under sec. 56 of the Contract Act.

**39.** Any person against whom a written instrument is  
When cancellation may be ordered. void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may, in its discretion, so adjudge it, and order it to be delivered up and cancelled.

If the instrument has been registered under the Indian Registration Act,\* the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered, and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

#### *Illustrations.*

(a.) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(b.) A conveys land to B, who bequeaths it to C, and dies. Thereupon D gets possession of the land, and produces a forged instrument, stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.

(c.) A, representing that the tenants on his land were all at will, sells it to B, and conveys it to him by an instrument dated the 1st January 1877. Soon after that day, A fraudulently grants to C a lease of part of the lands, dated the 1st October 1876, and procures the lease to be registered under the Indian Registration Act.† B may obtain the cancellation of this lease.

(d.) A agrees to sell and deliver a ship to B, to be paid for by B's acceptances of four bills of exchange, for sums amounting to Rs. 30,000 to be drawn by A on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills. B may obtain the cancellation of all the bills.

#### **Notes.**

Under the special procedure provided in the Registration Act (III of 1877) the defendant, in whose favour a document was said to have been

\* See Act III. of 1877, sec. 2.

executed, succeeded in obtaining an order from the District Registrar for the registration of the same, although the plaintiff, who was alleged to have executed it, appeared before the Sub-Registrar, and subsequently before the Registrar, and denied executing it, and alleged it to be a forgery. In a suit brought under the above circumstances to have the document declared void, and to have it cancelled, the Court placed the onus of proving its genuineness and its execution by the plaintiff on the defendant.—*Held*, that the proceedings of the Registrar, when he enquired whether the document had been duly executed or not, were in no sense those of a “competent Court,” but only those of an executive officer invested with *quasi-judicial* functions, and that, consequently such a suit was maintainable; and that, under the circumstances, the onus of proof was properly placed on the defendant. *Held* also, that the Specific Relief Act (I of 1877) applied, sec. 39 evidently contemplating and providing for such a suit.—I. L. R., 7 Cal. 736.

Upon the cancellation of instruments of hypothecation and sale on proof of fraud and collusion between the grantee, who had advanced money, and the manager of the grantor's estate, the grantor having been unduly influenced in the transaction:—*Held*, that the condition of cancellation should be, not the repayment of all money received by the manager, but only of sums shown to have been paid to the grantor personally, and of such sums received by the manager, as he would have been justified in borrowing in the course of a prudent management of the estate.—11 Cal. 61.

A suit was filed in 1888 on behalf of a Malabar Tarwad by two of its members to recover property improperly alienated in 1879 under a kanom instrument by the karnavan, who had since been removed from office:—*Held*, that since a prayer for the cancellation of the kanom instrument was not an essential part of the plaintiff's relief, the suit was not barred by the 3 years rule in Limitation Act 1877, Sch. II. Art. 91.—14 Madr. 26.

The plaintiff, alleging that he was the proprietor of certain land; that defendant No. 2 had wrongfully and fraudulently mortgaged it to defendant No. 1; and that defendant No. 1 had applied for foreclosure of the mortgage, and notice of foreclosure had issued; claimed “that, the mortgage-deed being set aside, the land be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings.” *Held* that the suit was not strictly one for the cancelment or setting aside of an instrument to which the limitation in No. 91, sch. ii, of the Limitation Act, 1877, would apply, (which relates to suits of the nature of those referred to in sec. 39 of the Specific Relief Act), but rather one for a declaratory decree.—5 Al. 322.

A vendor of land who, had covenanted with his vendees that he had a good title, and who after the sale, had no interest remaining in the property, brought a suit in which he claimed to set aside as fraudulent a mortgage on which the defendant had obtained a decree against the vendees, and the decree itself. He based his right to maintain the suit upon his liability under his covenant. The vendees were not parties to the suit. *Held* that as the defendant's mortgage had merged in his decree, the suit could only be maintained if the plaintiff could show himself entitled to have the defendant's decree set aside, and that he had shown no interest which would entitle him to maintain a suit for such a purpose.—9 Al. 439.

In a suit under sec. 39 of the Specific Relief Act (I of 1877) for cancelment of a deed of gift executed by the plaintiff in favour of the defendant, the plaintiff was a *Chattri* by caste, well advanced in years, and the defendant was his *guru* or spiritual adviser, a Brahman held in high consideration in the locality where he resided. The gift comprised the whole

of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world, and his having heard the defendant recite the holy book called Bhagwat. Almost immediately after execution of the deed the plaintiff repudiated it, and sued for its cancellation on the ground of fraud. *Held* that having regard to the fiduciary relation subsisting between the parties, the improvidence of the gift, the absurdity of the reason alleged for it, and the principal recognized by sec. 111 of the Evidence Act (I of 1872), the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and, in the absence of such proof the plaintiff was entitled to obtain cancellation of the deed. *Sital Prasad v. Parbhu Lal*, referred to.—12 Al. 523.

**40.** Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part, and allow it to stand for the residue.

*Illustration.*

A draws a bill on B, who endorses it to C, by whom it appears to be endorsed to D, who endorses it to E. C's endorsement is forged. C is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

**Notes.**

In a suit for cancellation of a sale-deed by the person whose name appeared on it as executant, it was alledged in the plaint that it was a forgery, and that if it was not a forgery, its execution had been obtained by fraud and that it was, moreover, void for want of consideration. The plaintiff's interest in the property to which the instrument related had been assigned by her to another by a conveyance which contained certain covenants by her with regard to the land:—*Held*, that the plaintiff was not entitled to maintain the suit. *Per cur*: The gist of the plaintiff's charge against the defendant was that she had never executed a sale-deed in his favor, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that if she did execute the document no consideration was received by her or that fraud had been practised upon her.—I. L. R., 13 Madr. 549.

See I. L. R., 14 Madr. 26, noted under sec. 39.

**41.** On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Power to require party for whom instrument is cancelled to make compensation

## CHAPTER VI.

### OF DECLARATORY DECREES.

**42.** Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to

of Court as to declarations of status or right.

such character or right, and the Court may, in its discretion, make therein a declaration that he is so entitled, and the plaintiff need not, in such suit, ask for any further relief:

Bar to such declaration.      Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

*Explanation.*—A trustee of property is a person interested to deny a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

*Illustrations.*

(a.) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A may sue for a declaration that they are not entitled to the right so claimed.

(b.) A bequeaths his property to B, C, and D, 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.' No such children are in existence. In a suit against A's executor, the Court may declare whether B, C, and D, took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.

(c.) A covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.

(d.) A alienates to B property in which A has merely a life-interest. The alienation is invalid as against C, who is entitled as reversioner. The Court may, in a suit by C against A and B, declare that C is so entitled.

(e.) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity, and was therefore void beyond the widow's lifetime.

(f.) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(g.) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.

(h.) A bequeaths property to B for his life, with remainder to B's wife and her children, if any, by B, but if B die without any wife or children, to C. B has a putative wife, D, and children, but C denies that B and D were ever lawfully married. D and her children may, in B's lifetime, institute a suit against C, and obtain therein a declaration that they are truly the wife and children of B.

**Notes.**

The plaintiff, claiming to be entitled in reversion to certain property on the death of his grandfather's widow, sued for a declaration that cer-



tain alienations made by the widow were void as against him. To this suit the widow and her alienee were defendants. The defence was, that the plaintiff was not the reversioner, and certain parties, who claimed to be the real reversioners, intervened, and were made defendants by order of the Court. The plaintiff obtained a declaration of his reversionary right, and the deeds of sale were, on certain conditions, declared void as against him. The intervenors appealed to the High Court. *Held*, on appeal, that, notwithstanding the provisions of sec. 42 of the Specific Relief Act (I of 1877), the plaintiff was not entitled to the relief sought, and that the defendants who claimed as reversioners should not have been made parties to the suit. Sec. 42 of the Specific Relief Act refers only to existing and vested rights, and not to contingent rights.—I. L. R., 8 Cal. 12.

Certain trusts of a house were declared in favour of A and B for life subject to forfeiture upon the happening of particular events and further trusts in favour of the issue of A and B were also declared. The settlor died leaving a will under which C took an estate for his life, with remainder to the settlor's son E absolutely. E assigned his interest in the premises to the plaintiff, who now sued the *cestuis que trustent* and C, praying that, in the events which had happened, it might be declared that the life-estates of A and B had been forfeited. He also asked for various declarations as to his rights. *Held*, that no declaratory decree could be made.—8 Cal. 761.

Notwithstanding the confiscation of land in Oudh, followed by its restoration under the Government Order 11th March 1858, affirming the absolute title of those with whom summary settlements had been made, and the granting of sanads to the latter persons, with full power of alienation, confirmed by "The Oudh Estates Act, 1869," the legal owner may, either by express agreement, or by his conduct, constitute himself a trustee for others as to the whole or part of the beneficial interest in the land, the subject of such restoration, settlement, and sanad. A taluqdar, deceased before annexation, had provided by will for the succession of his five widows, one at a time, to his estate, with remainder to a son of his nephew. Settlement was made with the senior widow after the mutiny; a sanad granted to her as taluqdar, with full power of alienation, and her name was afterwards entered in the lists prepared under sec. 8 of "The Oudh Estates Act, 1869." But certain of her acts were not explicable except on the understanding that she was abiding by the will. *Held*, in a suit by the widow next in order, that such senior widow had undertaken the trust of carrying out the provisions of the will, and that a deed of gift made by her transferred only her interest, which was an estate for life. *Held* also, in a suit by the remainderman for a declaration of the invalidity of the transfer by the widow as against him, that although declaratory relief might have been, at the Court's discretion, refused to him, on the ground of his remoteness in remainder, and the identity of the object of his suit with that of the other, yet he was entitled on this appeal to the decree which he sought, because his suit had been wrongly decided against him on the merits.—8 Cal. 769.

The Civil Courts have no jurisdiction to make a decree reversing an order for the registration of the name of any person made by a registering officer under Beng. Act VII of 1876. All that the Civil Courts can do is to declare the title of an individual, or to give him a decree for possession and then the registration officers should, as a matter of course, proceed to amend their registers in accordance with the rights of the parties as settled by the Civil Courts.—10 Cal. 350.



It is open to a landlord, where his title is in jeopardy from the aggressions of a neighbouring zemindar, and where his title may be damaged by a denial of his rights over his land, to bring a suit for the purpose of having his rights declared as against such wrong-doer and for the purpose of being put into possession of the land as against them. *Womesh Chunder Goopto v. Raj Narain Roy*, 10 W. R., 15, explained.—10 Cal. 1076.

A plaintiff, admitting a defendant's right to a *Kursa-jama* tenure in certain lands but denying a permanent *malguzari* tenure set up by him, sought to eject the defendant from the *kursa-jama* holding, and for a declaration that the defendant was not entitled to the permanent *malguzari* tenure:—*Held*, that the plaintiff was entitled to the declaration asked for, notwithstanding that in consequence of his failure to prove a reasonable notice to quit, he was unable to obtain a decree for ejectment. A Judge, interfering with the discretion exercised by a lower Court in granting a declaratory decree, should state his reasons for so doing.—13 Cal. 3.

In a suit for declaratory decree in respect of plaintiff's right to certain land where it appeared that rent was due to the plaintiff in respect of such land, if his case were a true one, and where such rent was not claimed: *Held*, that the "further relief" referred to in the proviso to sec. 42 of the Specific Relief Act is further relief in relation to "the legal character of right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying," and does not include a claim for arrears of rent.—14 Cal. 586.

An owner of land has a right to bring a suit under sec. 42 of the Specific Relief Act against any one of the public who formally claims to use such lands as a public road, and who thereby has endangered the title of the owner. To such a suit it is unnecessary to make the Secretary of State a party. Such a suit is not barred by an order of a Criminal Court under sec. 137 of the Criminal Procedure Code. *Khodabuksh Mundul v. Monglai, Mundul*, I. L. R., 14 Cal. 60, overruled.—15 Cal. 460.

A person bringing a suit under sec. 42 of the Specific Relief Act to stay a partition directed by the Collector under Beng. Act VIII of 1876, on the ground that a private partition has already been come to, must prove not only that there has been a private partition, but also that, under that partition, he is entitled to, and was in possession of, in severalty some specific portion of the property again sought to be partitioned by the Collector; and such person is entitled to no declaration effecting the rights of other shares in the parent estate. *Khobun v. Wooma Churn Singh*, 3 C. L. R., 453, distinguished. *Semble*.—Sec. 26 of Beng. Act VIII of 1876 does not bar the right to bring an action, but merely limits the effect of the decree unless the action is brought within a certain time.—16 Cal. 117.

M pledged his ship in August 1878 to C as security for a bond debt of Rs. 1,500, repayable by two instalments in February and August 1879. S seized the ship in French territory for a debt due to him by M and the French Court sold the ship. C made a claim on the proceeds of the sale in the hands of the Court in December 1878. The French Court required C to produce a copy of an English Court's judgment acknowledging and sanctioning C's claim against M. C sued S to obtain a declaration of his right to recover the amount due by M on the bond. *Held* that whether or not his lien was destroyed by the sale of the ship in French territory, C was not entitled to any of the proceeds of the sale either at the date of the sale or of his claim in the French Court and the denial by S of C's right to any of the proceeds of the sale gave C no cause of action.—5 Madr. 330.

A grant of lands free of revenue does not come within the purview of the Indian Pensions Act, 1871. A joint Hindu family, consisting of three brothers, enjoyed an undivided one-third share of certain lands. One member sued the others for partition of the family property, claiming to have his right declared to receive one-third of the share of the family in the profits of the said lands:—*Held*, that the Court was not debarred from granting the relief prayed for by the provisions of sec. 42 of the Specific Relief Act.—7 Madr. 191.

The plaintiffs, uncle's sons of R, a deceased Hindu, brought a suit as reversioners of R, for a declaration that certain alienations made by M the widow of R were not binding beyond the lifetime of M. The District Judge held on the strength of *Greeman Singh v. Wahari Lall Singh* (I. L. R., 8 Cal., 12) that the suit would not lie under sec. 42 of the Specific Relief Act:—*Held*, that the suit would lie.—10 Madr. 90.

The proviso to sec. 42 of the Specific Relief Act that "no Court shall pass a declaratory decree where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so" refers to the position of plaintiff at the date of suit: where a suit was brought for a declaration that certain alienations of land made by a Hindu widow to the defendants were not binding on plaintiff, her reversionary heir, and pending appeal by the plaintiff, the widow died:—*Held*, (1) that the plaintiff was entitled to proceed with his appeal: (2) that plaintiff could not be permitted to amend his plaint and claim possession.—12 Madr. 136.

Suit to declare plaintiff's title to the stanom of fifth Raja of Palghat; the first Raja (defendant No. 1) received a malikana allowance from Government payable to the various stanomdars, but had refused to pay to plaintiff the fifth Raja's share:—*Held*, the plaintiff being entitled to sue for further relief than the declaration of his title and having omitted to do so, the suit must be dismissed under Specific Relief Act, sec. 42. *Per cur.*—Pensions Act, sec. 6, was not applicable to this case.—13 Madr. 75.

The intervention of two life estates does not preclude the reversioner from obtaining a declaration of his interest as to land under Specific Relief Act, sec. 42.—13 Madr. 195.

Suit for a declaration that a decree of a Subordinate Court was passed fraudulently, the Judge having been bribed by the present defendant:—*Held*, that the suit did not lie. *Per cur.*—The remedy would appear to be by way of injunction to restrain the party from executing the decree.—14 Madr. 167.

The plaintiff obtained a decree in a suit in which he averred that he was entitled to the office of Sheik of Kallai and to certain properties attached hereto, and prayed for a declaration that the defendant had no right either to the office of Sheik or to the properties in question, for an injunction restraining him from interfering with the properties or doing anything in any way inconsistent with the plaintiff's right to the office, and for further and other relief. It appeared, on the evidence for the defence, that the defendant was in possession of part of the property, but no issue had been framed as to the maintainability of the suit under the last clause of Specific Relief Act, sec. 42:—*Held, on appeal by the defendant*, that the Court of First Instance should take evidence and try an issue specifically directed to this question. It having appeared on the evidence recorded on that issue that the defendant was substantially in possession of the office of Sheik and of its emoluments:—*Held*, that the suit was not maintainable, although an injunction was asked for as relief consequential on the declaration. The

plaintiff was permitted to pay additional stamp duty and amend the plaint by adding a prayer for possession.—15 Madr. 15.

In a suit in which the plaintiffs sought declarations that they were members of an undivided Aliyasantana family with the defendants, that certain property belonged to the family, and that plaintiff No. 1, the senior member of the family, was entitled to have the lands registered in his name, the defendants denied the allegations in the plaint, and pleaded that the suit for declarations only was not maintainable, and that it was barred by limitation. It was found that the plaintiffs had separated themselves from the defendants, and had for more than twelve years been excluded to their own knowledge from the joint family property :—*Held*, that, if, as alleged by the plaintiffs, plaintiff No. 1 was the *de jure* ejaman of the family, he was entitled to the possession and management of the family property, and a suit for a mere declaration of his right would not lie—*Chandu v. Chathu Nambiar*, I.L.R., 1 Madr. 381, distinguished. *Per cur.*—"We are of opinion that article 127 applies to this case, and that the plaintiffs, having separated themselves from the defendants, have for more than twelve years been to their own knowledge excluded from the joint family property, and that their suit to enforce a right to share therein is barred"—*Mahalinga v. Mariyamma*, I. L. R., 12 Madr. 462, distinguished.—15 Madr. 186.

A karar was executed by members of two Malabar tarwads, by which the tarwad of the plaintiffs and defendants Nos. 1 and 2 was amalgamated with that of which defendant No. 3 was a karnavan ; part of the property of the plaintiffs' branch was in the possession of defendants Nos. 1 and 3, and part of it was held under demises from defendant No. 3. The plaintiffs sued for a declaration of their title to this property and for a declaration that the karar was not binding on them. An issue was framed on the question whether the suit was maintainable for want of a prayer for all relief consequential on these declarations :—*Held*, (1) that the suit was not maintainable for want of a prayer for possession of the lands under demise ; (2) that the plaintiffs should not be permitted to amend the plaint on appeal by the addition of such a prayer.—15 Madr. 255.

The widows of a shrotriendar, who was a Sudra, brought a suit for a declaration of their title by inheritance to his lands against his illegitimate son, who had been registered as shrotriendar in lieu of his deceased father, and to whom certain of the raiyats had attorned. The defendant claimed to be legitimate according to the customary law governing the family, although his parents might not have been married at the time of his birth, by reason of his parents having performed the ceremony of *pariyam* before his birth:—*Held* (1) that the suit was not precluded by Specific Relief Act, sec. 42, *proviso* ; (2) that the defendant was illegitimate and that the plaintiffs were accordingly entitled to one-half of the lands in question, and the defendant was entitled to the other half. Observations on the allegation and proof of a custom in derogation of the general Hindu law of inheritance.—15 Madr. 307.

The defendant was in possession of the estate of a deceased *gosavi* as his *shishya* (spiritual son). The plaintiff sued upon a stamp of Rs. 10 for a declaration that he was the true *shishya* of the *gosavi* by a previous adoption, his real object being to establish a title to the estate in the hands of the defendant.—*Held* that under the circumstances the Court would not exercise, in the plaintiff's favour, the discretionary power to grant a declaratory decree vested in it by sec. 42 of the Specific Relief Act (I of 1877),

inasmuch as to do so would enable the plaintiff to obtain a relief on a stamp of Rs. 10 which the Legislature intended should be chargeable with a higher fee, and thus would have the effect of giving countenance to an evasion of the stamp law.—3 Bom. 230.

The defendant obtained a decree against D, father of the plaintiffs, for satisfaction of his debt by the sale of a moiety of a village mortgaged to him by D. In execution of it he attached the mortgaged property, the attachment being made, under sec. 274 of the Civil Procedure Code (Act X of 1877), by an order prohibiting D from transferring or charging the property in any way, and all persons from receiving it from him by purchase, gift, or otherwise. The plaintiffs thereupon applied for the removal of the attachment, but their application was rejected. They then sued for a declaration of their right to two thirds of the property. The District Judge, who tried the suit, rejected it on the ground that it was barred by s. 42 of the Specific Relief Act (I of 1877), because the plaintiffs might have sought further relief than a mere declaration of title, and omitted to do so. He was of opinion that the attachment constituted a dispossession, and that the plaintiffs might have asked to be replaced in possession, or, at any rate, for the removal of the attachment. *Held* by the High Court on appeal that the plaint was not open to objection on the ground that it only asked for a declaratory decree, without any consequential relief. *Held* that the prohibitory order to D did not constitute a dispossession of D, and still less of the plaintiffs, and that they could not have properly asked for removal of the attachment by a cancellation of the prohibitory order to D so long as they admitted that D had an interest in the attached property. *Held*, also, that the plaintiffs could not have properly asked for any consequential relief in their suit, but that when they instituted it, they were entitled and, indeed, bound to ask for a declaration of their right, if only to prevent a purchaser at the sale, under the defendant's decree against D, from afterwards alleging that he had purchased without notice of the plaintiffs' claim.—4 Bom. 529.

A suit will lie in a Civil Court for a declaration of the plaintiffs' right to officiate, in alternate years, as priests in a temple and receive the offerings to the idol. A suit should not be dismissed by an Appellate Court on the ground of its being one asking merely for a declaratory decree, and no consequential relief, where that objection has never been taken by the defendants to the suit. The plaintiffs should in such a case be allowed an opportunity of amending their plaint.—13 Bom. 548.

The plaintiff sued for a declaration that he was entitled to succeed, on his father's death, to a *talukdari* estate, to the exclusion of defendant No. 1, who, he alleged, was a supposititious child set up by his step-mother to defeat the plaintiff's right of inheritance. It appeared that defendant No. 1 had obtained a decree against the plaintiff's father, establishing his legitimacy, and declaring him entitled to receive maintenance out of the estate in question. In accordance with this decree, the Talukdari Settlement Officer, (defendant No. 2), who was in management of the estate under Bombay Act XXI of 1881, paid defendant No. 1 an allowance of Rs. 200 a month on account of his maintenance. The plaintiff alleged that the payment to defendant No. 1 was illegal and wrongful, but he did not ask for an injunction restraining him from receiving the allowance. The defendant contended that the suit was bad, (1) because notice had not been given to the Talukdari Settlement Officer as required by section 424 of the Civil Procedure Code (Act XIV of 1882), and (2) because the plaintiff had sued for

a mere declaration of title without asking for consequential relief. *Held*, following *Shahebzadee v. Fergusson* and *Bhau Balapa v. Nana*, that the suit was maintainable without giving the Talukdari Settlement Officer the notice required by sec. 424 of the Code of Civil Procedure. *Held*, also, (Candy, J., doubting) that the suit was barred under sec. 42 of the Specific Relief Act (I of 1877), as the plaintiff had omitted to seek the relief of an injunction against defendant No. 1, restraining him from receiving future payment of maintenance. *Held*, further, that plaintiff was at liberty to amend his plaint by praying for an injunction as against both defendants.—14 Bom. 395.

Bai Javer, a Hindu widow, made a will disposing of property, and of which under an award she had only the use during her life and to which the plaintiff, her son, was entitled after her death. While she was still living the plaintiff filed this suit, praying that the will might be declared invalid. The defendants were the testatrix and those who took under the will. While the suit was pending, the testatrix died. The Subordinate Judge passed a decree in plaintiff's favour and declared the will invalid. The defendants appealed, and contended for the first time, in appeal, that the allegations in the plaint, *viz.*, that the will was in their favour and that they (the defendants) were interested in denying the plaintiff's title as reversioner, did not constitute a case in which, in the exercise of a sound judicial discretion, a declaratory decree ought to be made. *Held*, that as the objection was taken for the first time in appeal, it would be unjust to allow the defendants to benefit after they had failed to resist G.'s claim on the merits. *Held*, further, that the will of J. should be declared to be invalid so far as it operated to defeat the award.—15 Bom. 697.

S sued B in a Court of Small Causes for arrears of ground-rent of a house. The latter denied S's proprietary right to the land and his liability to pay ground-rent, and S's suit was in consequence dismissed. Thereupon S sued B in the Civil Court for a declaration of proprietary right to the land and of his right to receive ground-rent. *Held* that the suit was not barred by the proviso to sec. 42 of the Specific Relief Act because it did not include a claim for arrears of ground rent; and that the suit was one in which the specific relief claimed might properly be granted. The principle laid down in *Sadut Ali Khan v. Khajeh Abdool Gunnee* (19 W. R., 171.) applied.—5 Al. 55.

On the death of P a Hindu widow, who had been in possession of the estate of her deceased husband, D's daughter B was entitled to succeed to the estate, if it were D's separate property. S, however, alleging that the estate was ancestral property, to which he was entitled to succeed, took possession of it. Thereupon the sons of another daughter of D, alleging that the estate of D was his separate property, that B was entitled to succeed to it, that they were the next reversioners, and that B was acquiescing in a possession on the part of S which was adverse to her and to them as next reversioners, sued B and S for a declaration of their reversionary right, and for possession of D's estate or such relief in this respect as the Court might think fit to give. *Held* that the plaint disclosed a right to sue on the part of the plaintiffs and a cause of action. *Nobin Chunder Chuckerbutty v. Gurn Persad Doss* (B. L. R., F. B. R., 1008); *Radha Mohan Dhar v. Ram Das Dey* (3 B. L. R., 362); *Gunesh Dutt v. Lall Muttee Kooer* (17 W. R., 11); and sec. 42 of the Specific Relief Act referred to. In order to show separation in a Hindu family, it is not necessary to establish a partition of the joint estate into separate shares or holdings: it is enough that



there has been ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, to effect a severance and destruction of the joint tenancy, so to speak, and to convert it into a tenancy in common, *Appovier v. Rama Subba Aiyan* (11 Moo. L. A. 75) followed. *Held*, therefore, where, although the ancestral property of a Hindu family had not been formally and completely partitioned by metes and bounds, the income of it had been enjoyed by the different members of it in distinct and defined share, that the family was not a joint and undivided Hindu family. It being decided that B was entitled to the estate of D and that she should be in possession of it, the Court, having regard to B's conduct, gave the plaintiffs a declaration of their reversionary right to D's estate and directed that possession of it should be given to B, and, if she declined to accept possession, then that A, one of the plaintiffs, should be put in possession for her as manager on her behalf, and he should act under the orders and directions of the lower Court, filing accounts in, and paying the income to her, through such Court, whose receipts should be a sufficient discharge.—5 Al. 532.

The zemindars of a village sued an occupancy-tenant for a declaration of their right to maintain a custom which was thus recorded in *wajib-ul-arz*:—"When necessary, one or two bighas out of the tenant's lands are taken without their consent (*khushi*) for sowing indigo." Upon the basis of this entry, they claimed to be entitled to take a portion of the occupancy-holding at a certain period of the year, for the purpose of cultivating indigo:—*Held*, by the Full Bench that the word "*khushi*" used in the *wajib-ul-arz* indicated that the land was only to be taken with the occupancy-tenant's consent, and the document created no right of the nature alleged, namely to take the land despite the tenant. *Per Tyrrell, J.*—That the suit was not maintainable under the special provisions of the Act.—7 Al. 880.

Subsequent to a decree for partition of an ancestral estate, the creditors of one of the parties thereto who, from the time of the suit, had borrowed money from them on the security of his rights and interests in the estate, brought a suit against their debtor and obtained a decree for the monies due to them. They then sued all the parties to the partition for a declaration that the decree then passed was, so far as it affected their (the plaintiff's), interests, fraudulent and collusive, and of no effect:—*Held*, that the suit was not maintainable.—7 Al. 884.

The name of the widow of a member of a joint hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property during her lifetime. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond:—*Held*, that if the widow's possession were only a possession by the plaintiff's consent entitling her merely to receive the profits for her maintenance, the plaintiffs might eject her from the property,

and that before they could obtain a declaration under sec. 42 they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate :—*Held* also that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and upon its face, mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate.—8 Al. 70.

An improper or irregular exercise of the discretionary power conferred by sec. 42 of the Specific Relief Act (I of 1877) does not in itself constitute sufficient ground for the reversal of a decree which is not open to objection on the ground of jurisdiction or of the merits of the case, being covered by sec. 578 of the Civil Procedure Code. *Sant Kumar v. Deo Saran* referred to.—9 Al. 622.

Under the Specific Relief Act (I of 1877) sec. 42, a suit was brought for a decree declaratory of the plaintiffs' title to be mutawalis and managers of property from ancient times connected with religious observances, viz., a ghat upon the Jumna with temples adjoining; of their title also to receive a proportion of the offerings; and they also claimed to have the proceeds of a decree obtained by the defendants against a third party spent upon repairs. *Held* that the suit had been rightly dismissed in the first Court. Even if the evidence had shown that the plaintiffs had some rights in respect of the property in question, they had, nevertheless, so far failed in giving definite proof of their claims that they were not entitled to the decree claimed. No decision was, however, given, nor was any opinion expressed, with respect to other rights, which either of the parties might have, or claim to have, relating to the property.—12 Al. 587.

The effect of sec. 95 (a) and sec. 10 of the North-Western Provinces Rent Act (XII of 1881) is to deprive the Civil Courts of jurisdiction to take cognizance of any suit the object of which is to declare, as between the zemindar and tenants, the status of the tenants. A Civil Court has no jurisdiction to entertain a suit in which, the defendants being admittedly the tenants of the plaintiffs, the plaintiffs pray for a declaration that certain entries of the defendants in the revenue records as occupancy tenants, and certain orders of the Revenue Courts maintaining those entries, be set aside, and that the defendants are shikmis and not occupancy tenants, and that the land in question is the plaintiffs' sir land. Such a suit cannot be brought within the Civil Court's jurisdiction by dropping all the reliefs claimed except the last-mentioned declaration, that being merely of importance as incidental to the previous ones, and as a roundabout mode of obtaining a declaration that the defendants are not the plaintiffs' occupancy tenants. *Per* EDGE, C.J., and MAHMOOD, J.—Whether the last-mentioned prayer is one which could be brought under sec. 42 of the Specific Relief Act, *quaere*. *Per* STRAIGHT, J.—The suit might also be considered as one to set aside orders passed by the Settlement Officer in the discharge of his duty for the purpose of correcting the jamabandi as a part of the record of rights, and thus the jurisdiction of the Civil Court was barred by sec. 241 of the North-Western Provinces Land Revenue Act (XIX of 1873).—13 Al. 17.

See I. L. R., 7 Cal. 343, noted under sec. 53 of the Civil Procedure Code; 5 Bom. 177, noted under sec. 28 of the Civil Procedure Code; 15



Bom. 309, noted under sec. 26 of the Civil Pro. Code ; 11 Madr. 116, noted under sec. 13 of the Evidence Act ; 13 Madr. 324, noted under sec. 54 of the Transfer of Property Act ; 14 Madr. 26, noted under sec. 39.

**43.** A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Effect of declaration.

*Illustration.*

A, a Hindu, in a suit to which B, his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized, and an order for the restitution of his conjugal rights. The Court makes the declaration and order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

## CHAPTER VII.

### OF THE APPOINTMENT OF RECEIVERS.

**44.** The appointment of a receiver pending a suit is a matter resting in the discretion of the Court.

Appointment of receivers discretionary.

The mode and effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure.\*

Reference to Code of Procedure.

## CHAPTER VIII.

### OF THE ENFORCEMENT OF PUBLIC DUTIES.

**45.** Any of the High Courts of Judicature at Fort William, Madras and Bombay, may make an order requiring any specific act to be done or forbore, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature: provided—

Power to order public servants and others to do certain specific acts.

(a) that an application for such order be made by some person whose property, franchise, or personal right, would be injured by the forbearing or doing (as the case may be) of the said specific act;

(b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or

\* See Act XIV. of 1882, sec. 3.

Court in his or its public character, or on such corporation in its corporate character ;

(c) that, in the opinion of the High Court, such doing or forbearing is consonant to right and justice ;

(d) that the applicant has no other specific and adequate legal remedy ; and

(e) that the remedy given by the order applied for will be complete.

Exemptions from such power.

Nothing in this section shall be deemed to authorize any High Court—

(f) to make any order binding on the Secretary of State for India in Council, on the Governor-General in Council, on the Governor of Madras in Council, on the Governor of Bombay in Council, or on the Lieutenant-Governor of Bengal ;

(g) to make any order on any other servant of the Crown as such, merely to enforce the satisfaction of a claim upon the crown ; or

(h) to make any order which is otherwise expressly excluded by any law for the time being in force.

#### Notes.

Section 31 of Bengal Act II of 1888 does not impose on the Chairman of the Municipality the duty of exercising any judicial discretion or taking any judicial action with regard to the list of candidates prepared under that section.—L. L. R., 19 Cal. 192.

Mr. G. bought some shares in the Bombay Fire Insurance Company and applied to the directors for registration as a shareholder in respect of the shares bought. The directors refused the application, giving no reason for so doing. Mr. G. now applied to the Court, under sec. 45 of the Specific Relief Act and under sec. 58 of the Indian Companies Act, for an order compelling the directors to register him as a shareholder. The Articles of Association of the Company provided (*inter alia*) that any shareholder might with the sanction of the Board of Directors sell or dispose of and transfer all or any of his shares to any other person approved by the Board (who shall not be bound to assign any reason for the withholding of such sanction). *Held*, that the application should be refused, for section 45 of the Specific Relief Act did not apply (there being another “specific and adequate legal remedy”), and under the Companies Act the proper procedure had not been adopted. Mr. G. was a transferee whose title was not complete, in as much as the requisite sanction to the transfer had not been obtained, and, therefore, there was no privity between him and the directors of the company, and he had no right to complain.—16 Bom. 398.

**46.** Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial thereof ; and the High Court may, in its discretion, make

Application how made.

Procedure thereon.

the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

If in the last case, the person, Court, or corporation complained of, shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary, and make an answer thereto by such day as the High Court fixes in this behalf.

**47.** If the person, Court, or corporation, to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

Every order under this chapter shall be executed, of, and appeal and may be appealed from, as if it were from, orders. a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

**49.** The costs of all applications and orders under this chapter shall be in the discretion of the High Court.

**50.** Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

**51.** Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this chapter; and, until such rules are framed, the practice of such Court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this chapter.

### PART III.—OF PREVENTIVE RELIEF.

#### CHAPTER IX.

##### OF INJUNCTIONS GENERALLY.

**52.** Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

**53.** Temporary injunctions are such as are to continue until a specified time or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.\*

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

## CHAPTER X.

### OF PERPETUAL INJUNCTIONS.

**54.** Subject to the other provisions contained in, or referred to by, this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II. of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely):—

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief;

(d) where it is probable that pecuniary compensation cannot be got for the invasion;

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

*Explanation.*—For the purpose of this section, trademark is property.

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\* See Act XIV. of 1882, secs. 492—497.

*Illustrations.*

(a.) A lets certain land to B, and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of this contract.

(b.) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(c.) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(d.) The directors of a fire and life-insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(e.) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(f.) A, a trustee for B, is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(g.) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.

(h.) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

(i.) A is B's medical adviser. He demands money of B, which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.

(j.) A, the owner of two adjoining houses, lets one to B, and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.

(k.) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seeds injurious thereto, and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husbandlike manner.

(l.) A, B and C, are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership-property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

(m.) A, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(n.) A, B, and C, are members of an undivided Hindu family. A cuts timber growing on the family-property, and threatens to destroy part of the

family-house, and to sell some of the family-utensils. B and C may sue for an injunction to restrain him.

(o.) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official assignee, and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(p.) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(q.) A, in an administration-suit, to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.

(r.) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine, and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(s.) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise.

(t.) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(u.) A infringes B's patent. If the Court is satisfied that the patent is valid, and has been infringed, B may obtain an injunction to restrain the infringement.

(v.) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(w.) A improperly uses the trademark of B. B may obtain an injunction to restrain the user, provided that B's use of the trademark is honest.

(x.) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.

(y.) A, a very eminent man, writes letters on family-topics to B. After the death of A and B, C, who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them.

(z.) A carries on a manufactory, and B is his assistant. In the course of his business, A imparts to B a secret process of value. B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.

#### Notes.

Before a Court will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the other should be restored to its former condition (as, for instance, where a tank has been excavated), a

plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position. *Lala Biswambhar v. Rajaram Lal*, 3 B. L. R., Ap. 67, applied in principle; *Shamnagar Jute Factory Co. v. Ram Narain Chatterjee*, I. L. R., 14 Cal. 189, approved. The fact that a portion of the land on which a tank had been excavated by the defendant was fit for cultivation does not constitute an injury of a substantial nature such as would justify an order of that nature.—I. L. R., 14 Cal. 236.

The plaintiffs were owners of the Grant Buildings situated at Colaba in Bombay. The said buildings comprised two three-storied blocks known respectively as the eastern block and the western block. Each block consisted of four divisions, those in the eastern block being numbered respectively Nos. 1, 2, 3, and 4, and those in the western block being numbered Nos. 5, 6, 7, and 8. Each block contained thirty-four sets of rooms. The plaintiffs became owners of the Grant Buildings in 1868, and had ever since derived a considerable income from the rooms by letting them as dwelling rooms to Europeans at an average rent of Rs. 50 <sup>1</sup>/<sub>2</sub> month. The defendants were owners of an adjacent cotton mill known as the Nicol Mill, which was erected in 1873. Prior to 1873 the site of the mill was occupied by the buildings of the Hydraulic Press Company, which were erected in 1868. These premises were in 1873 purchased by the Nicol Press and Manufacturing Company, who thereupon proceeded to build the Nicol Mill. On the 3rd August, 1874, the erection of the mill having then just commenced, the plaintiff's solicitor wrote to the Secretaries of the Nicol Press and Manufacturing Company as follows:—"It is rumoured that it is intended to carry on the business of spinning and weaving in the buildings now being erected. A business of this nature carried on so close to the Grant Buildings will render our client's property comparatively valueless, and we are instructed to bring this fact to your notice and to say that the Bank will not permit any business of the kind to be carried on to the detriment of their property." To this letter the Company replied that the business of the Hydraulic Press Company had been previously carried on by that Company on the same site without any remonstrance either from the plaintiff's or from the occupants of the Grant Buildings; that the value of the plaintiffs' property would be increased, not depreciated by the erection of the new mill; that the plaintiffs had been aware of the intention of the Nicol Company to convert the Hydraulic Press Company's premises into a spinning and weaving mill, and that they should have entered their protest months before; that under the circumstances the plaintiffs had no right to interfere in the working of the mill, and that the Nicol Company therefore intended to continue the erection of the building and to use it, when completed, for the purposes of the Company. The mill was completed and commenced working in June, 1876, with 13,644 spindles, there being room and engine-power sufficient for 40,000 spindles and 250 additional looms. In March, 1877, the number of spindles was increased to 19,832, which was the number in the mill at the date of suit. Since March, 1874, the eastern block of the Grant Buildings had been closed and not offered to tenants, the demand for rooms of that character having been only sufficient to fill the western block. In 1878, however, the demand again increased and the eastern block was re-opened and let to tenants, Division No. 1 being opened in January, 1878, and Division No. 2 in March, 1878, Division No. 3 in November and Division No. 4 in December, 1878. Complaints having been received from the tenants of these divisions of the nuisance arising from the Nicol Mill, the plaintiffs in December, 1878, sent instructions to counsel to prepare a plaint against the Nicol Press and



Manufacturing Company. On the 26th of that month, however, a resolution was passed to wind up the Company and the working of the mill was discontinued. In consequence of this no plaint was prepared, but the plaintiffs' solicitor sent a notice to the Liquidators of the Company referring to what had taken place and warning them not to sell the mill without giving the purchaser notice of the plaintiffs' intention to take proceedings against any person who should recommence to work the mill. Advertisements to that effect were also published in the English and native daily newspapers. On the 9th August, 1880, hearing that the mill was to be put up to auction, the plaintiffs sent to the Liquidators a similar notice. On the 25th August, 1880, the defendants' mill was put up for sale and the notices were read out by the plaintiffs' solicitor. The defendants were present and heard the notice read. The defendants purchased the property for Rupees 3,61,000, and the sale was confirmed by the Court. On the 1st January, 1881, the mill recommenced working, having been idle for two years. On the 26th January, 1881, a notice was sent to the defendants to discontinue the working of the mill on pain of a suit. The defendants replied denying the nuisance and stating that any suit would be defended. The suit was filed on the 5th February, 1881. The plaintiffs alleged a nuisance, especially to the tenants of the eastern block of the Grant Buildings, arising from the noise, smoke and cotton fluff and smells issuing from the defendants' mill. They complained that the said nuisances would be much increased when the defendants carried out their intention of completing the number of spindles and looms for which the mill was built. They prayed for an injunction and Rs. 1,000 damages. The defendants denied the alleged nuisance and contended that the plaintiffs were debarred from the relief claimed. At the time of the filing of the suit the only rooms in the Grant Buildings that were vacant were the following:—In the east block two rooms in Division No. I, one room in Division No. III, and one room in Division No. IV. In the west block five rooms were vacant. The total net rental of the vacant rooms was Rs. 350 a month, and of the occupied rooms Rs. 2,410. Evidence was given that many tenants had vacated their rooms in the east block on account of the nuisance experienced from the mill, but that the demand for rooms was so great that other tenants were found to fill the vacancies almost as soon as they occurred. At the time of the hearing of the suit four rooms were vacant in the east block and none in the west block. Between the date of the filing of the suit and the hearing, changes had been effected in the mill which decreased the nuisance, e.g., new boilers were erected, smokeless coal was used, screens, steam-jets and baffleplates were introduced. In order to diminish the noise double fixed windows were put in on the north side of the mill and the cog-wheeled gearing was bricked up. At the hearing it was contended—(1) that the mill was no nuisance; (2) that even if it was, the plaintiffs were debarred by their conduct from objecting; (3) that the plaintiffs being reversioners were not entitled to sue. *Held*, on the evidence, that the plaintiffs were not debarred from suing by acquiescence or laches, but that the defendants and the previous owners of the mill had been at every stage acquainted with the plaintiffs' intention to resist the working of the mill if it proved to be a nuisance; (2). That the working of the mill was a nuisance to the occupants of Divisions 2, 3 and 4 by reason of (a) the noise and also by reason of the (b) smoke and cotton fluff issuing from the mill during the monsoon; (3). That the only cause of action on which the plaintiffs could rely in support of their claim to an injunction was the diminution in the value of their property owing to the working of the mill being a nuisance

in respect of the four rooms vacant in Divisions Nos. 2, 3 and 4, at the time of the filing of the suit ; (4). That the efficacy of the changes and improvements made by the defendants after the filing of the suit for the purpose of diminishing the nuisance complained of depended so much on the good intention and constant personal care of the defendants and their servants that it ought not to influence the question of injunction when once the nuisance was proved to have existed ; (5). That although (the plaintiffs being at the date of the suit entitled only to complain of the nuisance as to four out of sixty-eight sets of rooms) it might be said there was no material diminution of the value of the property arising from the nuisance, the Court in considering the propriety of granting an injunction would have regard to the fact that the injunction, if granted, would render it unnecessary for the plaintiffs to bring an action in respect of all the other rooms in Division Nos. 2, 3 and 4 after giving the tenants notice to quit, and so prevent that multiplicity of suits on which an injunction is authorized by sec. 54 of the Specific Relief Act. Under the special circumstances of the cause the question whether an injunction should go, should be dealt with as if the plaintiffs had a right of action in respect of all the rooms in Divisions Nos. 2, 3 and 4 ; (6). The only interest of the plaintiffs in the Grant Buildings being a personal interest and the only object of the plaintiffs having been to secure the highest value for their property, and considering that, from the nature of the case, an injunction, such as the plaintiffs prayed for, would place the defendants entirely in the power of the plaintiffs, the relief given to the plaintiffs should assume the form of pecuniary compensation rather than of an injunction, and directed further evidence to be taken as to the diminution in value of the plaintiffs' property caused or likely to be caused by the nuisance so far as it affected Divisions Nos. 2, 3, and 4 of the eastern block. After taking further evidence the Court considered that the case would be best dealt with by a combination of damages and injunction ; and made an order for an injunction to issue against noise, smoke and cotton fluff so as to be a nuisance to the plaintiffs as owners or to their tenants for the time being of Divisions Nos. 2, 3 and 4. Such injunction not to issue in case the defendants should pay to the plaintiffs the sum of Rs. 40,000 before the expiration of a fortnight from the date of the decree. In the event of the payment of the said sum to them, an injunction to issue restraining defendants from working the said mill otherwise than with closed double glass windows on the side next the Grant Buildings, and also restraining defendants from allowing any smoke or cotton fluff to issue so as to cause such nuisance as aforesaid with liberty to plaintiffs to apply in case the noise be materially increased beyond what it is at present. On appeal, *Held*, per *Bayley*, C. J. (Acting) and *West*, J., that admitting that money compensation was a right form of relief, it should be compensation measured by the premises not owned but occupied by the plaintiffs ; in other words the rooms unlet. It was only in respect of these that the plaintiffs were competent to sue, and they could not be entitled to compensation on as more extensive ground. It was only in respect of the rooms in question that the present suit and the decree therein could guard the defendants against further actions. An award of Rs. 40,000 to the plaintiffs could not prevent any tenant of the rooms affected by the nuisance from suing the defendants on the same grounds as were taken by the plaintiffs in this suit. It would be unreasonable that the defendants should be made to pay as damages in bulk to persons not legally entitled what they might have to pay over again to those who are or may be entitled in detail. For the damages arising to the

plaintiffs on account of the rooms unlet at the institution of the suit, Rs. 1,000 would afford sufficient compensation, and the sum awarded should be reduced to that amount. The decree was varied accordingly and a clause was also inserted, distinctly providing against any increase of smoke, cotton fluff or noise of machinery beyond what subsisted at the date of the decree, and further providing that in case any invention should be made by which the nuisance might easily be diminished, the decree was not to be deemed to prejudice the right, if any, the plaintiffs as owners or the tenants of the Grant Buildings to require the defendants to introduce such invention into the said mill so as to cause the least annoyance reasonably possible.—I. L. R., 8 Bom. 34.

The plaintiff complained that the defendants intended to build so as to obstruct the passage of light and air through an ancient window in his house, and render a room therein unfit for use, and prayed for a perpetual injunction restraining the defendant from so building. It was proved that the wall intended to be built would so shut out the light and air as to render the room completely dark and unfit for use. The Subordinate Judge granted the injunction as prayed. The defendants appealed to the Joint Judge, who amended the lower Court's decree by ordering the removal of the injunction and directing, in its stead, a new window to be opened in the plaintiff's house to the east of the window in question. On appeal by the plaintiff to the High Court. *Held*, reversing the decree of the lower Appellate Court that the plaintiff had an absolute and indefeasible right to the easement he had acquired; and the only possible question was whether injunction or damages was the appropriate remedy under the circumstances of the particular case. *Held*, also, that, as the evidence established that, after defendant's wall was built, plaintiff's room would not remain substantially as useful to him as before, the plaintiff was entitled to an injunction. The High Court also directed a mandatory injunction to issue to the defendants to remove the wall they had raised after the lower Appellate Court had passed the decree in their favour and pending the plaintiff's appeal to the High Court.—13 Bom. 674.

One of several co sharers in a mahal having begun to erect certain kacheha buildings upon the common land, another co-sharer, three or four days after the building had commenced, brought a suit for an injunction to restrain the continuance thereof, on the ground that the defendant was ousting the plaintiff as a co-sharer from a portion of the common land. It was found that the defendant was building upon land which was in excess of the share which would come to him on partition, and that on partition the plaintiff could not be adequately compensated. *Held*, by the Full Bench that the plaintiff was entitled to a perpetual injunction restraining the defendant from proceeding further with the building, and directing that the building so far as it had proceeded be pulled down, and prohibiting the defendant from building on the land as exclusive owner at any future time. *Paras Ram v. Sherjit* referred to. *Per Straight, J.*, that it was for the defendant appellant to show that the lower appellate Court had exercised a wrong discretion in granting the injunction, and that, this not having been shown, the High Court ought not to interfere.—12 Al. 436.

See I. L. R., 10 Bom. 390.

See I. L. R., 15 Bom. 309, noted under sec. 26 of the Civil Pro. Code.

Mandatory injunctions.

**55.** When, to prevent the breach of an obligation, it is necessary to com-

pel the performance of certain acts which the Court is capable of enforcing, the Court may, in its discretion, grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

*Illustrations.*

(a.) A, by new buildings, obstructs lights, to the access and use of which B has acquired a right under the Indian Limitation Act, Part IV.\* B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

(b.) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(c.) In the case put as illustration (i) to section 54, the Court may also order all written communications made by B as patient to A, as medical adviser, to be destroyed.

(d.) In the case put as illustration (y) to section 54, the Court may also order A's letters to be destroyed.

(e.) A threatens to publish statements concerning B, which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

(f.) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(g.) In the cases put as illustrations (v) and (w) to section 54, and as illustrations (e) and (f) to this section, the Court may also order the copies produced by piracy, and the trademarks, statements, and communications, therein respectively mentioned, to be given up or destroyed.

**Injunction when refused. 56.** An injunction cannot be granted—

(a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings ;

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought ;

(c) to restrain persons from applying to any legislative body ;

(d) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government ;

(e) to stay proceedings in any criminal matter ;

(f) to prevent the breach of a contract, the performance of which would not be specifically enforced ;

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ;

(h) to prevent a continuing breach in which the applicant has acquiesced ;

\* See Act XV. of 1877, sec. 2.

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;

(j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court ;

(k) where the applicant has no personal interest in the matter.

#### *Illustrations.*

(a.) A seeks an injunction to restrain his partner, B, from receiving the partnership-debts and effects. It appears that A had improperly possessed himself of the books of the firm, and refused B access to them. The Court will refuse the injunction.

(b.) A manufactures and sells crucibles, designating them as "patent plumbago crucibles," though, in fact, they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(c.) A sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the sale. B shows that A's Mexican Balm consists of nothing but scented hog's lard. A's use of his description is not an honest one, and he cannot obtain an injunction.

#### **Notes.**

An injunction did not, under the law as it stood before the Specific Relief Act, 1877, lie against the decree-holder, by assignment or otherwise, to restrain him from executing a decree granted to him by a Court exercising co-ordinate jurisdiction with the Court in which the injunction was applied for, on the ground that the proceedings by which the decree was obtained against the person applying for the injunction were altogether illegal. The cases in which injunctions were granted by the Courts of Chancery in England against proceedings in other Courts rested upon the assumption that the rights of the parties could not be inquired into, except through the Courts of Chancery, and are, therefore not applicable to India. Injunctions to stay proceedings under the Specific Relief Act can only be granted in cases where the Court in which the proceedings are to be stayed is subordinate to that in which the injunction is sought.—I. L. R., 4 Cal. 380.

In a suit brought in a Subordinate Court by the junior members of a Malabar tarwad against their karnavan and others, the plaintiffs prayed for a declaration of the uraima right of their tarwad in a certain devasom, and for an injunction to restrain the defendants, other than the members of the plaintiffs' tarwad, from executing a decree of a District Court, passed on appeal from a Munsif's Court, whereby certain lands of the devasom were decreed to be surrendered to them in the character of uralers ; it appeared (1) that plaintiffs' karnavan was a party to the suit in which the above-mentioned decree was passed, (2) that the plaintiffs' tarwad was otherwise entitled to the uraima right by adverse possession, if not immemorial title :—*Held*, (1) that the plaintiffs were entitled to maintain the suit without proof of fraud and collusion on the part of their karnavan in the previous suit ; (2) that the injunction sought was not precluded by

Specific Relief Act, sec. 56 (b) ; (3) that the plaintiffs were entitled to the decree as prayed.—14 Madr. 425.

A tenant, on whom a notice of ejectment had been served under the N.W.P. Rent Act, 1881, and whose suit to contest his liability to ejectment, brought under that Act, had failed, sued in the Civil Court for a perpetual injunction to prevent his ejectment, leaving his suit on an agreement that he should not be ejected so long as he paid certain rent. *Held* that the suit was not maintainable, the jurisdiction of the Civil Court being excluded by sec. 95 of the Rent Act and by sec. 56, (b) and (f), of the Specific Relief Act.—5 Al. 429.

See I. L. R., 15 Madr. 15, noted under sec. 42.

### 57. Notwithstanding section 56, clause (f), where a

Injunctions to perform contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement. negative agreement. negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement ; provided that the applicant has not failed to perform the contract so far as it is binding on him.

#### *Illustrations.*

(a.) A contracts to sell to B for Rupees 1,000 the good-will of a certain business unconnected with business-premises, and further agrees not to carry on that business in Calcutta. B pays A the Rupees 1,000, but A carries on the business in Calcutta. The Court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(b.) A contracts to sell to B the good-will of a business. A then sets up a similar business close by B's shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from B.

(c.) A contracts with B to sing for twelve months at B's theatre, and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

(d.) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival-house as clerk.

(e.) A contracts with B that, in consideration of Rupees 1,000 to be paid to him by B on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance.

## SCHEDULE.

(See section 2.)

[*Repealed by Act XII. of 1891.*]



# LAW OF LIMITATION.

## ACT No. XV. OF 1877.

RECEIVED THE G.-G.'s ASSENT ON THE 19TH JULY 1877.

(*As amended up to date.*)

*An Act for the Limitation of Suits, and for other purposes.*

WHEREAS it is expedient to amend the law relating to the  
 Preamble. limitation of suits, appeals, and certain  
 applications to Courts; and whereas it is  
 also expedient to provide rules for acquiring by possession the  
 ownership of easements and other property; It is hereby en-  
 acted as follows:—

### Notes.

The law of limitation fixes a time at the expiration of which an action or right not already prosecuted becomes extinguished; and the law of prescription determines by what length of user the acquisition of right may be accomplished. And the rules of law, into which the element of time thus enters, belong to public law in the sense that individuals cannot by contract withdraw themselves from their operation. But persons may by agreement between themselves postpone to some future day *the full completion of a right* and therewith the accrual of a cause of action.

Laws of limitation and prescription rest on a common ground of policy derived from the necessity of circumscribing within some limits the uncertainty in which matters of right may be involved. In order to attain this object the one law prevents persons from asserting their rights, and the other law prevents persons from disputing the rights of others after the lapse of a certain time: the law of limitation securing persons against the further demands of others, that of prescription securing the possession of rights acquired.

Apart from the circumstances of their being based on a common ground of public policy, the law of limitation is clearly distinguishable from that of prescription. The former provides a mode in which actions or rights are extinguished, while the latter provides a mode for the acquisition of rights. The former is negative in its operation depriving a person of a power which he before possessed; the latter is affirmative conferring on a person the right to that which he has hitherto enjoyed in fact only.

The Act, as it now stands after the repeal by Act V of 1882 of secs. 27 and 28, is purely an Act of limitation, furnishing rules on the one hand for the limitation of suits, and on the other for the limitation of appeals and applications. The rules of prescription applicable to easements which formed part of the original Act have now found a more appropriate place in the Easements Act.

The Legislature did not intend to include in the Limitation Act every application to a Court with reference to its own list of causes, such as applications to transfer a case from one board to another, to transfer a case to the bottom of the board, change of attorneys, and so forth.—I. L. R., 6 Cal. 60.



Act XV of 1877 operates from the date on which it came to force as regards all applications made under it. *Bekari Lall v. Goberothun Lall*, 9 Cal. 446, dissented from.—I. L. R., 11 Cal. 55.

The Limitation Act is not applicable to an application for probate.—I. L. R., 6 Cal. 707 ; nor to applications of a ministerial character.—4 Madr. 172.

## PART I.

### PRELIMINARY.

Short title. 1. This Act may be called “The Indian Limitation Act, 1877 :”

Extent of Act. It extends to the whole of British India ;\* but nothing contained in sections two and three or in Parts II and III. applies—

(a) to suits under the Indian Divorce Act ; or

(b) to suits under Madras Regulation VI of 1831.

Commencement. And it shall come into force on the first day of October 1877.

2.† All references to the Indian Limitation Act, 1871,‡ shall be read as if made to this Act ; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act, or under any enactment thereby repealed ; and nothing herein contained shall be deemed to affect the Indian Contract Act, section 25.§

References to Act IX. of 1871. Saving of titles already acquired. Saving of Act IX. of 1872, sec. 25.

### Notes.

The words in sec. 2 of Act XV of 1877—“nothing herein shall be deemed to revive any right to sue”—should be used in their widest signification, and will include any application invoking the aid of the Court for the purpose of satisfying a demand. Where, therefore, a judgment-creditor sought, on the 25th September 1877, to execute a decree passed on the 27th May 1874 (which decree, at the time of the application for execution, was barred by art. 167 of sched. ii. of Act IX of 1871), on the ground that he was entitled to take advantage of art. 179 of sched. ii of Act XV of 1877 which was more favourable to him : *Held* that, under the wording of sec. 2 of the latter Act, he was not entitled to do so.—I. L. R., 5 Cal. 897.

Under Act IX of 1871, sched. ii. cl. 127, the limitation for a suit by a person excluded from joint family property, to enforce a right to share therein, was twelve years from the time when the plaintiff claimed and

\* See *Gazette of India*, 22nd October 1881, Part I., p. 504.

† Certain words, repealed by Act XII. of 1891, have been omitted here. Those words originally formed the first para. of sec. 2.;

‡ Repealed by this Act.—See First Schedule.

§ The third para. of sec. 2, as originally enacted, has been repealed by Act XII. of 1891, and therefore omitted here.

was refused his share. Under Act XV of 1877, sched. ii, cl. 127, the limitation for such a suit is twelve years from the time the exclusion becomes known to the plaintiff. *Held*, that the period of limitation prescribed by the latter Act is shorter than the period prescribed by the former Act, within the meaning of sec. 2, Act XV of 1877.—7 Cal. 461.

The period of limitation prescribed by Article 73 of the Second Schedule to Act XV of 1877 is a "shorter period of limitation" within the meaning of the last clause of sec. 2 of that Act than the period prescribed by Article 72 of the Second Schedule to Act IX of 1871. The language of Acts IX of 1871 and XV of 1877 leads to the conclusion that by each of these enactments the starting point and period given in its schedule were to take the place of those given by [the Act which preceded it, in the case of all suits instituted after the date of the Act coming into force, and that the expiration of the period, calculated with reference to the Act in force at the date at which the note was executed, does not necessarily affect the remedy.—2 Madr. 113

Acknowledgments which are insufficient to keep alive a cause of action because they were signed only by an agent, are equally insufficient to sustain a suit on the same cause of action under Act XV of 1877, as sec. 2 of the Act expressly bars the revival of a right to sue barred under the earlier Acts, although they might have been sufficient under Act IX of 1871.—8 Bom. 99.

Under the Limitation Act IX of 1871 the period of Limitation for suits to recover possession of property purchased from a mortgagee depended upon the good faith of the purchaser. A suit against a purchaser *in good faith* was barred after twelve years from the date of the purchase, under article 134 of Schedule II. In other cases a suit might be brought against the purchaser within sixty years from the date of the mortgage, under article 148. Article 134 of Act XV of 1877, by the omission of the words "in good faith," makes twelve years from the date of the purchase the period of limitation for all such suits, without reference to the question of good faith on the part of the purchaser. The result is, that, in cases of a purchase *not in good faith* from a mortgagee, the period of limitation allowed by Act XV of 1877 for a suit to recover the property is shorter than the period allowed by Act IX of 1871; and, consequently, under the provisions of Act XV of 1877, the plaintiff in such a suit has two years from the 1st October, 1877.—9 Bom. 475.

The plaintiff sued the defendant for money due upon accounts stated between them in December, 1874, when Act IX of 1871 was in force. Such accounts were not signed by the defendant. The suit was instituted after Act XV of 1877, which repealed Act IX of 1871, had come into force. *Held* that the plaintiff's right to sue upon such accounts within three years from the date the same were stated was not a "title" acquired under Act IX of 1871, within the meaning of sec. 2 of Act XV of 1877, which, under the provisions of that section, was not affected by the repeal of Act IX of 1871, and the suit was not governed by the provisions of Act IX of 1871, but by those of Act XV of 1877, and that, therefore, the accounts not being signed by the defendant, the plaintiff could not claim the benefit of art. 64 of sch. ii. of the latter Act, but must be regarded as suing merely for money lent.—2 Al. 872.

The accounts in a suit on accounts stated were stated when Act IX of 1871 was in force and were not signed by the defendant or an authorized agent on his behalf. Had that Act been in force when the suit was insti-

tuted the suit would have been within time under No. 62 of schedule ii. of that Act. The suit was brought, however, after the passing of Act XV of 1877, and by reason of the accounts not being signed did not come within the scope of No. 64 of schedule ii. of that Act. *Held* that the words in sec. 2 of Act XV of 1877, "nothing herein contained shall be deemed to affect any title acquired under the Act IX of 1871," did not save the plaintiff's right to sue on the accounts stated, a right to sue not being meant by or included in the term "title acquired," that term denoting a title to property and being used in contradistinction to a right to sue; that the last clause of that section was not applicable, because Act XV of 1877 did not prescribe a shorter period of limitation than that prescribed by Act IX of 1871 but attached a new condition to the suit, *viz*, that the accounts must be signed by the defendant or his agent duly authorized in that behalf; and that the suit was in consequence barred by limitation.—3 Al. 148.

The cause of action in a suit on a registered bond payable on demand, bearing date the 2nd March, 1870, was alleged to have arisen on the 5th January, 1879, the date of demand. Under Act XIV of 1859 the limitation for such a suit was six years computed from the date of the bond. Before that period expired Act IX of 1871 came into force, which provided a limitation for such a suit of three years computed from the date of demand. *Held* that, as the cause of action and the institution of such suit occurred after the repeal of Act IX of 1871, the provisions of that Act were not applicable, and accordingly, whether Act XIV of 1859 or Act XV of 1877 governed such suit, it was barred, as, in either case, limitation began to run from the date of such bond.—3 Al. 340.

Act XV of 1877, by making the period of limitation for a suit on a bond payable on demand computable from the date of its execution, has shortened the period a limitation prescribed for such a suit by Act IX of 1871 under which the period was computable from the date of demand. *Held*, therefore, that, under the provisions of sec. 2 of Act XV of 1877, a suit on such a bond executed on the 14th December, 1869, having been brought within two years from the date that Act came into force was, with in time.—3 Al. 415.

See I. L. R., 5 Cal. 894, noted under sec. 230 of the Civil Procedure Code.

**3.** In this Act, unless there be something repugnant in the subject or context,—

Interpretation-clause.

'plaintiff' includes also any person from or through whom a plaintiff derives his right to sue; 'applicant' includes also any person from or through whom an applicant derives his right to apply; and 'defendant' includes also any person from or through whom a defendant derives his liability to be sued;

'easement'\* includes also a right, not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to or subsisting upon, the land of another:

\* The definition of "easement" is repealed by the Indian Easements Act (V. of 1882), sec. 3, in the territories to which that Act extends, namely, Madras, the Central Provinces, and Coorg.

‘bill of exchange’ includes also a hundi and a cheque :

‘bond’ includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligations\* shall be void if a specified act is performed, or is not performed, as the case may be :

‘promissory note’ means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight :

‘trustee’ does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title :

‘suit’ does not include an appeal or an application :

‘registered’ means duly registered in British India under the law† for the registration of documents in force at the time and place of executing the document, or signing the decree or order referred to in the context :

‘foreign country’ means any country other than British India :

and nothing shall be deemed to be done in ‘good faith’ which is not done with due care and attention.

#### Notes.

The word ‘easement,’ as used in the Limitation Act, 1877, has, by force of the interpretation-clause (sec. 3), a very much more extensive meaning than the word bears in the English law, for it includes any right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing, or attached to, or subsisting upon the land of another. An easement, therefore, under the Indian law, embraces what in English law is called a *profit a prendre*,—that is to say, a right to enjoy a profit out of the land of another. A prescriptive right of fishery is an ‘easement’ as defined by sec. 3 of the Act, and may be claimed by any one who can prove a ‘user’ of it,—that is to say, that he has of right claimed and enjoyed it without interruption for a period of twenty years, although he does not allege, and cannot prove, that he is, or was, in the possession, enjoyment, or occupation of any dominant tenement.—I. L. R., 5 Cal. 945.

The right of establishing a private ferry and levying tolls is recognized in British India. *Per* GARTH, C. J., and WHITE, J.—Twenty years is the shortest period within which such a right of ferry can be established by user. *Per* MITTER, J.—Where the existence of a private right of ferry plying between the lands of A and B is admitted by B no question of user arises ; the issue that is raised between the parties is not whether a private ferry exists, but whether the *recognized* private ferry which is in existence is the property of A or B ; but *semble*, supposing such question of user to arise, a right of private ferry cannot be established as an indefeasible right by long user.—6 Cal. 608.

“Suit” does not include application.—5 Bom. 29.

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\* Sic. Read “Obligation.”

† See Act III. of 1877.

The purchaser at an auction sale acquires the right, title and interest of the judgment-debtor and in virtue of that is put in possession by reason of which he becomes liable to be sued by the true owner. He, therefore, derives such liability within the contemplation of sec. 3 of the Limitation Act (XV of 1877) from or through the judgment-debtor. R., the owner of sixty-two thikans, had mortgaged fourteen of them to M. On the 7th Dec., 1871, that is subsequent to the mortgage to M., R. sold the sixty-two thikans to the plaintiff, but did not give up possession. On the 18th June, 1872, the sixty-two thikans were sold in execution of a decree against R. and were purchased at the auction-sale by A., who redeemed the fourteen thikans from the mortgagee. On the 7th December, 1883, the present suit was filed by the plaintiff to recover possession against the heirs of R. and M. On the 17th January, 1884, A was joined as a co-defendant to the suit. *Held*, that the plaintiff's claim against A. was time-barred with respect to the forty-eight thikans which were not mortgaged, A. being entitled to add to the period of his possession to that of R., who remained in possession after the sale to the plaintiff.—16 Bom. 197.

## PART II.

### LIMITATION OF SUITS, APPEALS, AND APPLICATIONS.

**4.** Subject to the provisions contained in sections five to twenty-five (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

Dismissal of suits, &c., instituted, &c., after period of limitation.

*Explanation.*—A suit is instituted in ordinary cases when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is filed; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the Official Liquidator.

#### *Illustrations.*

(a.) A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.

(b.) An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

#### **Notes.**

A plaintiff wishing to appeal from a decision passed against him on the Original Side of the High Court, dated 16th August 1883, presented for filing his memorandum of appeal to the Registrar on the 5th September 1883, but by reason of the decree not having been signed on that date, no copy of the decree was presented therewith. The Registrar refused to accept the appeal. On the 6th September the decree was signed, and on the 7th an office copy thereof was obtained by the defendant's attorney, who, on the 8th September served a copy at the office of the plaintiff's at-

torney. On the 12th September, the plaintiff applied for an office copy, which he obtained on the 13th, and on the 15th tendered such copy and his memorandum of appeal to the Registrar. The Registrar refused to accept the appeal, unless under an order of Court, it being in his opinion out of time. On the 6th December 1883 a Judge sitting on the Original Side admitted the appeal. The appeal subsequently came on for hearing, when the defendant contended that the appeal was barred, it not having been filed within twenty days from the date of the decree. The Court held that the appeal was so barred. *Held, on review*, that the plaintiff having allowed five days to expire after the decree was signed before applying for a copy, and not having filed his appeal, after so obtaining a copy, at the earliest opportunity possible, such a delay, being entirely unaccounted for, could not be held to be "time requisite for obtaining a copy of the decree," and that, therefore, the appeal was out of time.—I. L. R., 10 Cal. 652.

If in an application for execution the Court erroneously holds that the application is not barred and orders a sale, the order, though erroneous and liable to be set aside in the way presented by the procedure law, is not a nullity but remains in full force until set aside, and a sale held in pursuance of such order is, until set aside, a valid sale; a suit to set aside such a sale is governed by Art. 12, cl. (a) of Sch. II of Act XV of 1877. The word "disallowed" in sec. 312 of the Civil Procedure Code has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under sec. 311 are taken. On the 15th June 1878, a Judgment-debtor filed a petition objecting to execution of a decree against him proceeding on the ground that the decree was barred. On the 18th November 1878, that objection was overruled and certain of his property sold. Against the order overruling his objection the judgment-debtor appealed, and ultimately on the 13th January 1880 the order was set aside by the High Court, and the decree was held to have been barred. Pending these proceedings the judgment-debtor also, on the 17th December 1878, applied, under the provision of sec. 311 of the Civil Procedure Code, to set aside the sale on the ground of material irregularity, but that application was ultimately rejected on the 17th May 1879, and the sale was confirmed on the 21st May 1879. On the 2nd April 1880, the judgment-debtor applied to set aside the sale, on the ground that the decree, in execution of which it had taken place had been held to be barred, and though an order setting aside the sale was made by the Original Court, it was subsequently set aside by the High Court on the 13th April 1881, as having been made without jurisdiction. The judgment-debtor now brought a suit on the 4th January 1882, upon the same grounds to set aside the sale and recover possession:—*Held*, that the suit was barred.—11 Cal. 287.

A landlord not having tendered a legal patta to his tenant made a demand on him as for rent, and on his refusal to pay attached his holding. The tenant, to release the attachment, paid the sum demanded under protest on 23rd September 1885. On 22nd March 1886 the tenant filed a suit on the small cause side of the District Munsiff's Court to recover the amount so paid: that suit was dismissed for want of jurisdiction on 2nd September 1886. On the last-mentioned date the tenant filed the present suit on the same cause of action: *Held*, (1) the suit was not barred by limitation under the six-months' rule in sec. 78 of the Rent Recovery Act by reason of the provisions of sec. 14 of the Limitation Act, 1877; (2) the landlord not having tendered a legal patta was not in a condition to establish any right to recover rent directly or by way of set off.—12 Madr. 467.



Where a petition of appeal was presented unstamped within the period of limitation and the stamp was ultimately affixed after the appeal would have been barred by limitation:—*Held*, following *Skinner v. Orde* (L. R., 6 I. A 126) that the appeal was in time.—15 Madr. 78.

Where, under the provisions of sec. 336, Act VIII of 1859, a memorandum of appeal is returned for the purpose of being corrected, the appellate Court should specify a time for such correction. Where an appellant presented an appeal within the period of limitation prescribed therefor, and the Appellate Court returned the memorandum of appeal for correction without specifying a time for such correction, the appeal again presented some days after the period of limitation was presented within time, the date of its presentation being the date it was first presented.—1 Al. 260.

*Held* (*per* STUART, C. J., SPANKIE, J., dissenting) that, in computing the period of limitation prescribed by art. 177, sch. ii. of Act XV of 1877, for an application for leave to appeal to Her Majesty in Council, the time requisite for obtaining a copy of the judgment on which the decree against which leave to appeal is sought is founded cannot be excluded under the provisions of sec. 12 of Act XV of 1877.—1 Al. 644.

Where a person, being at the time a pauper, petitions, under the provisions of Act VIII of 1859 for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, obtains funds which enable him to pay the Court-fees, and his petition is allowed upon such payment to be numbered and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper petition, and limitation runs against him only up to that time.—2 Al. 241.

Where the decree-holder had not on the last preceding application under sec. 230 of Act X of 1877 used due diligence to procure complete satisfaction of the decree, and Act X of 1877 had not been in force three years, *held* that the provisions of the third clause of sec. 230 of Act X of 1877 were applicable to a subsequent application under that section.—2 Al. 282.

The plaint in a suit for money charged upon immoveable property which described such property as “the defendants one-biswa five-biswanisi share within the jurisdiction of the Court” was presented on the 21st November, 1878, within the period of limitation prescribed for such a suit by Act XV of 1877. It was subsequently returned for amendment, and, having been amended by the insertion of the words “in mauza S, pargana S” after the word “share” was presented again on the 8th January, 1879, after such period. *Held* that the date of the amendment of the plaint did not affect the question of limitation for the institution of the suit, and the return of the plaint for amendment and its subsequent presentation and acceptance by the Court did not constitute a fresh institution of the suit — 2 Al. 832. Also 2 Bom. 120.

For the purpose of limitation, an appeal is preferred when the memorandum of appeal is presented to the proper officer, and not when, where the memorandum of appeal is insufficiently stamped and is returned in order that the deficiency may be supplied, it is again presented. When an appellate Court returns an insufficiently stamped memorandum of appeal in order that it may be sufficiently stamped, it should fix a time within which the deficiency is to be supplied.—2 Al. 875.

B and S executed a bond, dated the 15th August 1874, in favour of plaintiff in consideration of a loan of Rs. 15,000, agreeing to repay the same within three years from the above date, and covenanting to pay every half year interest on the same, at the rate of 8 per cent. per annum; and also to



pay the premia on certain policies of insurance made over to plaintiff by way of collateral security. In the event of failure in payment on due date of interest and premia, the obligors made themselves liable to pay the full amount of the bond debt. The bond also contained the stipulation that it should be optional with the obligee to claim and if necessary to sue for the full amount of the bond on the failure of any one or more stipulated payment, or on the full expiry of the period of three years. *Held*, that the bond was not an instalment-bond, and therefore art. 75, sch. ii. of Act XV of 1877 was inapplicable. *Held*, by STUART, C. J., that limitation commenced after the expiration of the three years allowed by the bond for payment of the debt. *Held*, by SPANKIE, J.,—That Art. 80, sch. ii. of Act XV of 1877 applies to the suit, and limitation would run from the date when the bond became due, that according to the stipulation in the bond, it would become due on failure in payment on date of both the interest and premia, and not on failure in payment of either of them only. *Held* further, that arts. 67 and 68, sch. ii. of Act XV of 1877, were not applicable to the suit. —2 Al. 322.

A suit to enforce a right of pre-emption in respect of a share of an undivided village was instituted against the vendor and the purchaser, the latter being a minor, on the 1st June, 1880. The instrument of sale was registered on the 9th June, 1879. On the 14th June, 1880, the Court in which such suit was instituted made an order appointing a guardian for such suit for the minor purchaser. *Held*, having regard to the provisions of sec. 4 of Act XV of 1877, and *Ram Lal v. Harrison*, I. L. R., 2 Al. 832, *Stuart Skinner v. William Orde*, I. L. R., 2 Al. 241, that, for the purposes of limitation, such suit was instituted, as regards the minor purchaser, on the 1st June, 1880, when the plaint was first presented, and not on the 14th June, 1880, when the order appointing a guardian for such suit for him was made, and such suit was therefore within time.—4 Al. 37.

See I. L. R., 5 Cal. 897, noted under sec. 2; 12 Al. 461, noted under sec. 5.

**5.** If the period of limitation prescribed for any suit, appeal, or application, expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented, or made on the day that the Court re-opens.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.

Proviso where Court is closed when period expires.

Proviso as to appeals and applications for review.

#### Notes.

The provisions of sec. 5 of Act XV of 1877 apply to suits instituted under the provisions of sec. 77 of the Registration Act (III of 1877).—I. L. R., 1 Cal. 910.

An order made *ex parte* under cl. b, sec. 5 of the Limitation Act of 1871, permitting an appeal to be registered although filed beyond time, may, on proper cause being shown, be set aside by the Court which made it; but such an order made by a District Judge cannot be afterwards can-

celled by a Subordinate Judge upon the appeal coming on for hearing before him.—5 Cal. 1.

Although a suit to recover moneys or obtain papers or accounts from an agent, must, under sec. 30 of Beng. Act VIII of 1869, be instituted within one year from the determination of the agency, yet, if on the last day of such year the Courts be closed, the suit will, under sec. 5 of Act XV of 1877, not be barred if filed on the first day of the re-opening of the Court.—5 Cal. 314.

When a tenant has been sued for arrears of rent and a decree obtained against him under Beng. Act VIII of 1869, sec. 52, which provides for the stay of execution if the amount of the arrears, together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, and the Court is closed on or before the last day of the period so limited, the tenant is at liberty to pay into Court the arrears, interest, and costs on the first day that the Court re-opens ; and if he does so, execution must be stayed.—5 Cal. 906.

The provisions of sec. 5 of the Limitation Act (XV of 1877) apply equally to suits under the Bengal Rent Act (Beng. Act VIII of 1869). In a suit for rent, where it appeared that a deposit had been made in Court under the provisions of the Bengal Rent Act [Beng. Act VIII of 1869], and that the six months allowed by sec. 31 of that Act for the purpose of instituting a suit had expired on a day when the Court was closed for an authorized holiday, but that the plaint had been filed on the first day the Court re-opened.—*Held*, that the provisions of sec. 5 of the Limitation Act (XV of 1877) applied to such cases, and that, consequently, the suit was not barred. *Golop Chand Nowluckha v. Krishto Chunder Dass Biswas*, I. L. R., 5 Cal. 314, and *Hossein Ally v. Donzelle*, I. L. R., 5 Cal. 314, followed. *Purran Bhunder Ghose v. Muttu Lall Ghose Lahira*, I. L. R., 4 Cal. 50, dissented from.—7 Cal. 690.

The High Court, sitting on second appeal, has power to look into the grounds which a Judge has given for admitting an appeal after the lapse of the period allowed by the Limitation Act. *Mowri Bewa v. Surendranath Roy*, 2 B. L. R., A. C., 184, note ; S. C., 10 W. R., 178, followed.—8 Cal. 251.

The fact that the plaintiff's attorney on being served with notice of appeal failed to notice that a party who had been a defendant in the Court below had not been made a respondent in the appeal, coupled with the fact that the application made by the plaintiff to make such defendant a party respondent after the period of limitation had expired, was not made at the earliest opportunity possible, is not a sufficient ground under sec. 5 of the Limitation Act for non-prosecution of the appeal within the period allowed.—10 Cal. 445.

Poverty is not "sufficient cause" within the meaning of sec. 5 for admitting an appeal after the ordinary period of limitation prescribed therefor has expired.—13 Cal. 78.

Section gives a discretion to a Court to admit an appeal filed out of time. A valued his suit at Rs. 18,000 which was reduced to less than Rs. Rs. 5,000 by the Court of first instance at Rajshahye. A decree, dated the 20th December 1883, was given against the defendant, who applied for copies on the 3rd of February, and the decree was ready on the 7th. The defendant was apparently under the impression that the appeal would lie to the High Court ; but on the 16th of March a letter was despatched by his Calcutta agent informing him that he was mistaken and that the ap-

peal lay to the District Judge. This letter reached Rajshahye on the 17th, and the appeal was filed on the 23rd of March :—*Held*, that under the circumstances the Court might admit the appeal in the exercise of its discretion.—13 Cal. 266.

Where parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity.—18 Cal. 631.

In the Limitation Act it was intended to draw a clear distinction between what are styled 'applications' and what are styled 'appeals.' The language of the Limitation Act precludes any other construction than that while a pauper may apply for a review of judgment with the same indulgence as to delay in making the application as a person who is not a pauper, yet, in making his application for leave to appeal, similar indulgence is not extended to him.—2 Madr. 230.

Where a District Court was adjourned for two months but the notification stated that the Court would be open twice a week for one hour for the reception of complaints, petitions, and other papers: *Held per curiam* (Innes, J., dissenting) that the Court was not closed till the last day of the adjournment within the meaning of sec. 5 of the Indian Limitation Act, 1877, so as to allow an appellant to present his appeal on the day the Court re-opened after the adjournment, the appeal time having expired during the adjournment.—5 Madr. 189.

An order made *ex parte*, under sec. 5 of the Indian Limitation Act, 1877 admitting an appeal after the period prescribed therefor, may be set aside on proper cause being shown by the court which made it.—9 Madr. 450.

Delay in preferring an appeal under the Madras Forest Act beyond the period prescribed by sec. 14 of that Act, may be excused, sec. 5 of the Indian Limitation Act, 1877.—10 Madr. 210.

Land was sold in execution of a decree which was passed against the defendant for a sum exceeding Rs. 5,000. A suit to set aside the sale was instituted in a Subordinate Court and was dismissed. The plaintiff who desired to appeal against the decree dismissing his suit was advised that the appeal lay to the High Court in which a memorandum of appeal was accordingly filed. On its appearing that the value of the property sold was less than Rs. 5,000 the High Court returned the memorandum of appeal for presentation to the District Court. The District Judge rejected it on the ground that it was barred by limitation, holding that the delay caused by the error, which the appellant committed in taking proceedings in the wrong Court, could not be excused :—*Held*, that the District Judge should have decided whether the appellant, under the special circumstances of the case in appealing to the High Court acted on an honest belief formed with due care and attention. *Per cur* : "We are not prepared to hold that a mistake in law is under no circumstances a sufficient cause within the meaning of sec. 5 of the Limitation Act."—13 Madr. 269.

An appellant is not entitled as of right to the exclusion of the time occupied by him in seeking a review of judgment, in the computation of the time within which his appeal is preferred. Where it appeared that the application for review proceeded on grounds dealt with in the judgment sought to be reviewed and on the discovery of fresh evidence which was made nearly three months before the application, the Court declined to exercise its discretionary power to exclude the time so occupied.—14 Madr. 81.

Where the period of limitation for the filing of an appeal has expired during vacation, a party to a suit has a right, under the provisions of the

Limitation Act (XV of 1877), to have his appeal admitted on the day the Court re-opens, and the Prothonotary of the High Court has power to receive and file a memorandum of appeal on that day.—6 Bom. 487.

G obtained a decree against M in the Court of the Subordinate Judge of Ahmedabad for the refund of a certain sum of money alleged to have been illegally levied by B, as *inamdar* for local-fund cess due for certain years. In appeal, the District Court on the 21st March, 1882, varied the decree, and reduced the amount. On 2nd appeal the High Court, on 23rd June, 1882, dismissed the appeal, on the ground that the lower Courts had no jurisdiction, the suit being a Small Cause Court suit. The decree of the District Court consequently remained in force. In July, 1882, G brought a second suit against M in the Small Cause Court at Ahmedabad for moneys illegally levied by M in subsequent years. The Judge of that Court held that the decree in the former suit passed on 21st March, 1881, estopped M from disputing G's claim, and that the matter was *res judicata*. M then procured the proceedings in the Small Cause Court to be stayed, and on the 11th November, 1882, applied to the District Court for a review of its decree of 21st March, 1881. The District Judge granted the review on the ground that the time lost by M in the prosecution of the second appeal should be excluded from computation, and that the subsequent delay was justified by the fact that M was not aware of the effect of the decision in the first suit until informed of it by the Judge of the Small Cause Court at the hearing of the second suit. On appeal to the High Court: *Held*, reversing the order of the District Judge, that circumstances did not justify the admission of M's application for review after the expiration of the ninety days allowed by the Limitation Act. The pendency of an appeal is not a "sufficient cause" for not presenting the application earlier within the meaning of sec. 5 of the Limitation Act XV of 1877.—8 Bom. 260.

The plaintiffs filed the present suit, (No. 317 of 1888), at the same time with Suit No. 316 of 1888 (*supra*, p. 360). They filed both suits as executors of the will of one Damodhar Madhowji. In Suit No. 316 of 1888 they sued the two sons (Gordhandas and Vullubhdas) of their testator for the purpose of having his will construed and of ascertaining the shares of his property taken under it by his said two sons respectively. The present suit (No. 317 of 1888) was filed by them against Gordhandas, one of the said sons of the testator, and against three other persons to whom he had mortgaged his interest in his father's estate. They alleged that the said Gordhandas had made over possession of the whole of his father's estate to the mortgagees, and that they refused to give it up. The plaintiffs submitted that, under the mortgage, no charge was created, save upon Gordhandas' individual interest in the estate, and they prayed for a declaration as to the extent of the mortgage, for an order for possession, for an account, &c., &c. Suit No. 316 of 1888 was heard and decided on the 15th August, 1889, and after argument, the Court of first instance, construing the will, held that the fourth defendant, Gordhandas, was entitled absolutely to certain property situate at the Girgaum Back Road in Bombay. Immediately after the said decree was made, the present suit was called on for hearing before the same Judge. As the questions raised in both suits were the same, a decree in this suit was passed at once, without argument, in accordance with the construction put upon the will in Suit No. 316 of 1888. Against the decree in Suit No. 316 of 1888, Vullubhdas, (one of the defendants therein), appealed, and on the 27th February, 1890, the Appeal Court revers-

ed the decree of the Court below, and held that Gordhandas was not entitled to an absolute estate in the above-mentioned property, but was entitled only to be paid the income thereof for his life. The plaintiffs in the present suit, being executors and not personally interested, had taken no steps to appeal from the decree of the 15th August. As soon, however, as the decree in Suit No. 316 was reversed, they proposed to have the decree in the present suit amended, so as to be in accordance with the construction put upon their testator's will by the Appeal Court. The defendants refused to consent, and the plaintiff now moved for leave to file an appeal, although the time limited for appealing had expired. It was contended that the fact they were executors and trustees and, as such, could not appeal, save at their own risk, was "sufficient cause," under section 5 of the Limitation Act XV of 1877, for their delay until the appeal in the other suit had been decided. *Held*, refusing the application, that no sufficient cause was shown for the plaintiffs' delay. The two suits were quite independent of each other. The plaintiffs thought proper to bring this second suit against the mortgagees, and they got a decision. If they were not satisfied, they should have appealed within the proper time. There was nothing in their position, as executors, to entitle them to any special consideration.—14 Bom. 365.

Where a District Judge admits an appeal filed beyond time, and the appeal is referred for disposal to a Subordinate Judge with appellate powers, the Subordinate Judge has the power to consider whether the delay in presenting the appeal is sufficiently accounted for. The power "to hear" an appeal conferred by section 27 of the Bombay Civil Courts Act (XIV of 1869) includes also the power to hear any question as to limitation relating thereto. The order for admission of an appeal under section 5 of the Limitation Act (XV of 1877) made before issue of notice to the respondent, is an *ex-parte* order, and cannot bind him.—14 Bom. 594.

*Held* that the order admitting an appeal after time, made *ex-parte* by a single Judge of the High Court sitting to receive applications for the admission of appeals, under a rule of the Court made in pursuance of 24 and 25 Vic., c. 104, sec. 13, and the Letters Patent of the Court, sec. 27, was liable to be impugned and set aside at the hearing by the Division Court before which it was brought for hearing, on the ground that the reasons assigned for admitting it were erroneous or inadequate.—1 Al. 34.

*Held*, that where the period of limitation prescribed for a suit expired when the Court was closed for a vacation, and the Court, instead of re-opening after the vacation on the day that it should have re-opened, re-opened on a later day, and the suit was instituted when it did re-open, it was instituted within time.—1 Al. 263.

A certain suit was dismissed on the 26th July, 1874, on which day the plaintiff applied for a copy of the Court's decree. She obtained the copy on the 31st July, and on the 31st August, or one day beyond the period allowed by law, she presented an appeal to the appellate Court. She did not assign in her petition any cause for not presenting it within such period, but alleged verbally that she had miscalculated the period. The appellate Court recorded that it should excuse the delay, and admitted the appeal. *Held*, that there was, under the circumstances, no sufficient cause for the delay. An appellate Court should not admit an appeal after the period of limitation prescribed therefor without recording its reasons for being satisfied that there was sufficient cause for not presenting it within such period.—1 Al. 250.

The plaintiff in a suit applied, more than two years after the proper time, for a review of the judgment in such suit, filing with his application

a copy of a decision by the High Court, which had been passed subsequently to the date of such judgment, in support of a contention contained in his application which should have been, but was not, urged at the hearing of his suit. Such contention, and the other arguments and statements contained in his application might have been adduced within the time allowed by law for an application for a review of judgment. *Held* that, as such contention might have been urged at the first hearing of the case, there was no "just and reasonable cause" for preferring the application after time, and the Court of first instance was therefore not warranted in granting the application and reviewing its judgment.—2 Al. 287.

The circumstances contemplated in sec. 14 of the Limitation Act, 1877, will ordinarily constitute a sufficient cause in the sense of sec. 5 for not presenting an appeal within the period of limitation. A bond for money provided that on failure on the part of the obligor to pay interest as agreed in the bond, and within a certain period from the date of the bond, the obligee might sue for possession of the immoveable property mortgaged in the bond. Default was made in the payment of interest as agreed, but the obligee deferred bringing a suit for possession of the mortgaged property so long that the time mentioned in the bond expired before he could obtain a decree. *Held* that under these circumstances a decree for possession of the property should not be granted to him.—5 Al. 591.

In February, 1884 the High Court dismissed an application by a Muhammadan *pardah-nashin* lady under sec. 592 of the Civil Procedure Code for leave to appeal as a pauper from a decree passed in September, 1882, on the ground that it was barred by limitation. On the 16th August, 1884, an order was passed allowing an application which had been made for review of the said order to stand over pending the decision of a connected case which had been remanded for re-trial under sec. 562 of the Code. On the 24th April, 1885, the connected case having then been decided, the application for review was heard and dismissed. On the 18th June, 1885, an order was passed *ex-parte* by PETHERAM, C. J., allowing the applicant, under sec. 5 of the Limitation Act (XV of 1877), to file an appeal on full stamp paper, and she thereupon, having borrowed money on onerous conditions to defray the necessary institution-fees, presented her appeal, which was admitted provisionally by a single Judge.

*Held* by TYRRELL, J. (MAHMOOD, J., dissenting), that the appellant had made out a sufficient case for the exercise of the Court's discretion under sec. 5 of the Limitation Act, and that the Court should proceed to the trial of her appeal.

*Held* by MAHMOOD, J., that the *ex-parte* order of the 18th June, 1885, was one which the Civil Procedure Code nowhere allowed and was *ultra vires*, and that the Bench before which the appeal came for hearing was competent to determine whether the order admitting the appeal should stand or be set aside. *Dubey Sahai v. Ganeshi Lal* referred to.

*Held* also by MAHMOOD, J. (TYRRELL, J., dissenting), that the circumstances were such as to require the Court to set aside the order admitting the appeal to dismiss the appeal as barred by limitation, inasmuch as it was presented more than two years beyond time, and neither the facts that the main reason why it was presented so late was that the appellant was awaiting the result of the connected case, and that the appellant was a pauper and a *pardah-nashin* lady, nor the orders of the 16th August, 1884, and the 18th June, 1885, constituted "sufficient cause" for an extension of the limitation period within the meaning of sec. 5 of the Limitation Act. *Mosh-ullah v. Ahmed-ullah* and *Mangu Lal v. Kandhai Lal* referred to.



*Held* further by MAHMOOD, J., that although but for the erroneous order of the 18th June, 1885, the appellant would neither have borrowed the money required to defray the institution-fees nor preferred the appeal, and this was a circumstance to be considered in the exercise of the discretionary power conferred by sec. 220 of the Code, it could not be said that the error of a Court of Justice which leads a party to initiate proceedings against another is sufficient to exonerate the losing party from paying the costs incurred by the opposite party, and that the appeal should therefore be dismissed with costs.—9 Al. 11.

On the 14th February, 1884, the High Court dismissed an application of the 22nd March, 1883, by a *pardah-nashin* lady, for leave to appeal *in forma pauperis* from a decree dated the 16th September, 1882, the application, after giving credit for 86 days spent in obtaining the necessary papers, being out of time by 73 days. On the 16th August, 1884, an order was passed allowing an application which had been made for review of the previous order to stand over, pending the decision of a connected case. On the 24th April, 1885, the connected case having then been decided, the application for review was heard and dismissed. Nothing more was done by the appellant until the 18th June, 1885, when, on her application, an order was passed by a single Judge allowing her under sec. 5 of the Limitation Act (XV of 1877) to file an appeal on full stamp paper, and she thereupon, having borrowed money on onerous conditions to defray the necessary institution fees, presented her appeal, which was admitted provisionally by a single Judge. *Held*, affirming the judgment of MAHMOOD, J., that the poverty of the appellant, and the fact that she was a *pardah-nashin* lady, did not constitute "sufficient cause" for an extension of the limitation period within the meaning of sec. 5 of the Limitation Act, and that such extension ought not to be granted. *Moshaullah v. Ahmedullah and Collins v. The Vestry of Paddington* referred to.—9 Al. 655.

In a suit for ejectment instituted in the Revenue Court under sec. 93 (b) of the N.-W. P. Rent Act (XII of 1881,) the Court gave judgment decreeing the claim, on the 15th September, 1884. The value of the subject-matter exceeded Rs. 100, and an appeal consequently lay to the District Judge; but there was nothing upon the face of the record to show that the value exceeded Rs. 100 and that the decree was appealable. The period of limitation for the appeal expired on the 15th October, and the defendant, being under the impression that the decree was not appealable, applied to the Board of Revenue on the 8th January, 1885, for revision of the first Court's decree. The proceedings before the Board lasted until the 24th April, when the defendant for the first time was informed that the value of the subject-matter being over Rs. 100, the decree was appealable, and that the application for revision had therefore been rejected. On the 23rd May, the defendant filed an appeal to the District Judge, who, under sec. 5 of the Limitation Act, admitted the appeal and, reversing the first Court's decision, dismissed the claim. *Held*, on appeal by the plaintiff, that under the circumstances, the High Court ought not to interfere with the discretion exercised by the District Judge in admitting the appeal under sec. 5 of the Limitation Act after the period of limitation prescribed therefor. *Per* EDGE C. J., that under the circumstances above stated, he would not himself have held that the defendant had shown "sufficient cause," within the meaning of sec. 5, for the admission of the appeal; but that the Court ought not to interfere with the discretion of the Judge when he had applied his mind to the subject-matter before him, unless he had clearly acted on insufficient grounds or improperly exercised his discretion.—9 Al. 244.



Questions of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. Presentation of an appeal within the period of limitation prescribed therefor to a wrong Court in ignorance of the provision of law, is not a sufficient cause within the meaning of sec. 5 of the Limitation Act for admitting the same appeal in the proper Court after the period of limitation prescribed therefor had expired. To enable the Court to admit an appeal after the period of limitation prescribed therefor had expired, on the ground that the same had in the first instance been preferred within the period of limitation provided therefor but to a wrong Court, the appellant must satisfy that he made his appeal to the wrong Court *bona fide*, that is under an honest though mistaken belief, formed with due care and attention, that he was appealing to the right Court.—10 Al. 524.

On the 26th January, 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1888. The application was insufficiently stamped, and the Munsarim endorsed on it "stamp insufficient." On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April, 1889, the deficiency pointed by the Munsarim was made good. On the 26th May the Judge admitted the application, on the applicant paying the court-fee payable on an application presented on or after ninety days from the date of the decree. *Held* that sec. 6 and the first paragraph of sec. 28 of the Court-fees Act (VII of 1870) were applicable; that there was no mistake or inadvertence within the meaning of the second paragraph of sec. 28; that the Judge had no power under the circumstances to admit the application as one presented after ninety days from the date of the decree; that there was no presentation within ninety days of an application which could have been received; that no sufficient cause had been shown, within the meaning of sec. 5 of the Limitation Act, for not making the application within ninety days; and that the application was consequently barred by limitation and ought to have been rejected. *Held* also that the application should have been presented to the Judge, and not to the Munsarim.—12 Al. 57.

Judgment was pronounced by the Court of first instance on the 23rd May 1887. The decree was signed on the 31st May. An application for copies was made by the defendants on the same day. Information of the estimate of the cost of copies was given to them on the 1st June; but they did not comply with that estimate until the 9th June. The copies were delivered on the 11th June. On the 30th June, the defendants filed their memorandum of appeal in the lower appellate Court which, on an office report that it was within time, admitted it, and fixed the 19th August for the hearing. On the 1st August, another office report was submitted, which showed that the appeal was beyond time. Accordingly the Judge on the 2nd August, directed the defendants to be informed that their appeal was dismissed. On the 27th August, however, the defendants presented a petition to the Judge, in consequence of which he readmitted the appeal, and, cancelling his order of the 2nd August, directed that the appeal should be heard. *Held* that the appeal was barred by limitation under art. 152, sch. ii. of the Limitation Act (XV of 1877). A question of limitation, when it arises upon the facts before a Court, must be heard and determined,

whether or not it is directly raised in the pleadings or in the grounds of appeal. The fact that a subordinate Court has decided that the suit or appeal before it was brought within time, or that there was sufficient cause, within the meaning of sec. 5 of the Limitation Act, for the appellant in that Court not presenting the appeal within the period of limitation prescribed, does not preclude the High Court from considering that decision in appeal. Sec. 5 of the Limitation Act cannot be applied in making the computation of time provided for by sec. 12, and does not become applicable until after such computation has been made. *Raj Coomar Roy v. Shaikh Mahomed Wais* dissented from. In computing the time to be excluded under sec. 12 of the Limitation Act from a period of limitation, the "time requisite for obtaining a copy" does not begin until an application for copies has been made. If therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless, an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. *Bani Madhub Mitter v. Matungini Dassi* dissented from. *Per* EDGE, C. J., BRODHURST and YOUNG, JJ.—A Court in computing under sec. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is confined to ascertaining for the purposes of such computation the time occupied by the office, after application made, in preparing the estimate, and, after payment of the amount of the estimate has been made, the time occupied by the office in preparing the copy or copies ready to be delivered to the party who has applied for them. *Per* EDGE, C. J.—The only section in the Limitation Act which enables a Court to admit an appeal or an application which is presented beyond the period of limitation prescribed by that Act, is sec. 5. *Per* MAHMOOD, J.—Where there is delay in compliance with the estimate which is unavoidable and due to causes beyond the control of the applicant, such delay may be included in "the time requisite for obtaining a copy." Whether or not such delay is unavoidable is a question of fact in each case. *Per* MAHMOOD, J.—A bare mistake of law is not a "sufficient cause" within the meaning of sec. 5 of the Limitation Act for extending the period of limitation. *Huro Chunder Roy v. Surnāmoyi*, dissented from.—12 Al. 461.

See I. L. R., 15 Cal. 242, noted under art. 156; 10 Al. 587, noted under sec. 14; 12 Al. 79, noted under art. 170.

**"5A.\*** Whenever it is shown to the satisfaction of the Court that an appeal or an application for a review of judgment was presented after the expiration of the period of limitation prescribed for such appeal or application owing to the appellant or applicant having been misled by any order, or practice, or judgment of the High Court of the Presidency, Province or District, such appeal or application, if otherwise in accordance with law, shall for all purposes be deemed by all Courts to have been presented within the period of limitation prescribed therefor."

Special and local laws of limitation.

**6.** When, by any special or local law now or hereafter in force in British

\* This section has been added by Act VI. of 1892, sec. 1.

India, a period of limitation is specially prescribed for any suit, appeal, or application, nothing herein contained shall affect or alter the period so prescribed.

#### Notes.

Though by sec. 6 of the Limitation Act, 1877 nothing in that Act affects the period of limitation prescribed by any special or local law for any suit, appeal, or application, still the rules prescribed by that Act for computing the period of limitation are applicable to such suit, appeal, or application, sec. 6 of Act IX of 1871, contrasted with sec. 6 of XV of 1877.—I. L. R., 5 Cal. 110.

In a suit under Bengal Act VIII of 1869 for arrears of rent, which accrued during minority, the plaintiff is not entitled to a fresh period of limitation under secs. 6 and 7 of the Limitation Act, 1877. *Dinonath Panday v. Roghoonath Panday*, 5 W. R. (Act X Rul.), 41; *Behari Lal Mookerjee v. Mongolanath Mookerjee*, I. L. R., 5 Calc., 110; *Golap Chand Nowlocka v. Krishto Chundar Das Biswas*, I. L. R., 5 Cal., 314; *Khoshelal Mahton v. Gonesh Dutt*, I. L. R., 7 Calc., 690; and *Phoolbas Koonwar v. Lalla Jogeshur Sahay*, I. L. R., 3 I. A., 7; I. L. R., 1 Cal., 226, explained. *Khetter Mohun Chuckerbutty v. Dinabashy Saha*, I. L. R., 10 Calc., 265, distinguished.—17 Cal. 263.

Suit, in July 1885, to set aside a sale of land of the plaintiff, sold in July 1884 as if for arrears of revenue under Act II of 1864 (Madras), on the ground that the sale had been brought about by fraud and collusion between the purchaser and the village officers; the plaintiff had knowledge of the alleged fraud more than six months before suit: *Held*, that the law of limitation applicable to the case was sec. 59 of Act II of 1864, and not sec. 95 of the Limitation Act, and that the suit was therefore barred. *Venkatapathi v. Subramanya* (I. L. R., 9 Madr., 457) explained, *Baij Nath Sahu v. Lala Sital Prasad* (2 B. L. R., Full Bench., 1), and *Lala Mobaruk Lal v. The Secretary of State for India* (I. L. R., 11 Cal. 200) considered.—12 Madr. 168.

The general provisions of the Limitation Act XV of 1877 are applicable to cases for which periods of Limitation are specially provided by local or special laws. Therefore where a suit was brought in the Court of the District Judge of Belgaum on 30th January, 1882, but was returned for want of jurisdiction on 6th February, 1882, and was subsequently presented on the same day in the Court of the Subordinate Judge of Belgaum, the High Court held that the provisions of sec. 14 taken together with sec. 6 of the Limitation Act XV of 1877 applied to the case so as to exclude the period between 30th January and 6th February, 1882, in computing the period of three months prescribed by the Bombay District Municipal Act (Bombay Act VI of 1871), sec. 86.—8 Bom. 529.

See I. L. R., 10 Madr. 210 & 18 Cal. 631, noted under sec. 5; 5 Cal. 314, noted under sec. 5; 12 Madr. 467, noted under sec. 4.

7. If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time

Legal disability.

prescribed therefor in the third column of the second schedule hereto annexed.

When he is, at the time from which the period of limitation is to be reckoned, affected by two <sup>Double and successive disabilities.</sup> such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

When such representative is at the date of the death affected by any such disability, the rules <sup>Disability of representative.</sup> contained in the first two paragraphs of this section shall apply.

Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years, from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

#### *Illustrations.*

(a.) The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

(b.) A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(c.) A right to sue accrues to Z during his minority. After the accruer, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease.

(d.) A right to sue accrues to X during his minority. X dies before attaining majority, and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.

(e.) A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accruer A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under this section.

(f.) A right to sue as landlord to recover possession from a tenant accrues to A who is an idiot. A dies three years after the accruer, his

idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

#### Notes.

The benefit of secs. 11 and 12 of Act XIV of 1859 is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian—I. L. R., 1 Cal. 226. See also Al. H. C. R. 1869, p. 122.

The privilege of this section is limited to minor, and after his death to legal representatives. A purchaser from the minor cannot claim the benefits of this section.—15 B. L. R., 357.

A suit by a guardian on behalf of a minor is that of the minor, and is governed by the law of limitation applicable to the minor. So, where a minor had been dispossessed of his share in certain property which had been sold in execution of a decree, and where an application under sec. 268 of Act VIII of 1859 to obtain possession of the share, was made by the then guardian of the minor, and disallowed, and subsequently, but beyond the period of one year from the date of the application, a suit was brought to obtain possession by another guardian of the infant who had been duly appointed.—*Held*, that such suit was not barred by limitation, the right to sue being that of the minor, and that it might be exercised by any one duly appointed on his behalf during his minority, or by the infant himself, within the time limited by sec. 7 of Act XV of 1877, after attaining his majority.—I. L. R., 7 Cal. 137. See also 17 W. R., 419; 3 W. R., 8.

A plaintiff, who has obtained a decree during his minority, has the option either of applying through his guardian to execute the decree during his minority or to wait until the expiration of his minority before executing his decree. The application of the guardian is the application of the infant. The minor is under disability during the whole period of his minority. His disability does not cease, because he, through his guardian, makes two or more applications for execution, however, long the interval between them, provided they are all made during his minority.—I. L. R., 9 Cal. 81.

In execution of a decree, dated the 29th April 1862, certain proceedings were taken which terminated on the 5th September 1866, when the execution case was struck off the file. Between that date and the 25th September 1882, no further proceedings were taken. On the latter date an application was made for execution. The decree-holder was a minor when the decree was passed and did not attain his majority till the 25th September 1879. *Held*, that the words to "bring an action" as used in sec. 11, Act XIV of 1859, must be taken to be synonymous with the words to "bring a suit" and that the word "suit" must be construed in the same way as the word "suit" used in sec. 14, and following the decision of the majority of the Full Bench in *Huro Chunder Roy Chowdhry v. Shoorodhoney Debia*, 9 W. R., 402, must be taken to include execution proceedings; *Mothoora Dass v. Shambhoo Dutt*, 20 W. R., 53, dissented from. *Held*, therefore, that as Act XIV of 1859, was applicable to the case previous to the date on which Act XV of 1877 came into operation, and as under sec. 11 the decree-holder was entitled to have the time during which he was a minor deducted from the period during which limitation was running against him, his

right to execution was not barred when Act XV of 1877 came into force, and that being so, and the present application being made within three years of the date on which he attained his majority, execution of the decree was not barred. *Gurupadapa Basapa v. Virbhadrappa Irsangapa*, I. L. R., 7 Bom., 459, discussed; *Bahary Lall v. Goberdhun Lall*, I. L. R., 9 Cal. 446; 12 C. L. R., 431, dissented from; *Nursingh Doyal v. Hurryhur Saha*, 6 C. L. R., 489; *Shambhu Nath Saha Chowdhry v. Guru Churn Lahiry*, 6 C. L. R., 437, approved.—10 Cal. 748.

The fact that a minor is for a time represented by a guardian does not remove the disability of the minor.—4 Madr. 119.

A member of an undivided Hindu family and his two minor brothers (who sued by him as their next friend) brought a suit for partition of family property against their father, and joined as defendants certain persons who were in possession of part of the property under alienations made by the father but alleged in the plaint to be invalid as against the family. In 1875 a decree was passed in favor of the plaintiffs in the above suit. No application for the execution of the decree was made by either the first or second plaintiff; but the third plaintiff, having attained his majority in June 1881, applied for execution in April 1884: his application was opposed by two of the defendants. The District Judge made an order granting his application in respect of the one quarter share to which he was declared to be entitled under the decree:—*Held*, that the order of the District Judge was wrong, as neither sec. 7 nor sec. 8 of the Limitation Act affected the case, and the application was accordingly barred by limitation.—13 Madr. 236.

The guardian and administratrix of her minor sons obtained a money decree against the defendants in August, 1874, and on the 22nd February, 1875, applied for its execution. The application was struck off on the 30th July, 1875, as no property belonging to the defendants could be found. On the 16th of June, 1881, the guardian died, and one of the sons, on the 20th of October, 1882, soon after attaining his majority made a fresh application for execution of the decree. *Held* that the fresh application was not time barred, the time from which the period of limitation began to run against the applicant being the date on which he attained majority.—7 Bom. 179.

Section 7 of the Statute of Limitations (Act XV of 1877), strictly speaking, only applies to cases dealt with by that statute itself. The provisions of the Civil Procedure Code (Act XIV of 1882) must, in the absence of anything to the contrary, be deemed to be subject to the general principle of law as to the disability of minors, which is that time does not run against a minor, and the circumstance that a minor has been represented by a guardian does not affect the question.—16 Bom. 536.

See I. L. R., 17 Cal. 263, noted under sec. 6.

**8.** When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.



\*

*Illustrations.*

(a.) A incurs a debt to a firm, of which B, C, and D, are partners. B is insane, and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C, and D.

(b.) A incurs a debt to a firm, of which E, F, and G, are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

**Notes.**

Attained majority on the 11th March, 1882, sued from that date, upon a bond obtained in 1872 by his mother and guardian in the plaintiff's name alone. The defendant contended that the plaintiff's brother, who was capable of giving a valid discharge to his debtors, having failed to sue within proper time, the suit was barred. On reference the High Court held, that suit was not barred. The plaintiff's brother not being a party to the bond, sec. 8 would not apply. The bond was passed to the plaintiff alone, and the right of action accrued to him on the 8th July, 1878. Being then a minor, time did not begin to run until he attained his majority.—I. L. R., 10 Bom. 241.

The manager of a joint Hindu family, of which S was a minor member, lent money on behalf of the family to K. The time limited by law for a suit for such money was three years from the date of the loan. During that period there were several members of the family who were *sui-juris*. After attaining his age of majority S sued K for such money, and as the period limited by law for such suit had expired, relied on the saving provisions of sec. 8 of the Limitation Act, 1877. Held that, although during such period S was one of several joint creditors who was under disability, yet as more than one member of the family could have given a discharge to K without S's concurrence, such provisions of sec. 8 of the Limitation Act were not applicable, and S's suit was therefore barred by limitation.—4 Al. 512.

See I. L. R., 13 Madr. 236, noted under sec. 7.

Continuous running of time.

**9.** When once time has begun to run, no subsequent disability or inability to sue stops it:

Provided that, where letters of administration to the estate of, a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

**Notes.**

Absence beyond seas voluntarily or in consequence of transportation gives no exemption when once time has begun to run, 1 B. L. R., S. N., 25; nor voluntary absence abroad after attaining majority, 2 M. H. C. R., 113; nor ignorance of the defendant's residence.—Al. H. C. R., 1870, p. 173.

When time began to run owing to cause of action arising in lifetime of ancestor, subsequent disability of heir was not reckoned.—3 B. L. R., App. 80.

On the 20th August, 1879, the defendant being indebted to the plaintiff, gave his bond for Rs. 8,000. The bond provided for the payment of monthly instalments of Rs. 80 each, the first of such instalments to become due on the 4th September, 1879. The bond also contained the following



clause :—“If the said Arthur Bowles shall—in default of payment of any one of such instalments, or in the event of default being made by him in payment of the premium money when and as the same shall become due in respect of the said policy, *if so required* by the said Hamantram Sadhuram Pity, his executors, administrators or assigns—pay the whole amount which may then be due under and by virtue of these presents without deduction, then the above written bond or obligation shall be of no effect ; otherwise the same shall be and remain in full force and virtue.” The defendant paid three of the said monthly instalments, the last of which was paid on the 2nd December, 1879, being that which had fallen due on the 4th November, 1879. No further instalments were paid, but no demand for payment of the entire sum secured by the bond was made by the plaintiff until the 30th January, 1884. The plaintiff filed this suit on the 28th April, 1884. The defendant contended that the plaintiff’s cause of action arose on the 4th December, 1879, when he (the defendant) failed to pay the instalment then due, and pleaded limitation. The plaintiff contended (1) that under the bond the cause of action did not arise until the date of his demand, *viz.*, on the 30th January, 1884 ; (2) that, even if the cause of action arose on the 4th December, 1879, the suit was not barred, the defendant having been absent from India for upwards of two years and three months out of the four years and four months which had elapsed between the date of the defendant’s default and the date of suit. *Held* that the suit was not barred. The language of the bond showed that it was the intention of the parties that, in case of default being made in payment of one instalment, the whole amount should become due only if a demand for such amount were made. The cause of action did not arise against the defendant until the date of demand, *viz.*, the 30th January 1884. *Held*, also, dissenting from *Naronji Bhimji v. Mugniram Chandaji*, that, even if the cause of action had arisen on the 4th December, 1879, nevertheless the suit was not barred, inasmuch as the period during which the defendant had been absent from India was to be deducted in computing the period of limitation.—8 Bom. 561.

Where time has once begun to run, subsequent absence of the defendant from British India will not be excluded. Secs. 9 and 13 must be read together.—I. L. R., 6 Bom. 103. This was dissented from in.—4 Al. 530.

**10.** Notwithstanding anything hereinbefore contained,  
     Suits against express      no suit against a person in whom pro-  
     and their repre-      perty has become vested in trust for any  
                                  specific purpose, or against his legal re-  
 presentatives or assigns (not being assigns for valuable consi-  
 deration) for the purpose of following in his or their hands  
 such property, shall be barred by any length of time.

#### Notes.

In 1860 certain shares in a Company then formed were allotted to S, on the understanding, as the plaintiffs alleged, that 120 of such shares should, on the amount thereof being paid to S, be transferred to, and registered in the Books of the Company in the names of, the plaintiffs. In 1862 the plaintiffs completed the payment to S in respect of the shares, and during his lifetime received dividends in respect of the said shares. S died in 1870, leaving a will, probate of which was granted to the defendant as his executor. In a suit brought by the plaintiffs after demand of the shares from the defendant, and refusal by him to deliver them, to compel the defendant to transfer the shares to the plaintiffs and register the same

in their names, the plaintiffs case was, that the shares had been held in trust for them, and that, consequently, their suit was not barred by lapse of time. *Held*, that the transaction between S and the plaintiffs did not amount to "a trust for any specific purpose" within the meaning of sec. 10 of the Limitation Act, or to a trust at all, but to an agreement of which the plaintiffs were entitled to specific performance; and the limitation applicable was that provided by cl. 113 of Sch. II, Act IX of 1871, and, therefore, the suit was not barred. Nor were the plaintiffs disentitled to relief by reason of any laches or delay in bringing the suit.—2 Cal. 323.

Where trust is expressly created for specific purpose and property vested in a trustee upon such trust, the section applies, but not where trust is implied or is to be inferred by law.—4 Cal. 456; See also 4 Cal. 897.

A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property and for an account, is a suit to follow property, and as such, is not barred by any lapse of time.—8 Cal. 766.

A alleged that his father B had, before his death, placed in the hands of C a certain sum of money, and had also transferred to C his landed property upon trust, that C should, during the minority of A, hold the money and manage the property for the benefit of A, and maintain A, and should, on A's attaining his majority, make over to him the property and so much of the money as should then be unexpended; and that C had accepted the trust, but, upon A's coming of age, had refused to render any account. A, accordingly, brought a suit for an account. C pleaded that A had attained his majority at a much earlier period than he alleged, and that the suit was barred by limitation. A replied that, under sec. 10 of Act XV of 1877, his suit could not be barred by any length of time. *Held*, that sec. 10 of Act XV of 1877 did not apply to such a case, and that A's suit would be barred if not brought within six years from the time when he attained his majority, and became entitled to demand an account. In India, suits between a *cestui que trust* and a trustee for an account are governed solely by the Limitation Act (Act XV of 1877); and unless they fall within the exemption of sec. 10 are liable to become barred by some one or other of the articles in the second schedule of the Act. To claim the benefit of sec. 10, a suit against a trustee must be for the purpose of following the trust-property in his hands. If the object of the suit is not to recover any property *in specie*, but to have an account of the defendant's stewardship, which means an account of the moneys received and disbursed by the defendant on plaintiff's behalf, and to be paid any balance which may be found due to him upon taking the account, it must be brought within six years from the time when the plaintiff had first a right to demand it.—5 Cal. 910.

A charge of debts generally by a testator upon his property or any part of it, will not affect limitation, because it does not at all vary the legal liabilities, of the parties, or make any difference with respect to the effect and operation of the Statute itself. The executors take the estate subject to the claim of the creditors, and are in point of law trustees for the creditors, and such a charge adds nothing to their legal liabilities. But the case is different when particular property is given upon trust to pay a particular debt or debts. In such a case the trustee has a new duty, not the ordinary duty of an executor to pay debts generally out of property generally, but a duty to apply a particular property to secure a particular debt; and there is a trust within the meaning of sec. 10 of the Limitation Act.—7 Cal. 772.

An auction-purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is an assignee of the trustee within the meaning of that term as used in sec. 10 of the Limitation Act (XV of 1877), and consequently a suit against such a person by a plaintiff claiming to be entitled as trustee to possession of the trust property is governed by the ordinary rules of limitation and not excluded therefrom by the provisions of sec. 10.—15 Cal. 703.

A solehnama in 1847 to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters in their father's estate, having been executed by their mother, the widow, on their behalf. In a suit in 1882 to set aside the solehnama at the instance of the two daughters, the evidence showed that sons managed the property after their fathers death, and at the time the solehnama was executed. *Held*, on the question of limitation, that it was not to be inferred that the sons, by reason of their having managed their late father's estate, should be regarded as trustees, at the time of the execution of the solehnama, for the daughters; and, therefore, sec. 10 of Act XV of 1877 was inapplicable. So that as regards the property included in the solehnama a suit brought in 1882 by the daughters would be barred by time.—16 Cal. 161.

Where A instituted a suit in November 1889 to recover from the Secretary of State for India in Council the surplus sale proceeds of three taluks sold for arrears of Government revenue on the 3rd of October 1877 and which were in the hands of the Collector, *Held*, that the suit was governed by art. 62, sch. II, of the Limitation Act, and was therefore barred. *Held* also, that sec 31 of Act XI of 1859 did not vest the surplus sale-proceeds in the Collector as trustee, that a deposit did not necessarily create a trust, and that therefore section 10 did not apply. *Held* further, that the Collector was not a depository of the money within the meaning of art. 145 of sch. II.—18 Cal. 234.

A claim to vindicate the personal right of a trustee to the possession of immoveable property against another person claiming such right in the same character is not governed by sec. 10 of the Indian Limitation Act 1877.—7 Madr. 417.

Where property has become vested in a person in trust for specific purpose, a suit to follow such property in his hands is not barred by lapse of time. Acting under Regulation V of 1804, the Court of Wards took charge of an impartible zemindari, on the death of the zemindar, leaving minor sons, of whom the eldest was afterwards recognized as heir and received possession on attaining full age. Upon a subsequent adjudication of forfeiture against him under Regulation VII of 1808, the Government obtained possession of the zemindari :—*Held*, that the Government was not placed in the position of a person in whom property had become vested for a specific purpose, and that the above section was not applicable to prevent the operation of the law of limitation which barred the suit brought by another of the sons, alleging title to the zemindari.—8 Madr. 525.

This was a suit brought in 1881 with no written consent of the Advocate-General by the head of an Adhinam for declarations that a Mutt was subject to his control : that he was entitled to appoint a manager : that the present head of the Mutt was not duly appointed and his nomination by his predecessor was invalid ; and for delivery of possession of the moveable and immoveable properties of the Mutt to a nominee of the plaintiff. The claim extended also to religious establishments at Benares and elsewhere connected with the Mutt. The Mutt was founded by a member of the Adhinam.

Many previous heads of the Mutt had agreed to be "slaves" of the head of the Adhinam, but for over 60 years the head of the Adhinam had exercised no management over the endowments belonging to the Mutt; and in a suit (compromised) of the year 1854 the present pretensions of the head of the Adhinam had been denied *in toto*. The defendant had succeeded in 1880 to the management of the Mutt under the will of his predecessor, dated the same year, and was not a disciple of the Adhinam:—*Held*, (1) that the Mutt is affiliated to the Adhinam, but the head of the Adhinam is not entitled to appoint to the office of head of the Mutt and is not entitled to an order for delivery of the property of the Mutt to himself or to his appointee; (2) that on the evidence as to the usage in the establishments in question, the head of the Mutt is entitled to appoint his successor, but his erection is limited to members of the Adhinam; and the head of the Adhinam is entitled to enforce this rule though he is bound to invest a disciple properly nominated by the head of the Mutt; (3) that the defendant not being disciple of the Adhinam, his appointment is invalid and the head of the Adhinam is entitled to see that a competent member of the Adhinam was appointed in his stead; (4) that the plaintiff is entitled to declarations based on the two last-mentioned findings since they were comprised in the issues framed under secs. 146 and 147 of the Code of Civil Procedure, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself; (5) that the suit was barred by limitation in respect of the personal claim to manage the endowments as to which no claim had been put forward for 60 years; (6) that the suit was not barred by limitation in respect of the claim to set aside the appointment of the defendant (who entered into possession in 1880 under a will, dated in the same year), or to see that a competent Dharmapuram man be appointed, in spite of the total denial of the claims of the head of the Adhinam in 1854; (7) that the consent of the Advocate-General to the suit is not required; the suit having been instituted under the Civil Procedure Code of 1877 and the cause of action not being an alleged breach of trust; (8) that there is nothing irregular in seeking to recover moveable and immoveable property in the same suit if the cause of action is the same in respect of both; (9) that the agreement of the head of the Mutt to become the "slave" of his *guru* could have no legal operation since 1843, and that the adverse possession of the defendant from that year is fatal to any claim of the plaintiff under such agreement.—10 Madr. 375.

Plaintiff, as dharmakarta of a Hindu temple, alleging that the defendant, a former dharmakarta, who had been removed from office, had, when in office, misappropriated certain temple funds held by him, sued to recover a certain sum alleged to have been misappropriated:—*Held* that the defendant was a person in whom the temple funds had become vested in trust for a specific purpose within the meaning of sec. 10 of the Limitation Act, 1887, and that as the plaint disclosed a right to follow trust funds in his hands, the suit might be treated as a suit for that purpose.—11 Madr. 274.

The plaintiff sued his father in 1887 for a declaration of his title to, and for possession of, certain property as being stridhanam property of his late mother, whose only son he was. The plaint alleged that some of the property had been given to the plaintiff's mother about the time of her marriage in 1836: that in 1843 her father had appointed the defendant trustee of the property for the plaintiff and his mother, and that further sums had been since paid to the defendant in his capacity of trustee on account of the stridhanam of the plaintiff's mother, and that he had traded

with the property and misappropriated it:—*Held*, that under Limitation Act, sec. 10, the suit was not barred by limitation on the allegations in the plaint.—14 Madr. 61.

R died in 1865, leaving a will of which his nephews P and S were the executors. His will provided that after payment of all debts, &c., the residue of his property should remain in the hands of the executors, who were “to maintain the family in the same manner as I used to maintain the family in my house.” After the death of both the executors the residue was to be apportioned among the children of his nephews in equal shares. On the death of the testator, P took possession of the estate, and died on the 10th January, 1876. S remained passive until the 27th August, 1884, when he took out probate of R’s will. On the 23rd January, 1885, he filed the present suit against the defendant as widow and administratrix of P, praying for an account of the estate of R that had come to the hands of P, and also for an account of the estate of P. The plaintiff contended that R’s estate came into the hands of P as a trustee; that the suit was to recover the property for the purposes of the trust, and that sec. 10 of the Limitation Act (XV of 1877) applied. The defendant alleged that all the moneys belonging to R’s estate, which had come into the hands of P, had been expended in paying R’s debts, and that there was no residue left for the purposes of the trusts of the will, and she contended that the suit was barred by limitation:—*Held*, that the suit was barred by article 120 being primarily not a suit to follow trust property in the hands of a representative of a trustee, but really to ascertain whether any trust remain to be administered after the testator’s debts and funeral expenses had been paid. No breach of trust was alleged. The suit was merely for an account against the executor or his representative. To such a suit sec. 10 does not apply.—10 Bom. 242.

G died without issue in 1854. By his will he appointed three executors, and after making certain bequests he directed as follows:—“After all the above matters shall have been settled, whatever property of mine may remain, that remaining property shall be disposed of in a righteous manner, in a pious and charitable way, as may appear advisable to all my three executors. It shall be disposed of in such manner that people may speak well of me, and that all my three heirs may acquire great fame.” The last surviving executor, (the brother’s widow), died in 1868, leaving a will, whereby she appointed four executors, and confirmed and continued the provisions of G’s will. In 1886 C, one of G’s heirs, assigned all his interest in G’s estate to the plaintiff, who in 1887 filed this suit for administration. He contended, that the above claim in the will was void for uncertainty; that there was, therefore, an intestacy as to the residue of the estate; and that the executors held such residue in trust for G’s heirs within the meaning of sec. 10 of the Limitation Act XV of 1877; and that the suit was, therefore, not barred. *Held*, that section 10 of the Limitation Act (XV of 1877) did not apply, and that the suit was barred by limitation. The executors of G were, no doubt, trustees, and for some specific purposes property became vested in them under the will, but with regard to the residue there was no trust declared and no direction given to distribute it among the heirs-at-law. In the absence of such a trust or direction the executors could not be held to be express trustees, or trustees for a specific purpose, and it is to such trustees alone that the section applies.—14 Bom. 476.

Clause in Wajib-ool-urz that lands of absconded or absent co-sharers should be restored to them on return, did not constitute the ‘*ad interim*’ holders trustees.—2 Al. 394; *Ibid*, 493; 3 Al. 458.

Sec. 10 of the Limitation Act, 1877, has reference to express trustees, and in order to make a person an express trustee, within the meaning of that section, it must appear either from express words or clearly from the facts that the rightful owner has entrusted the property to the person alleged to be a trustee for the discharge of a particular obligation. In 1813 S, being unable to pay the Government revenue due on his land, abandoned his village. In 1838 H, who had paid the revenue due by S, and had taken, or obtained from the Government, possession of S's land, attested a village paper in which it was stated that, if S returned and reimbursed him, he should be entitled to his land. Sixty years after S abandoned his village B, as the representative of S, sued the representative of H for such land, alleging that it had vested in H in trust to surrender it to S or his heirs on demand. As evidence of such trust B relied on the village-paper mentioned above, and on the village administration-paper of 1862, in which it was stated that absent co-sharers might recover their shares on payment of the arrears of Government revenue due by them. *Held* that such documents did not prove any express trust within the meaning of sec. 10 of the Limitation Act, 1877, and the suit was therefore barred by limitation.—4 Al. 187.

Certain of the grantees of lands, granted for the maintenance of the grantees and the support of a mosque and other religious purposes, sued for the removal of the superintendent of the property from his office. The parties to this suit entered into a compromise, which made certain arrangements for the management of the property, and a decree was made in accordance with the compromise. The grantees who were not parties to this suit then sued the grantees who were to set aside the compromise and decree on the ground of fraud. *Held* that the suit fell within the terms of No. 95, sch. ii. of the Limitation Act, 1877, and there was nothing about it which made the exemption of sec. 10 of that Act applicable to it.—5 Al. 294.

M and S purchased certain property jointly in 1865 and had equal interests in it till 1868, when M's interest was reduced to one third. S paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property, and for registration of the deed, and ultimately obtained possession in 1869 or 1870, and took the profits from that date. M did not pay any part of the money up to 1870, and it was not till 1878 that the whole of this share of it was subscribed, and he paid little or nothing towards the expenses. Subsequently he sued S for possession of his share, to have an account taken of the profits, and to recover his share of them with future mesne profits and costs:—*Held* that, under the above circumstances, there was a resulting trust in favour of the plaintiff, and the defendant became liable to account to him for his share; but inasmuch as there was no express trust, and the property did not become vested in trust for a specific purpose within the meaning of sec. 10 of the Limitation Act, and the suit was not brought for the purpose of following such trust property in the hands of a trustee, within the meaning of the section, such suit was not one which, under sec. 10, might not be barred by any length of time. *Bulwant Rao Bisharat Shor v. Puram Mal Chobey* referred to.—7 Al. 52.

## 11. Suits instituted in British India on contracts entered

Suits on foreign contracts entered into in a foreign country are subject to the rules prescribed by this Act.

Foreign limitation law.

No foreign rule of limitation shall be a defence to a suit instituted in British



India on a contract entered into in a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

### PART III.

#### COMPUTATION OF PERIOD OF LIMITATION.

In computing the period of limitation prescribed for any suit, appeal, or application, the day from which such period is to be reckoned shall be excluded.

Exclusion of day on which right to sue accrues.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence, or order appealed against or sought to be reviewed, shall be excluded.

..... in case of ap- and certain applica- tions.

Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

#### Notes.

Certain accused persons were convicted on the 29th February 1884, and made their first application for a copy of the judgment on the 25th March, tendering stamped paper for such copy on the 26th and 29th March. The copy was prepared on the 30th, and the prisoners, who had been admitted to bail on the 5th March, presented their appeal on the 7th April 1884, which was rejected as being out of time. *Held*, that the appeal ought to have been admitted.—I. L. R., 10 Cal. 642.

A plaintiff wishing to appeal from a decision passed against him on the Original Side of the High Court, dated 16th August 1883, presented for filing his memorandum of appeal to the Registrar on the 5th September 1883, but by reason of the decree not having been signed on that date, no copy of the decree was presented therewith. The Registrar refused to accept the appeal. On the 6th September the decree was signed, and on the 7th an office copy thereof was obtained by the defendant's attorney, who, on the 8th September served a copy at the office of the plaintiff's attorney. On the 12th September, the plaintiff applied for an office copy, which he obtained on the 13th, and on the 15th tendered such copy and his memorandum of appeal to the Registrar. The Registrar refused to accept the appeal, unless under an order of Court, it being in his opinion out of time. On the 6th December 1883 a Judge sitting on the Original Side admitted the appeal. The appeal subsequently came on for hearing, when the defendant contended that the appeal was barred, it not having been filed



within twenty days from the date of the decree. The Court held that the appeal was so barred. *Held, on review*, that the plaintiff having allowed five days to expire after the decree was signed before applying for a copy, and not having filed his appeal, after so obtaining a copy, at the earliest opportunity possible, such a delay, being entirely unaccounted for, could not be held to be "time requisite for obtaining a copy of the decree," and that, therefore, the appeal was out of time.—10 Cal. 652.

Where a decree was passed on the 22nd September and application for a copy was made not until 29th, and then with insufficient folios, and the Court was closed for the vacation from 30th September to 1st November, the deficient folios being filed on the day it re-opened, 2nd November, the copy delivered on the 6th, and the appeal filed on the 14th:—*Held*, that the appeal was out of time under sec. 12 the appellant not being entitled to deduction of the time occupied in ascertaining what the requisite number of folios was.—12 Cal. 30.

Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under sec. 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal.—13 Cal. 104.

In calculating the period allowed by the *Indian Limitation Act, 1877*, for presenting an appeal, the time during which an application for review of judgment is pending cannot be excluded as a matter of right. But, if an application for review has been presented with due diligence, and admitted, and there was a reasonable prospect that the petitioner would obtain by the review all he could obtain by appeal, the Court would be justified in admitting an appeal presented out of time. Where a District Court admitted an appeal presented out of time on the ground that the appellant having filed an application for review within the time allowed for an appeal was entitled to exclude the time occupied in prosecuting the review:—*Held*, that the High Court could not interfere on revision.—7 Madr. 584.

A filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A or his ancestors:—*Held*, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed.—10 Madr. 292.

On a petition for leave to appeal to the Privy Council presented on the 8th April, it appeared that the period of six months from the date of the decree to be appealed against had expired on the 23rd of March if the time occupied by the petitioner in getting a copy of the decree was to be computed in that period:—*Held*, that the petition was barred by limitation.—10 Madr. 373.

In computing the period of limitation for an application for a certificate admitting an appeal to Her Majesty in Council, the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded.—15 Madr. 169.

*Held* that, in computing the period of limitation prescribed by art. 177, sch. ii. of Act XV of 1877, for an application for leave to appeal to Her Majesty in Council, the time requisite for obtaining a copy of the judgment on which the decree against which leave to appeal is sought is founded,

cannot be excluded under the provisions of sec. 12 of Act XV of 1877.—1 Al. 644.

In computing the period of limitation prescribed for an appeal under cl. 10 of the Letters Patent, the time requisite for obtaining a copy of the judgment appealed from cannot be deducted, such copy not being required, under the rules of the Court, to be presented with the memorandum of appeal.—2 Al. 192.

See I. L. R., 5 Cal. 110, noted under sec. 6; 12 Al. 79, noted under art. 170; 12 Al. 461 and 14 Madr. 81, noted under sec. 5.

**13.** In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded.

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India.

#### Notes.

The provisions of sec. 13 of Act XV of 1877 are not applicable to proceedings in the execution of a decree.—I. L. R., 3 Al. 185; nor, if the absence of the defendant from British India is subsequent to time having commenced to run in respect of the cause of action.—I. L. R., 6 Bom. 103. But see I. L. R., 4 Al. 530, where it was held that this section is in no way affected or controlled by sec. 9, and that, in every case, the time a defendant was absent from British India must be excluded.

Sec. 13 of the Limitation Act, which excludes the time during which a defendant has been absent from British India in computing the period of limitation for any suit, does not apply to a case when, to the knowledge of plaintiff, the defendant, though not residing in British India, is represented by a duly constituted agent and mookhtar.—I. L. R., 10 Cal. 440.

Money paid as the price of goods to be delivered hereafter is money received for the use of the seller, and it is only upon failure of consideration that the money so paid becomes money received for the use of the buyer. When goods which have already been paid for are afterwards found to be short delivered, the failure of consideration takes place on the date of delivery, and limitation in respect of a suit to recover back the sum overpaid will be reckoned from that date. The words "absent from British India," in sec. 13 of the Limitation Act should be construed broadly, and not limited in their application only to such persons as have been present there, or would ordinarily be present, or may be expected to return. *Semble*.—A defendant is within sec. 13, notwithstanding his having carried on trade or had a shop or a house of business under an agent in British India. *Harrington v. Gonesh Roy*, I. L. R., 10 Cal. 440, commented upon.—14 Cal. 457.

**14.** In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded, upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

Exclusion of time of pro-  
in Court

In computing the period of limitation prescribed for a

Like exclusion in case of order under Civil Procedure Code, section 20.

suit, proceedings in which have been stayed by order under the Code of Civil Procedure,\* section 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is re-instituted, shall be excluded.

In computing the period of limitation prescribed for any

Like exclusion in case of application.

application, the time during which the applicant has been making another application for the same relief shall be excluded, where the last-mentioned application is made in good faith to a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to grant it.

*Explanation 1.*—In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

*Explanation 2.*—A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.

#### Notes.

In the following cases time was deducted.

(1.) The plaintiff brought in 1876 a suit against the defendant in respect of the same subject-matter and founded on the same cause of action as the present suit. Issues of fact arising on the merits were inquired into; but a certificate of the Collector under sec. 6 of the Pension Act (No. XXIII of 1877), which was necessary to give jurisdiction to the Court not having been obtained, the claim was rejected on that ground. The non-production of the Collector's certificate does not necessarily constitute such a want of due diligence on the plaintiff's part as disentitle him to the deduction of time allowed by sec. 14 of the Limitation Act, XV of 1877.—I. L. R., 3 Bom. 325.

(2.) A suit was instituted in the Court of the Subordinate Judge, who, after seven months returned the plaint to be filed in the Munsif's Court, on the ground that the suit had been over-valued. There was nothing to show want of *bona fides* in the plaintiffs' instituting the suit in the Court of the Subordinate Judge. *Held* that in computing the period of limitation prescribed for the suit, time during which the plaint was on the file of the Subordinate Judge's Court must be deducted.—I. L. R., 7 Cal. 284. See also 1 B. L. R., S. N., 12, where plaint was returned as undervalued by Munsiff.

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\* See Act XIV. of 1882, sec. 8.

(3.) Where decree was reversed on appeal on the ground that Court had no jurisdiction and the plaintiff filed his plaint in proper Court, time was deducted.—13 B. L. R., 146.

(4.) Where plaintiff sued co-talukdars in Revenue Court for arrears of rent, and the suit was dismissed for want of jurisdiction, time was deducted.—15 B. L. R., 56.

(5.) Plaintiff, as payee of an order drawn by defendant at Ahmedabad where he (defendant) resided, on a firm at Bangkok in Siam and dishonoured on presentation, sued defendant and an agent of the Bangkok firm who resided at Surat, in the Subordinate Judge's Court at Surat. Permission to proceed with the suit against the defendant (the drawer) having been refused by the High Court, plaintiff withdrew his plaint and filed his suit in the Court at Ahmedabad against the drawer alone. The Subordinate Judge rejected the claim as barred by limitation. *Held* by the High Court in appeal that, under sec. 15 of the Limitation Act (No. IX of 1871), a deduction might properly be made of the time during which the suit was pending in the Court at Surat, and that the deduction on this account was to run from the filing of the plaint to the final refusal of the High Court to allow the suit to proceed at Surat against the drawer (defendant).—I. L. R., 3 Bom. 182.

(6.) Time was deducted where a second suit was instituted before the first suit decided in Court without jurisdiction.—6 M. H. C. R., 45.

(7.) Where the plaintiff sued two defendants at Surat, but the High Court refused leave to sue one of them, and consequently the plaintiff withdrew the suit and filed it at Ahmedabad, time was deducted.—I. L. R., 3 Bom. 312.

(8.) See I. L. R., 8 Bom. 529, noted under sec. 6.

In the following cases time was not deducted :—

(1.) The defendants cut down and carried away some trees which had been growing on the plaintiff's land. The plaintiff's manager brought a suit in his own name against the defendants for the value of the trees so cut and carried away. This suit was dismissed on the ground that the manager had no cause of action against the defendants. In a subsequent suit brought by the plaintiff against the defendants for the value of the same trees, he contended that the time occupied in the former suit ought to be excluded in computing the period of limitation prescribed for the second suit. *Held* that the provisions of this section did not apply, and that the time could not be excluded, as the reason why the previous suit was dismissed, was, because it was brought in the name of the wrong person, not from defect of jurisdiction, or from any cause of a like nature.—I. L. R., 7 Cal. 367. See also Al. H. C. R., 1875, 284.

(2.) Where a plaint was presented in a wrong Court and returned to the party to be presented to a Court having jurisdiction within one month,—*Held*, that the order of the Court allowing the plaintiff one month in which to present his plaint could not extend the Statutory period.—5 M. H. C. R., 407.

(3.) Where a plaintiff sues upon his *jenm* title, having previously instituted a suit in which he unsuccessfully set up his *kanom* right, the latter suit cannot avail to prevent the Statute of Limitations from running against him.—2 M. H. C. R., 266.

(4.) The provision of the Indian Limitation Act of 1877, sec. 14, which excepts such time as is spent in litigating in a Court of defective jurisdic-

tion in favour of a plaintiff does not apply where the plaintiff brought his suit in a foreign Court which, according to its own laws, had ample jurisdiction, but according to the law of British India had no jurisdiction whatever.—1. L. R., 2 Madr. 407.

(5.) Where the plaintiff was non-suited on appeal, time was not deducted.—B. L. R., Sup., Vol. 553.

On the 2nd of September 1869 a suit was instituted for, among other things, the possession of land claimed under a kobala, dated the 31st October 1867. This suit was dismissed on the ground of misjoinder of causes of action. On the 14th of April 1881, the plaintiff sued for possession of the land only. *Held*, that the suit was not barred by limitation as the plaintiff had, within the meaning of sec. 14, been prosecuting his claim in a Court which, from a cause of “like nature” to defect of jurisdiction, was unable to entertain it. *Ram Sabhag Das v. Gobind Prasad*, 2 Al. 662.—1. L. R., 10 Cal. 86.

Sec. 14 of the Limitation Act provides for cases in which a plaintiff in perfect good faith, but under mistake, has instituted proceedings in a Court not having jurisdiction in the matter, and is applicable not only to the provisions of all Acts providing a special time for the Limitation of suits, but also to the provisions of the Limitation Act itself.—10 Cal. 265.

The plaintiff on the 31st March 1884 brought a suit in the Small Cause Court on a promissory note, dated the 24th April 1879. In his plaint he omitted to set out certain payments of interest by the defendant, which payments (if so set out) would have had the effect of saving the suit from being barred by limitation. The Judge of the Small Cause Court *held*, that on the face of the plaint the suit was barred, and rejected the plaint on the 24th April 1884, under cl. (c) of sec. 54 of the Civil Procedure Code. On the 25th April 1884 the plaintiff brought a fresh suit on the same promissory note, and in his plaint set out how it was that he claimed exemption from limitation:—*Held*, that in computing the period of limitation, the plaintiff was not entitled under sec. 14 of Act XV of 1877 to exclude the time during which he was prosecuting the previous suit.—11 Cal. 264.

The provisions of sec. 14 of Act XV of 1877 are not applicable to suits for arrears of rent under Act X of 1859 — 18 Cal. 368.

The karnavan and an anandravan of a Malabar tarwad were authorized by a karar to manage the affairs of the tarwad. A decree was obtained against them, and land belonging to the tarwad was attached and sold in execution. The plaint did not describe the defendants otherwise than by their individual names, but the plaintiff's claim was, *inter alia*, in respect of the breach of a contract by the defendants to put him into possession of certain land which was expressed to be “the jenm of the defendants' tarwad.” It was found in the present suit that the amount decreed in the prior suit constituted a debt due by the tarwad: *Held*, the decree and the execution sale did not bind the tarwad—*Daulat Ram v. Meer Chand* (1. L. R., 15 Cal. 70) distinguished. This suit was brought on 8th August 1884 to declare that the sale in execution was not binding on the tarwad. The present plaintiffs being members of the tarwad intervened in execution of the decree, but their claim was dismissed on 5th September 1882. On the 27th September 1882 they filed a suit in the Court of the District Munsiff, praying for the relief now sought. The District Munsiff dismissed the suit on the ground that he had no jurisdiction. On appeal the District Judge made an order directing him to dispose of it, which he accordingly did, and he passed a decree against which an appeal was pend-

ing on 17th August 1883. But on the last-mentioned date the High Court set aside the order of the District Judge and directed him to ascertain the market-value of the land and make a fresh order, and the enquiry, directed by the High Court, did not terminate until 30th October 1883, when another order was made by the District Judge by which the original decision of the District Munsiff was confirmed: *Held*, that the prior suit terminated only on the 30th October 1883, and that the present suit was not barred, under Limitation Act, 1877, sch. ii, art. 11.—12 Madr. 434.

Of six persons in whom was vested the obligee's interest under a hypothecation bond, three brought a suit upon it in a District Court and the other three brought a similar suit in a District Munsiff's Court to recover, with interest, their respective shares of the sum secured. The former suit was dismissed as not being maintainable and the latter was withdrawn. The present suit was brought by all six:—*Held*, that in computing the time within which the plaintiffs had to sue, the time occupied by them in prosecuting the former suits should be deducted. *Deo Prosad Sing v. Pertab Kairee* (I. L. R., 10 Cal. 86) followed.—13 Madr. 451.

In October, 1881, an account was struck between K and M, and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount a sum of Rs. 885 was paid. In March, 1885, K sued M for the balance of Rs. 600 then due on the account stated. The plaintiffs claimed the benefit of sec. 14 as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain zemindari property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October, 1881:—*Held* that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction or other cause of a like nature, was unable to entertain it; that the provisions of sec. 14 were not applicable; and that the suit was barred by limitation. *Per Straight, Offg. C. J.*—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated. *Per Mahmood, J.*—The Courts of British India in applying Acts of Limitation are not bound by the rules established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts, whether their language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as “statutes of repose” and not as of a penal character or as imposing burdens. *Roddam v. Morley*, *Syed Ali Saib v. Sri Raja Saunairaz Peddabaliyra Simhula Bhadr*, *Empress v. Kola Lalang*, *Beil v. Morrison*, *Shah Keramut Hossein v. Gulab Koonwur*, and *Mahummud Bobadoor Khan v. The Collector of Barcilly*, referred to.—8 Al. 475.

Sec. 14 of the Limitation Act (XV of 1877) does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent, but is limited to cases where from *bona fide* mistake of fact the suitor has been misled into litigating in a wrong Court. The phrase “other cause of a like nature” in the section is vague, and cannot be held to release a person from the obligation to know the law of the land. The decree in this suit was passed by the Subordinate Judge as the Court of first instance on the 31st March, 1886. Against the decree



the plaintiffs preferred an appeal to the District Court on the 1st July, 1886, and on the 11th December, 1886, the District Court returned the memorandum of appeal filed in that Court to the plaintiff upon the ground that the subject-matter in dispute was above Rs. 5,000. The plaintiff then on the 20th December, 1886, presented the memorandum of appeal to the High Court, and it was admitted, subject to the consideration by the Bench determining the appeal of any question as to its admissibility, after the period of limitation prescribed for presentation of appeals to the High Court. Upon the hearing of the appeal, the respondent objected to the appeal being entertained, on the ground that it was presented beyond the period of limitation. *Held* that no sufficient cause being shown for the delay in the presentation of the appeal, the appeal must be dismissed. *Balwant Singh v. Gumani Ram* explained.—10 Al. 587.

The words "other cause of a like nature" in sec. 14 of the Limitation Act (XV of 1877) mean some cause analogous to defect of jurisdiction. Where a suit dismissed on the ground that the debt sued for was due not to the plaintiff alone, but to the plaintiff and his partner, the latter not having been joined in the suit; and where the plaintiff subsequently brought a fresh suit for the same debt, making his co-partner a party, *Held* that the case was not within sec. 14 of the Limitation Act, and that the time during which the plaintiff had been prosecuting the former suit could not be excluded in computing the period of limitation prescribed for the second suit. *Ram Subhag Das v. Gobind Prasad* and *Chunder Madhub Chnokerbutty v. Ram Coomar Chowdry* referred to. *Deo Prasad Singh v. Pertab Kairce* not followed.—12 Al. 207.

See I. L. R., 11 Cal. 287, 12 Madr. 467, noted under sec. 4; 10 Al. 524, 13 Madr. 269, noted under sec. 5.

**15.** In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

Exclusion of time during which commencement of suit is stayed by injunction or order.

#### Notes.

A member of a firm sued for a partnership debt and obtained a decree; he died before execution. In a suit brought by his widow an injunction was issued restraining his partner from realising the partnership assets. Subsequently, a receiver was appointed for the partnership assets, and he applied for execution of the above decree:—*Held*, that the time during which the injunction was in force was not to be excluded in computing the period of limitation.—I L. R., 11 Madr. 103.

Where an injunction obtained against the execution of a decree has been dissolved, the time during which it was in force cannot be deducted under sec. 15 of Act XV of 1877 in computing the period of limitation within which an application for execution may be made. Sec. 15 only relates to injunctions which stay the institution of suits, and the word "suit" does not include an application (section 3)—5 Bom. 29.

See I. L. R., 13 Al. 76 & 14 Al. 162, noted under sec. 268 of the Civil Procedure Code.



computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded.

**17.** When a person, who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

When a person against whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

Nothing in the former part of this section applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

**Note.**

A manager is bound to account to his employer whenever he is called upon to do so under reasonable circumstances. On the death of such manager a fresh right to an account accrues to the employer as against the manager's representatives. In a suit for such an account accruing to the employer on the death of his manager, limitation will not commence to run until administration has been taken out to such manager's estate.—I. L. R., 7 Cal. 627.

**18.** When any person, having a right to institute a suit or make an application, has, by means of fraud, been kept from the knowledge of such right, or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application—

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in

the case of the concealed document, when he first had the means of producing it or compelling its production.

**Notes.**

The words "any document, necessary to establish such right, has been fraudulently concealed from him," show that the document must have been fraudulently concealed from the knowledge of the plaintiff, and that he must, owing to such fraudulent concealment, have been unaware of its existence. What is a 'necessary document' considered.—7 M. H. C. R., 22.

Sec. 18 is applicable only to those cases where the fraud is committed by the party against whom a right is sought to be enforced.—I. L. R., 2 Cal. 1.

Prior to and in the year 1865 the defendant's brother Alladinbhoy carried on an extensive business in Bombay and in China. The defendant and another brother (Ahmedbhoy) carried on a separate business under the name of Ahmedbhoy Hubibbhoy. In December, 1866, Alladinbhoy became insolvent, and his property vested in the Official Assignee. The present suit was brought in 1887 against the defendant by the Official Assignee to recover certain property which he alleged belonged to the insolvent, and ought to be distributed among his creditors. The plaintiff alleged that in 1865 the insolvent was possessed of a very large amount of property, and that, being unwilling to meet his liabilities, he and his son and his two brothers, viz., Ahmedbhoy and the defendant Rahmubhoy, fraudulently concealed his property from his creditors, and in September, 1866, he himself went to Daman, beyond British jurisdiction. In 1881 the plaintiff, having obtained information that some of the insolvent's property was in the possession of his brother Ahmedbhoy, filed a suit (No. 473 of 1881) against Ahmedbhoy to recover it. That suit was referred to arbitration, and the plaintiff obtained a decree for Rs. 3,60,600. The plaintiff now alleged that, shortly before the hearing of that suit and subsequently, he had obtained information which led him to believe that the defendant had obtained some of the insolvent's property for which he was accountable. The defendant had been made a party to the former suit, No. 473 of 1881, for the purpose of discovery only, and it was in the course of such discovery being given that some of the above information had been obtained. The plaintiff then set forth, in detail, the various items of claim in respect of which the plaintiff sought to make the defendant liable. The defendant pleaded (1) that the claims were barred by limitation; (2) that the said claims had been in issue in the former suit (No. 473 of 1881), and were adjudicated upon, and that this suit was, therefore, barred by section 13 of the Civil Procedure Code (Act XIV of 1882); (3) that the plaintiff was barred by sec. 43 of the Civil Procedure Code (Act XIV of 1882), the plaintiff having omitted to include these claims in the former suit to which defendant was a party; (4) that the decree in the former suit (No. 473 of 1881) was (*inter alia*) in respect of the matters alleged in this suit, and that as, according to the plaintiff's allegation, the defendant in that suit was a joint wrong-doer with the defendant in this suit in respect of these matters, the said decree was a bar to this suit. *Held* by Scott, J.—(1) That the suit was not barred by limitation. There was sufficient evidence of fraud to bring the case under sec. 18 of the Limitation Act (XV of 1877). The limitation only began to run from the time the fraud became fully known to the Official Assignee, which was not until December, 1885. The knowledge required by sec. 18 of the Limitation Act (XV of 1877) is not mere suspicion. It must be knowledge of such a character as will enable the person

defrauded to seek his remedy in Court. (2) That the suit was not barred, either by sec. 13 or sec. 43 of the Civil Procedure Code (Act XIV of 1882). The defendant was made a party to the former suit for certain limited purposes only. No relief was asked from him; no decree was made against him. He was merely a nominal defendant. He was not a party to the former suit in such a way as to bring the present suit within the section. (3) That the rule of *King v. Hoare* (13 M. & W., 494,) applies in India, viz., that a judgment recovered against any one of several joint-debtors merges the remedy for the joint debt, and is a bar to an action against a co-debtor upon the joint liability; and, similarly, in a matter of *tort-feasance*, a judgment against one of several wrong-doers is a bar to an action on the same matter against the others. Such of the wrongs, therefore, alleged in the present suit as were of a joint character, and were adjudicated upon in the previous suit, were extinguished by the former judgment. Applying the above rule, the Judge disallowed some of the items of the plaintiff's claim, and allowed others, and directed an account in respect of the latter. The Court of Appeal confirmed the decree of first instance, except as to the one of the allowed items, which it held to be barred by limitation.—14 Bom. 408.

The plaintiff claimed, as an heir to N, deceased, a moiety of moneys, which, at the time of N's death, were deposited with a banker, and which the defendant, the other heir to N, had received from such banker. *Held* that the suit was one for money received by the defendant for the plaintiff's use, to which the limitation provided in art. 62, sch. ii. of Act XV of 1877, applied, and not one to which the limitation provided in art. 120 applied.—3 Al. 170.

See I. L. R., 5 Al. 294, noted under sec. 10.

**19.** If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

*Explanation 1.*—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance, or enjoyment, has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the entitled to the property or right.

*Explanation 2.*—In this section ‘signed’ means signed either personally or by an agent\* duly authorized in this behalf.

#### Notes.

B’s agent, under the orders of B, wrote a letter to S containing an acknowledgment in respect of a debt. This letter was headed as follows:—Written by B to S. The concluding portion of the letter was written by B in his own handwriting. *Held* that, under these circumstances there was sufficient evidence that the heading of the letter was written by an agent duly authorized. *Held* also, looking at the heading of the letter, that the letter was “signed” by B.—1 Al. 683. For similar rulings see 5 Bom. 22, 23; 2 M. L. C. R., 70.

The manager of a Hindu family, as such, is not an agent “generally or specifically authorized” by his co-partners so as to bind them by acknowledgment.—1 Madr. 385. See also 14 B. L. R., 21.

Acknowledgments which under Act XIV of 1859 were insufficient to keep alive a cause of action, because they were signed only by an agent, held to be sufficient to sustain a suit on the same cause of action under

cipal.—6 Cal. 340.

An application for the execution of a decree is an application in respect of a “right” within the meaning of sec. 19, Act XV of 1877, and a petition made by a judgment-debtor, and signed by his vakeel, praying for additional time for payment of the amount of a decree, constitutes an “acknowledgment of liability” within the meaning of that section, and a new period of limitation should be computed from the date of such petition in order to ascertain whether the execution of the decree is barred or not

716.) followed.—!

of

acknowledgment of a debt on account of a  
fresh start for the period of limitation.—13 Cal. 292.

The manager of a Hindu family has the same authority to acknowledge as he has to create debts on behalf of the family, but has no power, without special authority, to revive a claim, already barred by against the family.—5 Madr. 169.

Where a landlord sued to recover arrears of rent due from a tenant who entered as a Chalgaini tenant for one year and continued in possession without executing a fresh agreement : *Held* that an admission, made in writing,

\* See 19 and 20 Vic, c. 97, sec.

and signed by the tenant, that he hold the land as *Mulgaini* or permanent tenant at a lighter rent, was not an acknowledgment of the landlord's right, which, under sec. 19 of the Limitation Act, 1877, would entitle the landlord to recover arrears of rent for three years prior to the date of the admission.—6 *Madr.* 182.

The acceptance of a sale certificate, granted by a *Zila Court* in 1824 to the purchaser of a mortgagee's interest in land sold by auction in satisfaction of a decree, is not an acknowledgment, by the purchaser, of the title of the mortgagor which will satisfy the conditions of sec. 19 of the Limitation Act and give a fresh starting point from which limitation will run for redemption.—6 *Madr.* 325.

Where a creditor sued an agent of his debtor, alleging that the agent had made himself personally liable for the debt, and the suit was dismissed on the ground that the creditor gave credit to the principal:—*Held*, that the creditor was not debarred by such proceedings from suing the principal, *R* who owed *V* money, drew a hundi in favour of *V* which was dishonoured. *V* sued *R* to recover the sum for which the hundi had been drawn. Within three years before suit *R* wrote a letter to the drawee of the hundi requesting him to pay the amount due by *R* upon the hundi:—*Held*, that the letter was a sufficient acknowledgment, within the meaning of sec. 19 of the Indian Limitation Act, 1877, of *R*'s liability for the debt for which the hundi was drawn.—7 *Madr.* 392.

*A* acted as commission agent for *B* and *C*. *A* furnished a debit and credit account in February 1878. The account was disputed and the matter was referred to an arbitration: for which purpose in March 1880 a "memorandum of items to be settled" was drawn up and signed by *B* and *C*, in which they denied that any balance would be found due to *A*, but acknowledged that account must be taken and that they would be liable if any balance were found due to *A*. In June 1880 *B* signed and supplied to the arbitrator an account on behalf of himself and *C*. The arbitrator made an award which was set aside. *A* filed a suit against *B* and *C* in September 1882 for a balance due to him:—*Held*, that the accounts were mutual, open and current accounts; that *B* and *C* had made an acknowledgment of their debt to *A*; and that the suit was not barred by limitation.—10 *Madr.* 259.

In a suit against the legal representative of a deceased debtor to recover the amount of the debt, it appeared that the debt was contracted more than three years, but was payable less than three years before suit. In bar of limitation the plaintiff relied upon an admission of the debt in a draft will, written by the testator, in the first line of which his name appeared:—*Held*, per *Weir, J.*, that the admission in the will did not constitute an acknowledgment under Limitation Act, sec. 19; per *Muttusami Ayyar and Parker, JJ.*, that the period of limitation should be computed from the date when the debt was due and the suit was not barred.—15 *Madr.* 380.

An unregistered instrument, the registration of which is compulsory, may be put in evidence as acknowledgment of debt for the purposes of this section, *I. L. R.*, 3 *Al.* 523; but not as evidence of acknowledgment of title.—4 *Bom.* 590.

A sum of money was deposited with the defendant's firm in 1857. Three years afterwards interest was paid by the firm, which was debited in the ledger to the creditor against a credit of a like amount. In 1875 a balance was struck, and carried to another account signed by the defendant, and acknowledging the same to be "due for balance of old account." In 1878, the account was again balanced, and the balance again transferred

to a fresh account similarly signed. *Held* that the transaction did not amount to an account stated within the meaning of article 62, schedule II of Act IX of 1871, or article 64 of schedule II of Act XV of 1877, and was no more than a mere acknowledgment, which, as the suit had then long been barred by limitation, was of no avail. An account stated, in the true sense of the term, and in the sense employed in the above-mentioned sections of the Limitation Acts of 1871 and 1877, is where several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge on each side; each party resigning his own rights on the sums he can claim, in consideration of a similar abandonment on the other side, and of an agreement to pay, and to receive in discharge the balance found due.—7 Bom. 414.

Acknowledgment must be made within ordinary period of limitation, and when special law fixes period, within that period.—5 Cal. 303; 6 Bom. 683.

On the 7th of December 1877, additional time for payment of the amount of a decree, dated the 24th of March 1876, was granted to the judgment-debtor upon a petition signed by his vakeel. On the 4th of December 1880 a fresh application for execution was made. *Held*, that it was not barred under art. 179 of sch. ii, inasmuch as the petition constituted an acknowledgment of liability under sec. 19, and a new period of limitation began to run from the 7th of December 1877. The object of the words "application in respect of any property or right" in sec. 19 is to extend to the applications mentioned in sch. ii. the same privilege as is accorded to "suits"—I. L. R., 8 Cal. 716. But for a ruling to the contrary, *i. e.*, that the provisions of the section do not apply to applications for execution of a decree, see 5 Madr. 171.

A balance of account was written by a person at the request of an illiterate debtor in the debtor's name, and signed by the writer in his own name, held a binding acknowledgment by a duly authorized agent within the meaning of sec. 19, expln. 2 of Act XV of 1877.—7 Bom. 515.

A *khata* consisting of one item only on the debit side, and bearing the mark of the debtor:—*Held* to be a mere acknowledgment, and not an account stated.—9 Bom. 516.

An entry in a debtor's own book does not amount to an acknowledgment within the meaning of sec. 19 of Act XV of 1877, unless communicated to his creditor or to some one on his behalf—Explanation, to sec. 19 showing that the acknowledgment is contemplated as "addressed" to the creditor. Every acknowledgment, in order to create a new period of limitation, must be signed by the debtor, or some one deputed by him, no matter in what part of the document the signature is placed.—10 Bom. 71.

On 20th July, 1871, the plaintiffs obtained a decree against the defendants for the sum of Rs. 4,083 and for the sale of their mortgaged property. On the 16th July, 1877, the plaintiffs applied for execution. The application was granted, the property was attached, and the sale was fixed for the 30th November, 1878. On the 18th November 1878, one of the defendants applied for a postponement of the sale until harvest time, when he said he would pay the amount of the decree. The sale was accordingly, with the plaintiff's consent, postponed to the 31st May, 1879. On the 13th June, 1879, the plaintiffs informed the Court that negotiations were proceeding between themselves and the defendants for the settlement of the decree, and prayed that their application the 16th July, 1877, might be struck off; adding that, if the negotiations failed, they would present a



fresh application. The negotiations for settlement proved abortive, and the case being one to which the Dekkhan Agriculturists' Relief Act (XVII of 1879) applied, the plaintiffs took steps to obtain a conciliator's certificate. These proceedings occupied the period from the 3rd July, 1880, to the 19th January, 1881. The certificate was granted on the 1st December, 1881. On the 13th December, 1881, more than three years after the date of the previous application, *viz.*, 16th July, 1877, the plaintiffs made the present application for execution. The defendants contended that it was barred by limitation:—*Held*, that the application was not barred. As it was understood between the parties when the application of the 16th July, 1877, was struck off on the 13th June, 1879, that if negotiations failed, a fresh application should be presented, the application of the 13th December, 1881, was to be regarded as an application for the revival of the old execution proceedings. But, in any case, the application by the defendant, of the 18th November, 1877, for a postponement of the sale of his property when he promised to pay the amount of the decree, was an admission of the plaintiffs' right to execute the decree within the contemplation of sec. 19 and created a new period of limitation, which would ordinarily have expired on the 18th November, 1881. As, however, by the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the period during which the conciliator was endeavouring to effect an amicable settlement, *viz.*, from 8th July, 1880, to 1st December, 1881, would have to be deducted, the present application was within time.—10 Bom. 108.

In a suit brought on the 20th July, 1886, by the plaintiff to recover the price of goods sold on the 12th March, 1881, to the defendant, the plaintiff filed two *khatas* under the defendant's signature, acknowledging the debt, and bearing dates the 6th March, 1882, and the 29th October, 1884. The Subordinate Judge, being of opinion that the suit was barred, referred the case to the High Court. *Held*, that the suit was not barred; the second acknowledgment having been made within "the new period" arising from the first acknowledgment, was made within a period prescribed for the suit, and was, therefore, itself the starting point of a new period.—11 Bom. 282.

Where the defendant, after his debt had become barred by limitation, wrote as follows to his creditor in reply to a demand for payment:—"I bear the matter in mind, and will do my utmost to repay this money as soon as I possibly can," *Held*, that this promise by the defendant was only a conditional promise, *viz.*, to pay when he was able; and the plaintiff having failed to prove the defendant's ability to pay, the promise did not operate, and the plaintiff could not recover.—11 Bom. 580.

The suit was for a sum of money with interest, being the balance of an account for money lent and advanced. The original loan was made in 1876. A balance was struck every year and a new receipt or acknowledgment was passed by the defendant. The last receipt or acknowledgment was dated 3rd November, 1880. The present suit was filed within three years of that date. The intermediate acknowledgments were alleged to have been returned to the defendants. Defence was limitation. For the plaintiff it was argued that, on proof of the intermediate acknowledgments having been given back to defendant, oral evidence might be let in to prove the acknowledgments of the intermediate period of four years. *Held*, that under sec. 19 of Act XV of 1877 and sec. 20 of Act IX of 1871, oral evidence of the contents of an acknowledgment could not be let in. The acknowledgments of the intermediate four years not being thus legally proved the suit was dismissed.—12 Bom. 269.



Where the defendants attested as correct the record-of-rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor, *held* (Spankie, J. dissenting), that there was an acknowledgment of mortgagor's right to redeem.—1 Al. 117.

*Held*, in the case of a decree for money payable by instalments, with a proviso that, in the event of default, the decree should be executed for the whole amount, that the decree-holder was strictly bound by the terms of the decree, and, not having applied for execution within three years from the date of the first default, the decree was barred. *Held* also, the judgment-debtor having, three years after the first default, acknowledged in writing his liability under the decree, and signed such acknowledgment, did not create a new period of limitation.—2 Al. 443.

An application for the execution of a decree is an application in respect of a "right," that is to say, the "right" of the decree-holder to execution, within the meaning of sec. 19 of Act XV of 1877. An application, in writing by a judgment-debtor for the postponement of a sale in the execution of the decree and the issue of fresh notifications of sale is "an acknowledgment of liability" within the meaning of the same section in respect of such "right." Such an acknowledgment, when the application is signed by the pleader expressly authorized to make it, is "signed" by an "agent duly authorized in the judgment-debtor's behalf," within the meaning of the same section.—3 Al. 247.

The nature of the pecuniary transactions between B and G were such, that sometimes a balance was due to the one, and sometimes to the other. On the 1st October, 1875, there was a balance due to B. During the ensuing year, as computed in the account, G made payments to B exceeding such balance. On the 19th November, 1876, a balance of Rs. 3,500 was found to be due from G to B. On the 11th December, 1876, G executed a conveyance of certain land to B, for which such debt was partly the consideration. In such conveyance G acknowledged his liability in respect of such debt. He died before such conveyance was registered, and it did not operate. On the 18th November, 1879, B sued G's widow for such debt. *Held* that such conveyance was admissible as evidence of the acknowledgment by G of his liability for such debt, notwithstanding such conveyance was not registered; that, applying art. 85, sch. ii of Act XV of 1877, such debt was not barred by limitation when such acknowledgment was made; and that, if that article was not applicable, but the period of limitation began to run from the time each item composing such debt became a debt, still such debt would not have been barred when such acknowledgment was made, as the debt with which the year, computed from the 1st October, 1875, opened, was extinguished by payments made by G in the course of that year.—3 Al. 523.

A decree for money, dated the 24th June 1878, directed that a certain instalment should be paid on the 22nd July 1878, and a like on the 20th December 1878, and the balance by certain instalments commencing from a certain date; and that, in case of default, the decree-holder might realize the whole amount of the decree. The instalments were not paid at the fixed dates but part-payments of the amount of the decree were made by the judgment-debtor from time to time out of court. On the 7th May 1879 he made a part-payment and an endorsement on the decree to the following effect:—"I, G, judgment-debtor of this decree, have myself paid Rs—, and have endorsed this payment on the decree in my own handwriting." On the 15th September 1881, the decree-holder applied for execution of the

whole decree. *Held* by the Court that the application was governed by the rule contained in sec. 19 of the Limitation Act, 1877; that the endorsement made by the judgment debtor on the decree was an acknowledgment of liability under the decree; and that consequently the period of limitation for the application should be computed from the time such endorsement was made, and the application was therefore within time. *Ramhit Rai v. Satgur Rai*, (I. L. R., 3 Al. 247) followed, but with doubt. *Per MAHMOOD, J.*—That, following the *ratio decidendi* in *Ramhit Rai v. Satgur Rai*, (I. L. R., 3 Al. 247), the part-payment made and endorsed on the decree by the judgment-debtor fell within the terms of sec. 20 of the Limitation Act 1877, *Asmutullah Dalal v. Kally Churn Mitter*, (I. L. R., 7 Cal. 56) distinguished. Also *per MAHMOOD, J.*—That it was doubtful whether in this case the decree-holder was bound to execute the whole decree when the first default occurred, as the terms of the decree appeared to give the decree-holder an option in the matter, and therefore whether the application for execution was barred because it was made more than three years after that date. *Shib Dat v. Kalka Prasad* (I. L. R., 2 Al. 443) distinguished.—5 Al. 201.

In the course of proceedings in execution of a decree dated the 14th June, 1878, the parties, on the 11th January, 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the bond advertized for sale; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and the previous attachment maintained, and stating that, after realization of the amount entered in the bond advertized for sale, an application for execution would be duly filed. On this the order was that the execution case be struck off the file, and the attachment maintained. On the 24th December, 1883, the decree-holder applied for execution of the decree alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment-debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January, 1881, and that the application was barred by limitation, the previous application being dated the 9th November, 1880:—*Held* that the application was within time, inasmuch as the acknowledgment in the deed of the 11th January, 1881, came within the terms of sec. 19 so as to originate a fresh period of limitation in respect of the execution of the decree. *Ghansham v. Mukha, Janki Prasad v. Ghulam Ali and Pamhit Rai v. Satgur Rai* followed. *Per Oldfield, J.*—That the agreement of the 11th January, 1881, did not contemplate, and had not the effect of cancelling the decree and substituting for it a new contract, inasmuch as the deed contained nothing to the effect that the decree was superseded, and all it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. Further, if the arrangement was to be regarded as within the meaning of an adjustment of the decree under sec. 258 of the Civil Procedure Code, it could only be recognized by the Court when certified by the decree-holder or judgment-debtor; and in this case the only certification which was made was by the decree-holder, by his petition of

the 11th January, 1881, which was in respect of a temporary arrangement under which the decree remained in force. *Per Mahmood, J.*—That the agreement of the 11th January, 1881, was intended by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract, but that the deed could not be regarded as such an adjustment of the decree as satisfied the requirements of sec. 258, because the creditors, whilst admitting the creation of a separate contract, took care to say that the decree was to be kept alive, and the attachment thereunder was to subsist; and that therefore the certification of the adjustment was inadequate and could not be recognized in executing the decree.—7 Al. 424.

A bond had been executed by A, B & C. The suit was brought against all the three. C contested the suit stating that he was only a surety, that the principal debtors were A & B, and that the suit, as against him, was barred, the ordinary period allowed by the Limitation Act having run by. The plaintiff relied on certain letters of acknowledgments by C, as taking the suit out of the bar. For the defence it was contended, in respect of these letters, that they were acknowledgments by C only as surety and that, therefore, they were not available for saving limitation. *Held*, that the acknowledgments, though they were of a conditional character, were sufficient to save limitation.—10 Al. 93.

See 1. L. R., 7 Bom. 414, noted under art. 64; 15 Madr. 491, noted under sec. 65 of the Evidence Act.

**20.** When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf.

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made :

Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

Where mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section.

#### Notes.

The word 'debt' applies only to a liability for which a suit may be brought, and does not include a liability for which judgment has been obtained.—1. L. R., 2 Cal. 468.

Two of the sons out of a joint Mitakshara family, consisting of a father and three sons and the widow and sons of a deceased son, and carrying on business in partnership, suit to recover money due on a hatchitta, dated the

11th December, 1876 ; the last payment made and entered by the defendant being on the 20th July, 1877. No time was fixed for payment of the money, so that it became payable on the date of the hatchitta. The suit was instituted on the 19th July, 1880, and came on for hearing on the 26th July, when an objection was taken, that all the parties who ought to sue were not on the record. On the application of the original plaintiffs the names of the father and the third son were then added, and the plaintiffs were described as surviving partners of the deceased son. At the time the additional plaintiffs were made parties, the suit was, as regards them, barred by limitation. *Held* that the additional plaintiffs were rightly made parties to the suit, notwithstanding that the suit was, as far as they were concerned, barred. In actions of contract it is the right of the defendant if he takes the objection in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs, and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. That, inasmuch as the original plaintiffs could only enforce their claim in conjunction with the added plaintiffs, and the added plaintiffs were barred by sec. 22 of Act XV of 1877, the claim of the original plaintiffs was also barred. That the suit, if all the plaintiffs had originally joined in suing, would not have been barred by sec. 20 of Act XV. of 1877. The words "prescribed period" in that section mean, not the period prescribed for the payment of the debt, but the prescribed period of limitation. There is no equity, but often much injustice, in allowing one joint contractor out of many to sue a defendant, notwithstanding an objection duly made by the latter ; and the Court has no right to allow one contractor to recover under such circumstances, though he may, no doubt, afterwards adjust the sum which he recovers with his co-contractors. As between the members of a joint family, any one or more may be authorized by the rest to act as their agent or agents in any business-transaction ; but when a joint family or any members of it carry on a trade in partnership, and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules of law for enforcing their contracts in Courts of law as any other partnership.—6 Cal. 815.

An agent may be impliedly authorised within the meaning of sec. 20 of the Limitation Act to make a payment of interest or principal before the expiration of the period prescribed.—17 Cal. 944.

A mortgagee *held* a usufructuary mortgage for five years from 1858, and in 1861 leased lands to mortgagor, who paid rent till 1871. The mortgagee in 1877 sued to recover the mortgage-debt, which was repayable on the expiry of the five years, alleging that payment of rent up to 1871 was payment of interest. *Semble*, that he might do this under the present law if it be *held* that payment of rent by the mortgagor is such a receipt of produce in virtue of a usufructuary mortgage as is to be deemed equivalent to a payment of interest.—3 Madr. 57.

To satisfy the conditions of sec. 20 of the Limitation Act, the endorsement in the handwriting of the person making a part-payment of the principal of a bond need not show the appropriation of the payment to principal, but only the fact of the payment.—6 Madr. 281.

In sec. 20 of the Indian Limitation Act, 1877, the condition that the fact of payment in the case of part payment of the principal of a debt must

appear in the handwriting of the person making the same is satisfied, if the payer signs or affixes his mark beneath an endorsement not written by him.—7 Madr. 55.

The mark of the payer subscribed to an endorsement not in the handwriting of the payer will satisfy the proviso to sec. 20 of the Indian Limitation Act, 1877, which requires that the fact of the payment of part of the principal of a debt made by the debtor or his agent duly authorized in that behalf shall appear in the handwriting of the person making the payment, in order that a new period of limitation may run from the date of such payment.—7 Madr. 76.

Receipt of the produce of land held under a deed of mortgage required to be, but not registered, cannot be deemed to be a payment for the purpose of sec. 20 of the Indian Limitation Act, 1877.—7 Madr. 539.

Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a cheque to the creditor.—*Held*, that such endorsement did not satisfy the conditions of sec. 20 so as to give rise to a new period of limitation from the date of such endorsement.—9 Madr. 271.

The words “prescribed period,” used in sec. 20 of the Limitation Act, 1877, mean the period prescribed by the Act. The contention that only one extension of the period of limitation is given by payment of interest is unfounded.—11 Madr. 218.

The defendant, at different times made payments to the plaintiff, who was his creditor, in reduction of the general balance of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt. *Held* that there had been no payment of interest “as such” by the defendant.—3 Bom. 198.

The relationship between a native banker and the person depositing money with him in the ordinary way of business is that of borrower and lender, and the money lodged can be recovered as money lent. Article 59 of the Limitation Act (XV of 1877) applies to such a transaction. The plaintiffs, who were members of the Dalvadi community, sued in 1883 to recover from the defendants the sum of Rs. 2,611-3-6 as found credited to their account in 1880 by the defendants’ father with whom the community had lodged a sum of Rs. 2,320 in 1874. They alleged that the sum was lodged on the condition that it was to be returned with interest on demand. It appeared that small sums were paid by Kalidas to the plaintiffs from time to time, and no demand had ever been made during the lifetime of Kalidas for repayment. The defendants denied the alleged condition, and contended that the suit was barred. The Court of first instance awarded the plaintiffs’ claim. The defendants appealed to the Assistant Judge, who reversed the decree, being of opinion that the transaction was a loan and not a deposit, and that the suit was barred. On appeal by the plaintiffs to the High Court. *Held* confirming the decree of the lower appellate Court, that the plaintiffs’ suit was barred by article 59 of the Limitation Act (XV of 1877). The plaintiffs contended that the money was lodged as a “deposit” and not as a loan, and that article 60 of Schedule II of the Limitation Act applied. They relied upon the following circumstances as showing the nature of the transaction, *viz.*, (1) that it was arranged that the money should remain until a favourable opportunity should occur for applying it to the building of a *dharmshala*; (2) that interest was to be paid upon it; (3) that the account was to be annually settled; (4) that it was to be withdrawn in one sum. *Held* that these circumstances, if proved, did not necessarily deprive the transaction of the character of a loan by creating a

fiduciary relationship between the parties, (which is essential to a deposit in its technical sense), and thus distinguishing it from the ordinary dealings between native bankers and their customers. It was further contended that the entry of interest in the defendant's book was made in the plaintiffs' presence, and amounted to a payment of interest within the meaning of section 20 of the Limitation Act (XV of 1877). *Held*, that such an entry did not amount to payment of interest within the meaning of the section so as to save limitation. Nothing took place which could be regarded as equivalent to payment of interest.—13. Bom. 338.

See I. L. R., 5 Al. 201, noted under sec. 19.

**21.** Nothing in sections 19 and 20 renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed, or of payment made by, or by the agent of, any other or others of them.

#### Notes.

The plaintiff, as heir of his mother, sued a firm, in which he was himself a partner, to recover the amount of certain loans which he alleged that his mother in her life-time had made to the said firm. The plaintiff was made a defendant in the suit along with the other partners. The alleged loans were made on the 2nd November, 1881, and the 12th October, 1882. The present suit was not filed until December, 1885. The plaintiff, however, relied on an acknowledgment signed in his mother's account book by himself as partner in the firm on the 1st November, 1883. The first defendant did not appear, or put in any defence. The second defendant pleaded limitation, and alleged that on the 2nd November, 1880, prior to the date of the alleged loans, he had retired from the firm, and, therefore, was not liable. From the evidence given at the hearing it appeared that the business stopped, so far as buying and selling and fresh trading were concerned, at the end of the year 1881, and that subsequently to that date the partners were occupied solely in winding up the affairs of the firm:—*Held*, that, under the circumstances, the acknowledgment given by the plaintiff did not bind the other partners, and that the claim against them was barred. If, at the time the acknowledgment was given, the firm had been a going concern, the plaintiff's authority to make such an acknowledgment on behalf of the firm might have been presumed; but in this case the business had been closed, and the partnership entirely dissolved. The presumption, therefore, which arises in active partnership, no longer existed, and there was no evidence that the plaintiff had been expressly authorized to act for the other partners in making the acknowledgment.

The meaning of the word "only" in sec. 21 of the Limitation Act XV of 1877 is that it must also be shown that the partner signing the acknowledgment had authority, express or implied, to do so. In a going mercantile concern such agency is to be presumed as an ordinary rule. It was objected that the suit was improperly framed, in as much as the plaintiff was also made a defendant:—*Held*, that the objection was not maintainable, the plaintiff being a defendant in a different capacity. *Premji Ludha v. Dossa Doongersey*.—I. L. R., 10 Bom. 358.

The word "only" in section 21 of the Limitation Act (XV of 1877) is not to be treated as a surplusage. It means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind



his co-partner, unless it can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment, and in effect purported so to bind him.—I. L. R., 10 Al. 418.

**22.** When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party :

Effect of substituting or adding new plaintiff or defendant.

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff :

Proviso where original plaintiff dies.

Provided also that, when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.

Proviso where original defendant dies.

#### Notes.

Where a plaint was filed against wrong parties supposed to be representatives of a deceased debtor, and after the expiration of the period true representatives were substituted, the suit was held barred.—10 Bom. H. C. R., 224.

In actions of contract it is the right of the defendant, if he takes the objection in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs, and if, after the objection has been raised the plaintiff proceeds with the suit, without taking steps to add the person or persons whose non-joinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. Where the original plaintiffs could only enforce their claim in conjunction with the added plaintiffs and the added plaintiffs were barred by sec. 22, the claim of the original plaintiffs was also barred. I. L. R., 3 Cal, 26, dissented from—I. L. R., 6 Cal. 815.

A suit for property in the possession of several persons was brought by the plaintiff against one of those persons only. After the institution of the suit, and after the period of limitation prescribed for a separate suit on the same cause of action against the other persons in possession had elapsed, these latter were added as defendants. *Held* that the suit must be dismissed as against the added defendants, on the ground that it was barred by limitation.—7 Cal. 284.

The creditor of a deceased trustee of a temple sued two persons, as his successors in office, to recover the amount of the debt. One of the defendants died; the other, who was the brother of the deceased, pleaded that other persons were joint trustees with him, and should have been impleaded with him, he also alleged that the debt in question was a private debt, and had not been incurred by the deceased as a trustee. The persons named were joined as defendants, and they repeated the above allegation. The plaintiff, thereupon, amended the plaint and prayed for a personal decree against the original surviving defendant, and the others were removed from the record. The amendment took place more than three years after the date when



the debt was payable, but the suit had been instituted within that period :—*Held*, that the claim was not barred by limitation.—15 *Madr.* 417.

To amend a plaint by making the plaintiff sue as attorney instead of on his own account, is not a substitution of a new plaintiff so as to bar the suit.—3 *Bom.* 312.

A, who with his three brothers composed a joint Hindu family, brought a suit in his own sole name to recover a joint debt. When the objection was taken to the form of the suit on the ground of the non-joinder of A's three brothers, it was too late to add them as co-plaintiffs, by reason of sec. 22 of the Limitation Act, XV of 1877,—a suit on the debt being by that time-barred. The three brothers at the hearing expressed their willingness that A should sue alone. *Held* that such assent did not obviate the necessity of joining all the proper parties as co-plaintiffs, and that the suit, therefore, as framed, would not lie. *Held*, further, that A would have been in no better position had he joined his three brothers as co-plaintiffs after the suit was, as regards them, time-barred ; since such a suit would have been virtually a suit by himself alone, and therefore bad. *Boydonth Bag v. Grish Chunder Roy*, (I. L. R., 3 Cal. 26) disapproved of.—7 *Bom.* 217.

On the 27th June, 1883, the plaintiff was arrested by a bailiff of the Small Cause Court at Bombay, under a writ of arrest for the amount of a decree obtained by the defendant on the 2nd May, 1883, against the plaintiff. On arrest the plaintiff informed the bailiff, that the money due under the decree had already been paid, as was the fact. Plaintiff could not produce the receipt of payment, and the bailiff refused to raise the arrest until payment was made. The plaintiff thereupon paid the money under protest, and was set at liberty. The mistake was subsequently discovered, and the money was refunded to the plaintiff. It appeared that, prior to plaintiff's arrest, defendant's clerk had inquired of the head Cashier of the Small Cause Court if the amount of the decree had been paid, but was told it was not, and a certificate of non-payment was issued. In conformity with the usual practice of the Court the chief Clerk of the Court on receipt of the certificate issued the writ of arrest under seal of the Small Cause Court, and the plaintiff was arrested. In March 1884, the plaintiff presented a petition to the High Court for leave to sue as pauper, and claimed Rs. 25,000 from first defendant as damages for the wrongful arrest. When the petition came on for inquiry into the pauperism of the plaintiff, the presiding Judge was of opinion that it disclosed no cause of action, and the plaint was returned to the plaintiff to be amended, but at the same time allowed to be filed. The plaintiff subsequently desired to add as party-defendants the Cashier, and the chief Clerk of the Small Cause Court, and on 5th July 1884, took out a summons calling upon the defendants to show cause why his amended plaint should not be received on the file of the Court in place of his first petition. It was contended for the Cashier and the chief Clerk of the Small Cause Court that the suit against them was barred by limitation :—*Held*, as regard the first defendant, that the plaint should be rejected, as there was no bad faith, fault or irregularity on the part of the first defendant so as to make him responsible for the wrongful arrest. The plaintiff's imprisonment having taken place under a warrant of the Court issued in regular manner, and such Court being of competent jurisdiction, the plaintiff had no cause of action as against the first defendant,—the error was wholly and entirely the error of the officers of the Small Cause Court :—*Held*, also, as regards the Cashier and the chief Clerk of the Small Cause Court that the plaintiff's suit was barred, as more than

one year had elapsed from the date of the termination of the plaintiff's imprisonment.—9 Bom. 1.

An Appellate Court has a discretionary power to substitute or add a new appellant or respondent after the period of limitation prescribed for an appeal. The right, title, and interest of G in certain immoveable property was attached and notified for sale in the execution of a money-decree held by T. It was also attached and notified for sale in the execution of a money-decree held by S and R. The same date was fixed for both sales. The officer conducting sales first sold the property in execution of T's decree, and T purchased the property. He then sold the property in execution of the decree held by S and R, and K purchased the property. The Court executing the decrees confirmed the sale to T, granting him a sale certificate, and disallowing K's objection to the confirmation. It also confirmed the sale to K, ordering the purchase-money to be paid to S and R, and disallowing K's objection to the confirmation; but it refused to grant K a sale-certificate, on the ground that, as the sale to T had been confirmed and a sale-certificate granted to him, it could not give K possession of the property. In a suit by K against S and R to recover his purchase-money, *held*, distinguishing the suit from the cases in which it had been held that, when the right, title, and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title, or interest, and therefore the auction-purchaser cannot recover his purchase-money, if it turns out that the judgment-debtor had no interest in the property, that the rule of *caveat emptor* did not apply, and the suit was maintainable. The provisions of sec. 257 of Act VIII of 1859 apply to applications made under sec. 256 of that Act, and to those only. *Held*, therefore, that, inasmuch as K objected to the confirmation of the sale to him on the ground that the Court was not competent to confirm a sale which had by its previous order been nullified, and not on any of the grounds mentioned in sec. 256 of Act VIII of 1859, K was not precluded by the terms of sec. 257 of that Act from maintaining his suit. Where the Court executing two decrees made separate orders directing the sale on the same date of certain immoveable property in execution of such decrees, the officer conducting sales was not bound to sell such property once for all in execution of both decrees, and his selling such property separately was therefore not an irregularity in the conduct of the sales.—2 Al. 107.

P, on the 12th April, 1880, instituted a suit against Z, claiming to enforce a right of pre-emption in respect of the sale of a share of an undivided estate to the latter and his minor brother A jointly, under an instrument dated the 12th April. 1879. On the 3rd May 1880, A was made a defendant to such suit, Z being appointed guardian for the suit for him. *Held* that, inasmuch as such suit, as regards A, was beyond time, and as the only relief which could be granted therein to P was the invalidation of the joint sale to Z and A, such suit, even admitting it was within time as regards Z, was not maintainable.—4 Al. 145.

Where, after a notice required by sec. 43 of Act XV of 1873 had been left at the office of a Municipal Committee, such Committee were sued within three months of the accrual of the plaintiff's cause of action in the name of their Secretary instead of in the name of their President, as required by sec. 40 of Act XV of 1873, and the plaintiff applied to the Court more than three months after the accrual of his cause of action to substitute the name of the President for that of the Secretary, *held* that by reason of such substitution such suit could not be deemed to have been instituted against such Committee when such substitution was made, sec. 22 of Act XV of 1877

applying to the case of a person personally made a party to a suit and not to the case of a Committee sued in the name of their officer, and that such substitution when applied for should have been made.—2 Al. 296.

See. I. L. R., 6 Cal. 815, noted under sec. 20 ; 14 Al. 524, noted under sec. 32 of the Civil Procedure Code.

**23.** In the case of a continuing breach of contract and  
 Continuing breaches and in the case of a continuing wrong in-  
 wrongs. dependent of contract, a fresh period of  
 limitation begins to run at every moment of the time during  
 which the breach or the wrong, as the case may be, continues.

#### Notes.

From time immemorial, and certainly for more than twenty years prior to the date of the obstruction by the defendants, the plaintiff enjoyed the right of having an egress for his rain-water through a drain in the defendant's land. The plaintiff, more than two years after the date of the obstruction, sued the defendants for the removal of the obstruction. *Held* that, though, under the circumstances, the plaintiff had failed to prove a title acquired under sec. 26 of Act XV of 1877, yet the plaintiff, having a title, evidenced by immemorial user, did not require the aid of that Act ; and inasmuch as the obstruction complained of constituted a continuing nuisance, as to which the cause of action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Act, but, on the contrary, was saved by the express provision of sec. 23.—I. L. R., 6 Bom. 20.

The purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land, and that, in default of payment the vendors should be entitled to the proprietary possession of a certain quantity of such land. The purchasers never paid such fees, and more than twelve years after the first default the vendors sued them for possession of such quantity of such land. *Held* that there had not been a "continuing breach of contract" within the meaning of sec. 23 of Act XV of 1877, and therefore the provisions of that section were not applicable to the suit ; and, further, that the suit, being governed by art. 143, sch. II of Act XV 1877, and more than twelve years having expired from the first breach of such agreement, was barred by limitation. The difference between sec. 23 of Act IX of 1871 and Act XV. of 1877 pointed out.—4 Al. 493.

See I. L. R., 10 Al. 85, noted under art. 115 ; 13 Al. 126 & 16 Bom. 714, noted under art. 34.

**24.** In the case of a suit for compensation for an act  
 Suit for compensation which does not give rise to a cause of  
 for act not actionable with- action, unless some specific injury actual-  
 out special damage. ly results therefrom, the period of limi-  
 tation shall be computed from the time when the injury results.

#### Illustrations.

(a.) A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

(b.) A speaks and publishes of B slanderous words not actionable in themselves without special damage caused thereby. C in consequence re-

fuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal.

**25.** All instruments shall, for the purposes of this Act,  
Computation of time mentioned in instruments. be deemed to be made with reference to the Gregorian calendar.

*Illustrations.*

(a.) A Hindu makes a promissory note bearing a native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.

(b.) A Hindu makes a bond, bearing a native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one year after date computed according to the Gregorian calendar.

**Notes.**

Where a bond bears a native date only, and is made payable after a certain time, that time, whether denoted by the month or the year, is to be computed according to the Gregorian (British) calendar.—I. L. R., 4 Bom. 103.

The plaintiff sued on a note, bearing a native date, Ashad Vadya 13th, Shake 1799 (7th August, 1877), and containing a stipulation for payment of the money to this effect: "In the month of Kartik, Shake 1799,—that is to say, in four months,—we shall pay in full the principal and interest." The plaint was filed on the 6th December, 1880, in the Court of Small Causes at Poona. The Judge was of opinion that the claim was barred. On his referring the case to the High Court for its decision: *Held* that the period of four months was, for the purpose of ascertaining whether the suit was barred by lapse of time, to be calculated according to the Gregorian calendar, under sec. 25 of the Limitation Act (XV of 1877), and that claim was not barred.—6 Bom. 83. See also 4 Cal. 497.

## PART IV.

### ACQUISITION OF OWNERSHIP BY POSSESSION.

**26.\*** Where the access and use of light or air to and for  
Acquisition of right to easement. any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way,

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\* Secs. 26 and 27 are repealed by Act V. of 1882 (Easements) in territories to which Act V. of 1882 extends. All references in any Act or Regulation to the said sections, or to secs. 27 and 28 of Act IX. of 1871, shall, in such territories, be read as made to secs. 15 and 16 of Act V. of 1882.

watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

*Explanation.*—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to, or acquiesced in, for one year after the claimant has notice thereof, and of the person making or authorizing the same to be made.\*

*Illustrations.*

(a.) A suit is brought in 1881 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right without interruption from 1st January 1860 to 1st January 1880. The plaintiff is entitled to judgment.

(b.) In a like suit, also brought in 1881, the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1858 to 1878. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(c.) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

**Notes.**

The provisions of this section do not exclude other modes of acquiring easements.—15 B. L. R., 361; 6 Cal. 394; 6 Bom. 20; 8 Cal. 956.

Where during the required 20 years the owner of the dominant tenement had himself for some years permanently obstructed the use of the easement, the easement could not be said, during the continuance of such obstruction, to have been “openly enjoyed.”—I. L. R., 1 Cal. 422.

On the 6th of April 1878, the plaintiffs sued for obstructing a right of way for boats in the rainy season. The defendants admitted the obstruction but denied the right of way. The plaintiffs proved that the right was peaceably and openly enjoyed, and actually used by them, claiming title thereto as an easement and as of right without interruption, from before 1855 down to November 1875, since when no actual user of the way by the plaintiffs had taken place. The lower Appellate Court dismissed the suit, on the ground that the plaintiff had made no actual use of the way within two years previous to the institution of the suit. *Held*, reversing the decision of the Court below, that notwithstanding Act XV of 1877, sec. 26 Illus. (b) actual user within two years previous to the institution of the suit is not necessary, in order that the right claimed may be acquired under Act XV of 1877, sec. 26. Illustrations in Acts of the Legislature ought never to be allowed to control the plain meaning of the section to which they are append-

\* See 2 and 3 Wm., IV. 71, secs. 2, 3, and 4.

ed, specially when the effect would be to curtail a right which the section in its ordinary sense would confer.—7 Cal. 132.

In a suit to restrain the defendants from fishing in certain bhils, which admittedly belonged to the plaintiff's zemindari, it appeared that the plaintiff had let out some of the bhils to Ijaradars who had sued the defendants for the price of fish taken by them from the bhils, and that the suit had been dismissed, on the ground that the defendants, in common with other inhabitants of the villages in the zemindari, had acquired a prescriptive right to fish in the bhils. The defendants contended that they had been in possession of the bhils for more than 12 years, and that they had a prescriptive right to fish therein, under a custom according to which all the inhabitants of the zemindari had the right of fishing. *Held*, that the mere fact that the defendants had trespassed and had misappropriated fish did not amount to a dispossession of the plaintiff, and that the suit was not barred by limitation. *Parputty Nath Roy Chowdhry v. Mudho Paroe*, (I. L. R., 3 Cal. 276,) distinguished. *Held*, also, that no prescriptive right of fishery had been acquired under sec. 26 of the Limitation Act, and that the custom alleged could not, on the ground that it was unreasonable, be treated as valid. *Lord Rivers v. Adams* (L. R., 3 Ex. D., 361,) followed.—9 Cal. 698.

For the purpose of acquiring a right of way or other easement under sec. 26 of the Indian Limitation Act, it is not necessary that the enjoyment of the easement should be known to the servient owner. In this respect there is a difference between the acquisition of such rights under that Act and their acquisition under the English Prescription Act.—10 Cal. 214.

The Indian Limitation Act, unlike the English Prescription Act, places light and air on the same footing; and the object of the Prescription Act and of the provisions of the Indian Limitation Act is not to enlarge the extent and operation of the easement, but to provide another and more convenient way of acquiring such easements—a mode independent of legal fiction and capable of easy proof in a Court of law; these Acts do not, therefore, alter in any way the pre-existing law as to the nature and extent of the right. The only amount of light for a dwelling house which can be claimed by prescription or by length of time (whether prior or subsequently to the Limitation Act 1871) without an actual grant is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. Rule laid down in *Bagram v. Khettranath Karformah*, 3 B. L. R., O. C. 41, followed. The right of air is co-extensive with the right to light. To give a right of action, either prior or subsequently to the Limitation Act of 1871, in a case (where there is no express contract on the subject) for an interference with the access of air to dwelling houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business. There is no such right as a right to the uninterrupted flow of south breeze as such. The "45-degree rule" is not a positive rule of law, but is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obstruction is not definite or satisfactory.—14 Cal. 839.

The rule of construction according to which the Crown is not affected by a Statute, unless specially named in it, applies to India. *Semble*—The provisions of section 26 of the Limitation Act XV of 1877 do not apply to the Crown. The mere mention of the Crown in an Act has not the effect of making all its provisions applicable to the Crown, and section 26 does not



relate to the limitation of suits, but to an entirely different matter, viz., the creation of rights by the enjoyment of them, which is a branch of the substantive law. The section is clearly in prejudice of the Crown's rights, and the other provisions of the Act do not afford sufficient evidence of an intention that this section should apply to the Crown. The rule of English law, that a claim to a profit *a prendre* cannot be acquired by the inhabitants of a village either by custom or prescription, does not apply to a right of pasturage claimed by a village in the Presidency of Bombay as against the Government. The right of free pasturage has always been recognized as a right belonging to certain villages, and must have been acquired by custom or prescription. The plaintiffs, who were the inhabitants of the village of Dani Limbda, sued for themselves and the other inhabitants to establish their right to graze their cattle on the banks and the dry part of the village tank Chandola and for a perpetual injunction restraining the defendant from interfering with such right. The defendant contended (*inter alia*) that the tank was *kharabo* or waste land, that it had never been set apart under the Land Revenue Code, sec. 38, for grazing purposes, and that the plaintiffs could not acquire, as against the Government, a right of grazing by prescription. The Court of first instance held the defendant not excluded from the operation of sec. 26 of the Limitation Act XV of 1877, but found that there was a break in the period of prescription, and, therefore, rejected the plaintiffs' claim. The lower Appellate Court held that there was no break, and awarded their claim. On appeal by the defendant to the High Court, *held*, restoring the decree of the Court of first instance, that the suit should be dismissed. Whether the plaintiffs' claim was considered with regard to sec. 26 of the Limitation Act XV of 1877, or to the general law of prescription, it was essential that the user should have been as "*of right*" to graze cattle on the tank in question. But the right of free pasturage which certain villages enjoy according to the recognized custom of the country, and which was admittedly enjoyed by the plaintiffs' village, does not necessarily confer the right of pasturage on any particular piece of land, although it may confer the right of having sufficient land set apart for the purposes of the village, and in the absence of special circumstances pointing to the tank in question having been used for grazing by the villagers in exercise of a right other than and independent of the aforesaid right, the user by the plaintiffs could only be referred to that general right.—14 Bom. 213.

In order to acquire an easement under section 26 of the Limitation Act (XV of 1877), the enjoyment must have been by a person claiming title thereto as an easement as of right for twenty years. Evidence of immemorial user adduced in support of a right founded on ownership, does not, when that right is negatived, tend to establish an easement. *Quoere*—whether upon a correct construction of section 1 of Regulation V of 1827 which applies to the acquisition of easements, the mere user would be sufficient to establish the right to the easement claimed.—16 Bom. 592.

See I. L. R., 16 Bom. 353, noted under art. 144; 13 Bom. 674, noted under sec. 54 of the Specific Relief Act.

**27.\*** Provided that, when any land or water upon, over, or from which any easement has been enjoyed or derived, has been held under or by virtue of any interest for life or

Exclusion in favour of reversioner of servient tenement.

\* See foot note to sec. 26 in the previous page.



any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.\*

*Illustration.*

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that, during ten of these years, C, a Hindu widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

**Notes.**

Secs. 26 and 27 of the Indian Limitation Act, 1877, and the definition of "easement" contained in that Act, are repealed in the territories to which this Act (The Easements Act, No. V of 1882) extends. All references in any Act or Regulation to the said secs., or to secs. 27 and 28 of Act IX of 1871, shall, in such territories, be read as made to secs. 15 and 16 of this Act (Easements Act).—Act V of 1882, sec. 3.

See I. L. R., 1 Cal. 422, noted under sec. 26.

**28.** At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.†

Extinguishment of right to property.

**Notes.**

Adverse possession for more than 12 years of immovable property not only bars the remedy and extinguishes the right of the true owner, but also confers a good title on the trespasser.—II Moo. I. A. 345; I. L. R., 3 Cal. 224; 4 Cal. 357; 3 Al. 435.

Trees growing upon land are "land."—I. L. R., 3 Al. 435.

In 1842 H C executed in favour of the plaintiff, his brother, who was in possession of the family property as *kurta* and administrator of the estate of their father, a mortgage of his (H C's) share of the estate in consideration of Rs. 3,700 advanced to him by the plaintiff. In the mortgage deed the money was expressed to be payable "on demand." In 1847 an amicable partition of the family property was proposed, and it was agreed that a certain portion should be allotted to the plaintiff in satisfaction of the debt due to him by H, C, but this arrangement was never carried out. In a suit brought in 1876 against the representative of H C for foreclosure of the mortgage, the plaintiff, who had admittedly been, since 1842, in possession of the family property, alleged that no payment had ever been made in respect of the mortgage, nor any demand for payment, until 1876. The defendant contended that the suit was barred by lapse of time. *Held*, on the construction of the mortgage-deed; and under the circumstances of the case, *per* GARTH, C. J., that a demand was necessary; *per* MARKBY, J., that the

\* See 2 and 3 Wm. IV., c. 71, sec. 8.

† See 3 and 4 Wm. IV., c. 27, sec. 34

words "on demand" did not postpone the date of payment, and that the mortgage-money became payable at once. *Per* GARTH, C. J., and MARKBY, J.—A demand was made in 1847 on the agreement to partition the property. The suit, therefore, was barred by Act XIV of 1859, as being brought more than twelve years after the cause of action arose. That Act not only barred the remedy, but extinguished the right, and therefore the plaintiff could derive no advantage from the extended period of limitation given by art. 149 of Act IX of 1871, which repealed the Act of 1859. Art. 149 of Act IX of 1871, moreover, only applies to cases in which some part of the principal or interest of the mortgage-debt has been paid. The 28th section of the Limitation Act of 1877 extends the doctrine that twelve years' adverse possession of land not only bars the remedy of the rightful owner, but extinguishes his right to property other than land ; but *per* GARTH, C. J., *Quære* : Whether this principle would apply to debts.—4 Cal. 284.

In a suit instituted in 1877, A prayed for a declaration, that he had a lakhiraj title to certain lands ; the defendant stated, that the lands for a declaration of a title to which A now sued formed part of certain lands which had been the subject of resumption-proceedings, which were terminated in 1863 by a decree declaring that the lands which were the subject of that suit, including the lands now claimed by A, were not lakhiraj. It being found as a fact, that A had neither been a party to, nor been represented in, the resumption-proceedings, that he had been in quiet and undisturbed possession of the lands which he now claimed for more than 12 years before the institution of his suit, and that proceedings had been taken by the defendant calculated to disturb such possession,—*held* that A was entitled under sec. 42 of Act I of 1877 to the declaration prayed for. *Held* also, that although the onus of proof lay on the plaintiff, it was not necessary for him to prove that the lands claimed by him to be held as lakhiraj had been held rent-free from before the date of the permanent settlement ; but it was sufficient for him to prove that the defendant was, at the time of the institution of the suit, debarred by lapse of time from instituting a suit for the resumption or assessment of rent upon the land.—5 Cal. 949. See also 1 Bom. 586 ; 9 Bom. H. C. R., 260 and Al. H. C. R., 1870, p. 106.

Failure to pay rent is a recurring cause of action, and therefore, where right to take it is proved or admitted, no question of limitation arises.—4 Cal. 661.

As far as regards debts, the Indian law of limitation merely bars the remedy but does not extinguish the right.—I. L. R., 6 Cal. 340. See also I. L. R., 5 Cal. 897 ; I. L. R., 1 Madr. 228 and 301.

Where the relation of landlord and tenant is proved to have existed, it lies on the defendant in possession of the land to prove that the relation was put an end to at such a period anterior to the suit as would entitle the defendant to rely on his possession as adverse to the plaintiff for 12 years. Non-payment of rent for upwards of 12 years and a grant of putta by Government to defendant for 5 years do not, when Government claims no interest adverse to plaintiff and plaintiff does not consent to defendant becoming tenant to Government, create any possession in defendant adverse to plaintiff.—3 Madr. 118. See also 4 Cal. 661 ; *Ibid.* 314 ; 2 Al. 517.

Where the equity of redemption of a certain estate became, on the death of the mortgagor, the property of two divided branches of a Malabar tarwad, and the rents and profits of the land paid by the mortgagee were enjoyed exclusively by K, the representative of one branch, for fifteen years : —*Held*, that K had not acquired thereby a title to the estate mortgaged.—7 Madr. 26.

A jenmi having demised certain land in Malabar on otti to defendant No. 3 in 1869, sold the jenm title to the plaintiff and defendants Nos. 1 and 2 in 1886. In 1888 defendant No. 3 made a further advance to and obtained a renewed demise from defendants Nos. 1 and 2. The plaintiff now sued more than six years after the sale to recover his share (defendant No. 3 being in possession) on payment of one-third of the otti amount :—*Held*, that (whether or not the suit was maintainable as framed) the third defendant had a right of pre-emption as *otti-dar*, which had not been waived by him and was not barred by limitation, and which constituted a good defence to the suit.—13 Madr. 490.

In 1872 the plaintiffs induced the first defendant by fraud and misrepresentation to execute in their favour a deed of sale of the property in dispute. They did not pay the purchase-money, nor obtain possession of the property. The defendant remained in possession, and in 1873 mortgaged the property with possession to defendants Nos. 2 and 3, and in 1880 sold it to defendant No. 2. In 1884 the plaintiffs sued for possession of the property, relying on their title under the sale-deed. The defendant impeached the deed as fraudulent, and disputed the plaintiffs' title. The plaintiffs contended that as the defendant had not sued to set aside the deed, on the ground of fraud, within three years, as provided by articles 91 or 95 of the Limitation Act (XV of 1877), or within twelve years from the date of sale, it was too late for him to set up the plea of fraud. *Held*, (Scott, J., doubting) that the defendant's right to raise the plea of fraud was not barred by the law of limitation. *Per* SCOTT, J. :—There was another point of limitation which could be raised. The consideration money was never paid by the plaintiffs, and possession was never given. There was no complete contract of sale passing the property. Therefore the plaintiffs, only right was to sue for specific performance of the contract. Such a suit, however, became barred in three years after the date of the contract. The plaintiffs, therefore, had lost their rights against defendant No. 1; and even if they had not, the present claim for possession as against defendants Nos. 2 and 3 must fail, as defendant No. 2 was mortgagee and defendant No. 3 was *bona-fide* purchaser for value, and no satisfactory evidence was given by plaintiffs on whom lay the *onus*, that these defendants had notice of the deed of sale. *Per* JARDINE, J. :—Section 28 of the Limitation Act XV of 1877 does not apply to the case of defendants, who rely on an actual possession which has never been disturbed.—14 Bom. 222.

Where a suit for the recovery of possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of his possession within twelve years of the suit. *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi and Parmanand Misr v. Sahib Ali* referred to.—14 Al.

**THE FIRST SCHEDULE.**

(See section 2.)

[Repealed by Act XII. of 1891.]

**THE SECOND SCHEDULE.**

(See section 4.)

N. B. -Each of the rulings applies to the article under which it is quoted.

**FIRST DIVISION—SUITS.**

Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part I.—Thirty days.**

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|--|-------------|---|
| 1.—To contest an award of the Board of Revenue under Act No. XXIII. of 1863 ( <i>to provide for the adjudication of claims to waste lands</i> ). | Thirty days | When notice of the award is delivered to the plaintiff. |
|--|-------------|---|

**Part II.—Ninety days.**

- |  |             |                                       |
|--|-------------|---------------------------------------|
| 2.—For compensation for doing, or for omitting to do, an act alleged to be in pursuance of any enactment in force for the time being in British India. | Ninety days | When the act or omission takes place. |
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**Part III.—Six months.**

- |   |            |   |
|---|------------|---|
| 3.—Under the Specific Relief Act, 1877, section 9, to recover possession of immoveable property.  | Six months | When the dispossession occurs.  |
| 4.—Under Act No. IX. of 1860 ( <i>to provide for the speedy determination of certain disputes between workmen engaged in Railway and other public works and their employers</i> ), section 1. | Ditto      | When the wages, hire, or price of work claimed accrue or accrues due. |
| Under the Code of Civil Procedure, Chapter XXXIX* ( <i>of summary procedure on negotiable instruments</i> ).  | Six months | When the instrument sued upon becomes due and payable.                |

**Part IV.—One year.**

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|--|----------|---|
| 6.—Upon a Statute, Act, Regulation, or Bye-law, for a penalty or forfeiture.                             | One year | When the penalty or forfeiture is incurred. |
| 7.—For the wages of a household servant, artisan, or labourer, not provided for by this schedule, No. 4. | Ditto.   | When the wages accrue due.                  |

\* Act XIV. of 1882, sec. 3.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part IV.—One year.—(continued.)

#### Notes.

C. R., 87.

A person whose d are to sweep and clean a temple, provide for the idol, is not a household ser-

8.—For the price of food or drink sold by the keeper of a hotel, tavern, or lodging-house. One year When the food or drink is delivered.

9.—For the price of lodging. Ditto. When the price becomes payable.

10.—To enforce a right of pre-emption, whether the right is founded on law or general usage, or on special contract. Ditto When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold; or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.

#### Notes.

A B

Rs. 199 by deeds of *bai-bil-wufa* dated the 12th and 21st June, 1876. C and D subsequently instituted foreclosure proceedings, and on the 5th May, 1884, were put into possession of B's share in the first mentioned putti in execution of a decree which they had obtained. On the 18th April, 1885, A sued C and D to enforce his right of pre-emption. *Held*, that though the coparcenery could not be said to have ceased to exist, or those who were coparceners be said to have become strangers to one another, yet, there being a finding that the puttis were separate, it was not necessary, in order to establish A's preferential right, that a partition by metes and bounds should be shewn to have taken place: but that a private partition, if full and final between the parties, would have the same effect as the most formal partition on the right of pre-emption, and that A's claim must, therefore, succeed. *Held*, also, that the suit was not barred by limitation, it being governed by either Art. 10, Sch. II of the Limitation Act (Act XV of 1877), plaintiff from the 5th May, 1884, the date on which the

lowed from that ti . L. R., 14

T a of his share in a should

possession of his share, and lay the interest on the mortgage-money annually to the mortgagee, who, in the event of default in payment of the interest, was empowered to sue for actual possession of the share. On the 19th May, 1877, T's name was substituted for that of A in the proprietary registers in respect of the share. On the 8th February, 1878, G sued T and A to enforce his right of pre-emption in respect of the share, alleging that his cause of action arose on the 19th May, 1877, and that A, notwithstanding the mutation of names, was still in possession. T alleged that he had been in possession since the execution and registration of the deed of mortgage. *Held* that whether T had been in plenary possession of the share since the date of the deed, or whether he had only such constructive or partial possession of it as was involved in the receipt of interest on the mortgage-money, the plaintiff was equally bound to have sued within a year from the date of the deed, and was not entitled to reckon the year from the date on which possession by the mortgagee of the share was recognised by the revenue department, and the suit was therefore barred by art. 10, sch. II of Act XV of 1877.—2 Al. 237.

*Held* in a suit for pre-emption, where the property had been purchased by the mortgagee in possession, that the purchaser obtained physical possession of the property under the sale, not from the date of the sale-deed, but when the contract of sale became completed. *Held*, therefore, that the contract of sale having become completed on the payment of the purchase money, the suit being brought within one year from the date of such payment, was within time.—2 Al. 409.

Where a shareholder, if he desires to transfer his share, is bound to offer the transfer of it to his co-sharers before transferring it to a stranger, the right of pre-emption, in the case of a conditional sale, under which possession is not transferred, arises, not when such sale is made, but when the conditional sale becomes absolute. Under Art. 10, the period of limitation runs from the date of physical possession is taken of the whole of the property sold.—3 Al. 175.

This article does not apply to a suit to enforce a right of redemption in respect of a conditional sale of a share of an undivided mahal.—4 Al. 218. Also 5 Al. 187.

A share in an undivided zemindari mahal is not susceptible of "physical possession" in the sense of art. 10, sch. ii of Act XV of 1877. Limitation, therefore, in a suit to enforce a right of pre-emption in respect of such a share, runs from the date of the registration of the instrument of sale.—4 Al. 24.

In a suit to enforce a right of pre-emption in respect of a sale of property consisting in part of a share of an undivided mahal, which does not admit of a physical possession, limitation will run from the date of registration of the instrument of sale.—4 Al. 179.

A conditional vendee, who was in possession, applied under Regulation XVII of 1806 to have the conditional sale made absolute. The year of grace expired in July 1878. In November, 1871, the conditional vendee sued for possession of the property by virtue of the conditional sale having become absolute. He obtained a decree, in execution of which he obtained, on the 30th April, 1879, formal possession of the property according to law. On the 23rd March, 1880, a suit was brought against him, to enforce a right of pre-emption in respect of the property. *Held* that the period of

limitation for such suit ran, not from the expiration of the year of grace, but from the 30th April, 1879, the date the conditional vendee obtained possession in execution of his decree.—4 Al. 291.

The *wajib-ul-arz* of a village provided that the right of pre-emption should accrue “not only in respect of absolute sales, but also on regard to conditional sales, mortgages, and *thika* leases.” *Held* that under its terms the right of pre-emption accrued on a mortgage by conditional sale becoming absolute.—5 Al. 187.

The pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay, as the price of the property, the entire amount due on such mortgage at the time it became absolute.—5 Al. 187.

The *wajib-ul-arz* of three villages which originally formed a single *mahal* gave a right of pre-emption to co-sharers in case of transfers of shares to strangers. Afterwards the shares in these villages were made the subject of a perfect partition and divided into separate *mahals*. Subsequently, by two deeds of sale executed on the 13th January, 1884, and registered on the 17th January, 1884, some of the original co-sharers sold to strangers their shares in all three villages. At the time of the sale, the shares in two of the villages were in possession of the vendees under a possessory mortgage, the amount due upon which was set off against the purchase-money. The share in the third village was, at the time of the sale, in possession of another of the original co-sharers under a possessory mortgage. On the 17th January, 1885, this last mentioned co-sharer brought a suit against the vendors and the vendees to enforce his right of pre-emption under the *wajib-ul-arz* in respect of the shares sold in three villages. *Held* that, notwithstanding the partition of the village into separate *mahals*, the existing *wajib-ul-arz* at the time of partition must be presumed to subsist and govern the separate *mahals* until it was shown that a new one had been made. *Gokal Singh v. Mannu Lal* referred to. *Held* that in the case of the sale of an equity redemption by the mortgagor to the mortgagee in possession, which has the effect of extinguishing the right to redeem by a merger of the two estates in the mortgagee, it cannot properly be said that any property is sold which is capable of “physical possession” within the meaning of art. 10, sch. ii, of the Limitation Act. In a statute, such as the law of limitation, which contemplates notice express or implied to the party to be affected by some act done by another in respect of which a right accrues to him to impeach it, and as to which time begins to run against him, *quoad* his remedy, from a particular point, the word “physical” implies some corporeal or preceptible act done which of itself conveys or ought to convey to the mind of a person notice that his right has been prejudiced. An equity of redemption is not susceptible of possession of this description under a sale by which it is transferred, and a pre-emptor impeaching such a sale has one year from the date of registration of the instrument of sale within which to bring his suit. *Held*, therefore, that the period of limitation began to run from the date of the registration of the deed of sale, and that the suit was within time. *Held* also that the Court below was wrong in holding that the plaintiff, by reason of his having omitted in a suit previously brought against him for redemption of his mortgage, and dismissed for want of jurisdiction, to set up in defence any right of pre-emption or to express any desire to purchase, was equitably estopped by in the sale from asserting his pre-emptive right.—9 Al. 234.



Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part IV.—One year.—(continued.)

11.—By a person against whom an order is passed under section 280, 281, 282, or 335 of the Code of Civil Procedure* to establish his right to, or to the present possession of, the property comprised in the order.	One year	The date of the order.
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#### Notes.

A refusal to postpone sale is not an order contemplated by the Article. A suit to recover lands sold in execution brought more than a year after refusal to postpone sale, is not barred.—15 B. L. R., 228.

Where property was released on objection of the defendant, and the plaintiff sued to establish his right more than a year after the order, it was held that the plaintiff was a person against whom the order was given.—4 M. H. C. R., 472.

Where plaintiff's property is sold without any objection being preferred, the period prescribed will be the ordinary limitation for a suit to recover.—3 Bom. H. C. R., (A. C.) 139; B. L. R. Sup. Vol. 638.

The period of limitation is to be computed from the date on which the order is signed, and not from that on which it is verbally made.—10 Bom. H. C. R., 19.

A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution proceedings. He is not bound to sue to establish his right, but may follow them into the hands of the purchaser or of any other person, and sue for them or their value without reference to any thing which has taken place in the execution proceedings, except that he must bring his suit within one year from the time when the adverse order in the execution proceedings was made.—7 Cal. 608. See also 3 Al. 504.

Certain property, which the plaintiff alleged to belong to her, was sold in execution of a decree obtained by the purchaser of the property at the auction sale against a third party. The plaintiff put in a claim to the property, which was rejected on the 6th of September 1873. The plaintiff, on the 10th of January 1878, brought a suit to recover possession of the property sold. *Held* that the suit was not barred under this Article.—9 Cal. 43.

The defendants attached certain property, which the plaintiffs alleged belonged to them. The plaintiffs preferred a claim to the property under sec. 246 of Act VIII of 1859: this claim was disallowed on the 15th August 1877. In June 1878, the plaintiffs brought a suit to establish their title to the property attached, and for confirmation of possession. Pending this suit, the principal defendant died, and the plaintiffs applied for an order to substitute certain persons as defendants. The Court thereupon directed the issue of a summons on the defendants proposed by the plaintiffs to appear and defend the suit; but the plaintiffs failing to pay the costs of the service of this summons, the suit was dismissed on the 14th

March 1879. On the 14th March 1880, the plaintiffs again brought a suit to establish their title to the same property, and for confirmation of possession. *Held*, that the order of the 15th August 1877 not being an order passed under sec. 283 of Act X of 1877, art. 11 of sched. ii. of Act XV of 1877 did not apply, but that art. 120 of sched. ii. was applicable; and that as the first suit had not been dismissed upon the merits, the plaintiffs were entitled to maintain the second suit.—9 Cal. 163.

Where in consequence of an adverse order passed under the provisions of Civil Procedure Code, a suit is instituted to establish the plaintiff's right to certain property, and for possession, such suit is not governed by this Article, but by the general limitation of 12 years.—9 Cal. 230.

The order contemplated by sec. 281 of the Code of Civil Procedure is an order made after investigation into the facts of the case, and it is only when the order is made after such investigation that the limitation of one year is applicable to a subsequent suit under sec. 283 of the Civil Procedure Code.—11 Cal. 108 & 12 Cal. 453.

A decree-holder, against whom the release of property, attached in execution of his decree, has been ordered, after investigation under sec. 280 of the Code of Civil Procedure, is limited by Art. 11 of sch. II of Act XV of 1877, the Indian Limitation Act, to one year within which to institute a suit to establish that the property is that of his judgment-debtor. The extent to which the "investigation" required by sec. 280 should be carried depends upon the circumstances of the case.—15 Cal. 521. See also 17 Cal. 260.

A judgment-debtor is not necessarily a party against whom an order is made within the meaning of that term as sued in sec. 283 of the Code of Civil Procedure so as to preclude his instituting a suit after the lapse of one year from the date of such order (the period of limitation prescribed by Art. 11, Sch. II, Act XV of 1877) to establish his title to and to recover possession of the property which has been the subject-matter of a claim in execution proceedings, and in respect of which an order has been made under sec. 280 of the Code. G, in execution of a decree, attached certain immoveable property belonging to the plaintiff, whereupon B preferred a claim, and on the 10th March 1881 got the attachment removed. On the 20th July 1881, B sold the property to K. In 1882 G instituted a suit against B to set aside the order of the 10th March 1881, and to have it declared that the property was liable to attachment as belonging to the plaintiff. K was not made a party to that suit, and it was eventually compromised between G and B, the plaintiff's title being admitted. G thereupon again attached the property, and was met by a claim preferred by K, which was allowed on the 15th August 1883. G then brought another suit against K to obtain relief similar to that claimed in his suit against B, but his suit was dismissed on the 17th February, 1885. On the 25th September 1885 the plaintiff instituted a suit against G, B and K, to obtain a declaration of his title to and to recover possession of the property. It was contended that the suit was barred by limitation, being governed by Art. 11, sch. II of Act XV of 1877, inasmuch as it was brought more than one year after the date of the order of the 15th August 1883. *Held*, that the suit was not such a suit as was contemplated by sec. 283 of the Code of Civil Procedure, not being one to establish any right which was the subject-matter of the litigation in the execution proceedings, and that consequently the provision of Art. 11 did not apply to it, and it was not barred by limitation.—15 Cal. 674.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part IV.—One year.—(continued.)

Where an application was made under sec. 332 of the Code of Civil Procedure for possession of property and rejected, and the applicant brought a suit to recover the property more than one year, subsequent to the order rejecting the application:—*Held*, that the suit was not barred either by art. 11 or art. 13.—8 Madr. 82.

An order rejecting a claim petition under sec. 335 of the Civil Procedure Code, not being appealed against within one year acquires the force of a decree—*Velayuthan v. Lakshmana*, I. L. R., 8 Madr. 506, followed.—10 Madr. 357.

A in execution of a decree against B attached a house. C intervened and the property was released from attachment. A then brought a suit against B and C to establish the title of B to the house and obtained a decree. B was *ex-parte* throughout. In an appeal by C a decree was passed by consent of A and C reversing the decree appealed against. B now sued C and another, more than a year from the date of the order removing the attachment, to obtain a declaration of title to the house:—*Held*, that since there was nothing to show that the order releasing the attachment was an order against the plaintiff the suit was not barred by limitation.—13 Madr. 366.

The investigation prescribed in the Civil Procedure Code must taken place, otherwise the article will not apply. But the claimant may bring his suit within the ordinary period of limitation applicable to his suit.—4 Bom. 21. See also 3 M. H. C. R., 139.

An order passed under the provisions of the Civil Procedure Code, unless overruled in a regular suit brought within the statutory period, is binding on all persons who are parties to it, and is conclusive.—1 Al. 381.

See I. L. R., 8 Bom. 411; 12 Madr. 434, noted under sec. 14.

12.—To set aside any of the following sales:—

(a) sale in execution of a decree of a Civil Court;

(b) sale in pursuance of a decree or order of a Collector or other officer of Revenue;

(c) sale for arrears of Government revenue, or for any demand recoverable as such arrears;

(d) sale of a patni taluq sold for current arrears of rent.

*Explanation*—In this clause 'patni' includes any intermediate tenure saleable for current arrears of rent.

When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.

### Notes.

Where a suit is to recover what has been taken in excess under color of sale the article does not apply.—Al. H. C. R., 1875, p. 288.

'Order' in (b) means order of the nature of a decree or made by the Collector or other Revenue Officer in his judicial capacity. Where sale was

not made on such order, the article would not apply.—8 Bom. H. C. R., (A. C.) 219.

M sold to S her rights under a decree for mesne profits which she had obtained against A and two other persons, and S thereupon proceeded to execute the decree against A's property, and that property was sold in execution of the decree purchased by S and was purchased by B: but in a suit brought by A for a declaration that S was not the real purchaser, the Court found that S had in fact purchased the decree *benami* for A's two joint-debtors, and that consequently he had no right to execute it against the property of A. In a suit brought by A against B in 1874 for the purpose of recovering the property, held that the purchase of the benefit of the decree by A's joint-debtors, although it had the legal effect of satisfying the judgment-debt, did not affect the decree itself. The decree was not void, but only voidable, and the sale under it binding on A. The suit, therefore, was in effect a suit to set aside a sale under a decree, and inasmuch as it was not brought within one year from the date of the sale, was barred.—I. L. R., 2 Cal. 98.

When one of several co-sharers fraudulently continued to have an estate brought to sale for arrears under Act XI of 1859 and purchased it in the *benami* of his son, and another co-sharer aggrieved by the sale sued to have the property reconveyed, held that the article did not apply.—3 Cal. 300.

A suit to set aside a sale for arrears of Government revenue must be brought within one year from the date when the sale becomes final and collusive.—8 Cal. 329.

V having brought lands from A, whose husband (deceased) acquired than at a Court sale, sued S in ejectment in 1879. S pleaded limitation on the ground that B (her deceased husband) had purchased the lands in question at a Court sale in 1876. *Held*, that as A was no party to the decrees or the execution proceeding under which B purchased, it was not necessary for V to set aside the sale to B in this suit.—4 Madr. 178.

The article does not apply to suits in which the plaintiff was not a party to, and not bound by the sale sought to be set aside.—5 Madr. 54.

Where lands had been sold for alleged arrears of revenue and brought in for Government, but the sale had not been registered under sec. 38 of Madras Act II of 1864, *held* that a suit brought to set aside the sale after one year from the date thereof against *bona fide* purchaser for value from Government, was barred by limitation.—6 Madr. 148.

The land of D was improperly sold, in execution of a decree of a Civil Court obtained against S, for arrears of revenue, by the assignee of the revenue of the lands of D and S:—*Held*, in a suit brought by D to recover her land from the purchaser at the Court sale, that the suit, not having been brought within one year from the date of the confirmation of the sale, was barred by Article 12 of Schedule II of the Indian Limitation Act, 1877.—7 Madr. 258.

Under Act XII of 1879, Form 149 of Schedule IV of the Code of Civil Procedure provided that sixty days should elapse between a sale in execution of a decree and its confirmation. A sale having been confirmed before the expiry of sixty days:—*Held*, that the sale was not rendered inoperative, and that its effect was not postponed by reason of the provision in ~~Form No. 149~~. Where a suit was brought to recover money from the defendant, who was the karnavan of a Malabar tarwad, and it was not alle-

ged in the plaint that the defendant was sued as karnavan or that the debt was binding on the tarwad: *Held*, that a sale of tarwad property in execution of the decree was not binding on the members of the tarwad and therefore that Article 12 of Schedule II of the Indian Limitation Act, 1877, did not apply to a suit brought by other members of the tarwad to recover the land sold in execution of the decree.—7 Madr. 512.

In 1866 V (the father of the plaintiff) sued his brother H and G (one of the two sons of H and defendant No. 1) to establish his right to a third share of the management of certain lands granted for the maintenance of a Hindu temple. In that suit V obtained a decree that he should have the exclusive management every third year, but was ordered to pay costs. To enforce payment of these costs, H in execution of the decree attached the third share of V in the management of the land. The share was accordingly sold by auction in January, 1870, to a Marwadi, who afterwards in May 1870, re-sold it to the appellant T (another son of H and defendant No. 2). V died in 1876. In 1879 the plaintiff sued G and the appellant (the two sons of H) for his share of the management. It was contended for the defence that as the execution sale of January, 1870, was not set aside within a year, the right to treat it as void by the plaintiff was barred by article 12 of Schedule II of Act XV of 1877.—7 Bom. 188.

On the 17th November, 1877, a certain piece of land described in the proclamation of sale as "Survey No. 294, Pot No. 3, measuring  $23\frac{3}{4}$  gunthas" the boundaries of which were also set forth, was sold by auction in execution of a decree obtained by the first defendant against defendants Nos. 2, 3 and 4, and purchased by the plaintiff. The boundaries, as stated, really included another piece of land, Survey No. 294, Pot No. 4, which comprised 3 acres  $2\frac{1}{2}$  gunthas. This latter piece of land was put up for sale on the following day, and was purchased by defendant No. 5. On 28th November, 1877, the plaintiff applied to the Court to have the sale set aside and his money returned, unless he was put in possession of all the land included in the boundaries mentioned in the proclamation; but his application was refused, and the sale was confirmed on 20th July, 1878. The plaintiff on the 3rd July, 1881, brought the present suit, praying that he might be put into possession of the land as described in the certificate of sale, which was identical with the proclamations, and included Pot No. 4, or that the first defendant might be ordered to pay him the amount of his purchase-money, with interest. Both the lower Courts rejected the plaintiff's claim. On appeal to the High Court:—*Held*, confirming the decree of the Court below, that suit, regarded as one to set aside the sale, was barred by sch. II, art. 12 cl. (a). It was contended in the Courts below and on second appeal that the plaintiff was, at any rate, entitled to damages or compensation because of the land as defined by the survey number proving to be of less acreage than that included in the boundaries, and the lower Court had held such a claim as barred also under article 36:—*Held*, that the suit, regarded as one for compensation, was not barred, as three years had not elapsed since the the confirmation of the sale when the suit was brought—article 36 applying only to suits for compensation for tortious acts independent of contract. But the claim for compensation was not maintainable, as the property offered for sale was sufficiently identified by the description as "Survey No. 294, Pot No. 3, containing  $24\frac{3}{4}$  gunthas," and the statement of boundaries, so far as it was inaccurate, might be properly regarded as "*falsa demonstratio*."—10 Bom. 214.

The plaintiff, as the nearest heir of one Odhav Tulja, who died intestate in 1873, sued to set aside a sale of certain immoveable property belong-

ing to the estate of the deceased, which had been sold on the 3rd November, 1875, in execution of a money-decree obtained by the defendant, Jagannath, against Bai Vakhat, the widow of Odhav Tulja. Bai Vakhat had married a second time in 1876, and her second husband was the brother of the purchaser at the execution sale. The plaintiff alleged that the decree had been fraudulently and collusively obtained on a bond in Odhav Tulja's name, which had been forged by Jagannath. The suit was brought on the 28th January, 1878, and the plaintiff prayed that the sale might be canceled, having been made in order to defeat his rights; that he might be declared the heir of Odhav Tulja; and that possession of the property, with mesne profits, might be awarded to him. The lower Courts dismissed the suit, holding that it was barred by article 12, clause (a) of Schedule II of the Limitation Act XV of 1877. On appeal to the High Court *held*, that article 12 did not apply for, although the plaintiff sued to set aside a sale held in execution of a decree, he did so, not as one who would have been bound by the sale if the suit had not been brought, but in order to obtain a declaration that he was not bound by it, the decree under which the sale held having been fraudulent and collusive; so that the cause of action could only have arisen when he became aware of the fraud. Article 95 of Schedule II of Act XV of 1877 applied to the present suit, which was, therefore, in time. A widow of deceased Hindu represents the estate of the reversioner for some purposes; but it is her duty not only to represent the estate, but to protect it. When a suit is brought on the ground that the widow did not in a former suit protect the interests of the person who was to take after her death, but collusively suffered judgment against herself and sale of her husband's property in execution, then if such person on that ground treats the sale as inoperative, and seeks for a declaration that it is not binding on him, article 12, clause (a) of Schedule II of the Limitation Act XV of 1877 does not apply to the suit. *Held*, also, on the evidence, that the suit against Bai Vakhat was collusive, and that the sale in execution was in fraud of the plaintiff's right. He was, therefore, entitled to a decree declaring that he was not bound by the sale of the 3rd November, 1875 in the suit brought by Jagannath against Bai Vakhat as representative of her deceased husband, Odhav Tulja. Whether the plaintiff was entitled, also, to immediate possession of the property in the suit, depended on the question whether Bai Vakhat's life-estate was defeasible on her remarriage. She belonged to a caste in which remarriage was permitted. The following issue was accordingly sent to the lower Court for trial:—"Whether, by the usage of the country, the rights and interests of Bai Vakhat by inheritance in her deceased husband's property, the subject of this suit, ceased and determined on remarriage in 1876, as if she had then died."—11 Bom. 119.

In 1870 a creditor of the plaintiff's father brought a suit (No. 573 of 1870) against the plaintiff, and obtained a money decree against him. The plaintiff, was then a minor, and his estate was administered by the Collector of Ratnagiri. In this suit he was represented by his mother and guardian. At the sale held in 1871, in execution of the decree, the property in question was purchased by the defendant, who obtained possession in 1876. In 1879 the plaintiff attained majority, and in 1882 he brought the present suit to recover the property from the defendant. The lower Courts, regarding the suit as one to set aside the sale to the defendant, held that it was barred by limitation under article 12 of Schedule II of the Limitation Act XV of 1877. On appeal by the plaintiff to the High Court *held*, that article 12 of the Limitation Act XV of 1877 did not apply, and that the suit was not barred.



Description of suit.	Period of limitation.	Time from which period begins to run.
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#### Part IV.—One year.—(*continued.*)

That article applies only to cases in which the plaintiff would be bound by the sale if he did not succeed in getting it set aside; but in the present case the plaintiff was not bound by the proceedings in suit No. 573 of 1870, as he had not been properly represented as required by sec. 2 of Act XX of 1864.—11 Bom. 130.

Articles 12 and 14 of Schedule II of the Limitation Act (XV of 1877) refer to orders and proceedings of a public functionary, to which by law is given a particular effect in favour of one person or against another, subject, in the regular course, to a further judicial proceeding having for its object to quash them or set them aside.

When an order does not fall within the authority of an official who makes it, it is legally a nullity, and, therefore, need not be set aside.—11 Bom. 429.

The plaintiff's land was sold by the revenue authorities for arrears of assessment due to the *inamdar*. The plaintiff applied to the Mamlatdar to have the sale set aside on the ground of fraud on the part of the *inamdar*, but his application was rejected; and the sale was confirmed in July, 1879. The auction-purchaser was thereupon put in possession. In 1886 the plaintiff sued to recover possession of the land in question. *Held*, that the suit, having been brought more than one year after the date of the sale, was barred by article 12, clauses (b) and (c) of Schedule II of the Limitation Act (XV of 1877). The sale was one in pursuance of an order of the Collector or other officer of revenue, and if not for arrears of Government revenue was at any rate a sale for arrears of rent recoverable as arrears of revenue. The plaintiff, as occupant of the land, was bound by the sale, unless and until it was reversed, and the title of the purchaser at the sale is a perfectly good title until the sale is set aside in due course of law. *Held*, also, that the plaintiff's allegation, that the sale took place in consequence of the fraud of the *inamdar*, would make, not article 144, but article 95, applicable to the case.—13 Bom. 221.

P obtained a decree against M in April 1874, in execution of which property belonging to the latter was sold in 1874, 1875 and 1876. In March 1880 this decree was reversed by the Court of last appeal. In February 1881 M sued to set aside the sales of his property in execution of the decree, and for possession of the property. *Held* that, both under No. 14, sch. ii. of the Limitation Act, 1871, and No. 12, sch. ii. of the Limitation Act, 1877, the suit was barred by Limitation.—5 Al. 573.

The plaintiff, alleging that certain immoveable property belonging to him had been sold in execution of a decree as the property of another, sued the purchaser to have the sale set aside, and to recover possession of the property. *Held*, that the suit was one for possession of immoveable property to which the period of limitation of twelve years was applicable.—5 Al. 614.

See I. L. R., 11 Cal. 287, noted under sec. 4; 12 Madr. 168, noted under sec. 6.

13.—To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	One year	... The date of the final decision or order in the case by a Court competent to determine it finally.
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Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part IV.—One year.—(continued.)

#### Notes.

*Held* that a suit to set aside a sale by certificated guardians, with the sanction of the District Judge, under sec. 18 of Act XL of 1858, is not a suit to set aside an order of a Civil Court. But it falls under art. 144.—I. L. R., 5 Cal. 363.

In execution of a decree against six persons the plaintiffs had certain property brought to sale, the proceeds of which were brought into Court. The defendants, who held five separate decrees against some of the persons against whom the plaintiff's decree was obtained, applied to have the amount in Court rateably distributed; and in accordance with an order of the Court, dated 13th September 1880, this was done, the proceeds being distributed in proportion to the amounts of the decrees. In a suit brought on 24th August 1883 against the defendants, on the allegation that the plaintiffs were entitled to the whole of the proceeds, or in the alternative for distribution on a different principle:—*Held* the suit was one to set aside the order, and not having been brought within one year from the date of the order was barred by limitation under Art. 13, *Ram Kishan v. Bhawani Das*, I. L. R., 1 Al. 333, distinguished.—12 Cal. 159.

See I. L. R., 15 Bom. 438, noted under sec. 295 of the Civil Procedure Code.

14.—To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for. | One year ... | The Date of the act or order.

#### Notes.

The Civil Court has no power to set aside an order passed under the Land Registration Act, and when a prayer for such relief is contained in a plaint which also asks for a declaration of right and title to, and confirmation of possession in property, such prayer may be treated as mere surplusage. When, therefore, a plaint was filed containing separate prayers for the above relief, and when the original Court held that the main object of the suit was to have certain orders made by the revenue authorities set aside, and that the suit was accordingly governed by Art. 14, sch. II of the Limitation Act, and passed a decree dismissing the suit as having been brought more than a year after the date of such orders, *held*, that such a decree was wrong; that the suit being one simply for the declaration of the plaintiffs' title in respect of the property in dispute, Art. 14 had no application to the case.—I. L. R., 10 Cal. 525.

Plaintiff in 1877 claimed possession of land which had been demarcated as poromboke in 1860, and of which a patta had been granted to defendant in 1875 by the Collector. *Held* that this suit was not governed by the Article, as it was not necessarily a suit to set aside an official act.—2 Madr. 306.

On the 1st September, 1882, the Collector of Ahmednagar by an order under sec. 37 of the Land Revenue Code (Bombay Act V of 1879) granted a piece of open ground to N. for building purposes. On the 31st March,

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part IV.—One year.—(continued.)

1888, S. brought a suit against N. and the Secretary of State for India in Council to recover possession of the ground, and to set aside the Collector's order. *Held*, that the suit not being brought within one year from the date of the Collector's order, as provided for in sec. 135 of the Land Revenue Code, it was time barred.—15 Bom. 424.

See I. L. R., 11 Bom. 429, noted under Art. 12.

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| 15.—Against Government to set aside any attachment, lease, or transfer of immoveable property by the revenue authorities for arrears of Government revenue.  | One year. | . | When the attachment, lease, or transfer is made. |
| 16.—Against Government to recover money paid under protest in satisfaction of a claim made by the revenue-authorities on account of arrears of revenue or on account of demands recoverable as such arrears. | Ditto.    |   | When the payment is made.                        |

#### Note.

Where a suit was brought after several years' arrears had been wrongfully recovered from the plaintiff, it was *held*, that he could only recover one year's arrears.—11 Bom. H. C. R., 1.

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| 17.—Against Government for compensation for land acquired for public purposes.*  | One year | ... | The date of determining the amount of the compensation. |
| 18.—Like suit for compensation when the acquisition is not completed.  | Ditto.   | ... | The date of the refusal to complete.                    |
| 19.—For compensation for false imprisonment.   | Ditto.   | ... | When the imprisonment ends.                             |
| 20.—By executors, administrators, or representatives under Act No. XII. of 1855 ( <i>to enable executors, administrators, or representatives to sue and be sued for certain wrongs.</i> )                | Ditto.   | ... | The date of the death of the person wronged.            |
| 21.—By executors, administrators, or representatives under Act No. XIII. of 1855 ( <i>to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.</i> ) | Ditto.   | ... | The date of the death of the person killed.             |
| 22.—For compensation for any other injury to the person.   | Ditto.   | ... | When the injury is committed.                           |

\* See Act X. of 1870 and Act XVIII. of 1885.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part IV.—One year.—(continued.)

<b>23.</b> —For compensation for a malicious prosecution.	One year.	When the plaintiff is acquitted, or the prosecution is otherwise terminated.
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#### Notes.

On the 26th of July, 1878, A complained to the Magistrate that B committed theft of his grain. The Magistrate, of his own motion, attached the grain on the 10th of August, 1878, pending inquiry into the complaint, then proceeded with the inquiry, and dismissed the complaint, but continued the attachment pending the decision of the Civil Court to which he referred the parties. A in 1879 brought a suit against B to establish his title to the grain, which was finally rejected on the 21st of June 1880, and B recovered his grain on the 30th of September 1880, but in a damaged condition. B on the 13th of November, 1881, sued A for damages for wrongful detention of his grain, and its consequent deterioration in quality and value. *Held* that the date of the complaint was the date of the wrong, and limitation ran from that date, or, at the latest, from the date of the attachment, and that B's suit was, therefore, barred, whether the period applicable was one year under article 23, or two years under article 36 of schedule II of Act XV of 1877.—*l. L. R.*, 7 Bom. 427.

<b>24.</b> —For compensation for libel.	One year	When the libel is published.
<b>25.</b> —For compensation for slander.	Ditto.	When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results.
<b>26.</b> —For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	Ditto.	When the loss occurs.
<b>27.</b> —For compensation for inducing a person to break a contract with the plaintiff.	Ditto.	The date of the breach.
<b>28.</b> —For compensation for an illegal, irregular, or excessive distress.	Ditto.	The date of the distress.
<b>29.</b> —For compensation for wrongful seizure of moveable property under legal process.	Ditto.	The date of the seizure.

#### Notes.

In 1861 B granted a lease of his zemindari to A for 30 years, A undertaking to pay off all debts then due by B. B died in 1882 and his successor sued A and obtained a decree that on payment Rs. 1,20,000 A should give up possession of the zemindari. This sum having been paid into Court, A lost possession of the zemindari. On January 5th, 1875, A had mortgaged the whole zemindari, which consisted of 22 villages, to M to secure a loan of Rs. 1,00,000 borrowed by A to pay off the debts of B which A undertook to pay in 1861. On June 27th, 1879, A being indebted to M in the sum of Rs. 1,78,900 paid M Rs. 1,00,000 and undertook to pay the balance out of the income of the estate, M releasing the 22 villages from the mortgage of January 5th, 1875. On June 28th, 1879, A execut-

Description of suit.	Period of limitation.	Time from which period begins to run.
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#### Part IV.—One year.—(continued.)

ed a mortgage of the 22 villages to L to secure repayment of Rs. 1,30,000. Of this sum, Rs. 1,00,000 was borrowed to pay M and Rs. 30,000 was a prior debt due by A to L. Of the Rs. 1,00,000 paid to M, Rs. 2,7000 was specially applied to discharge so much of the charge created by the mortgage of January 5th, 1875. On January 30th, 1875, A borrowed from S Rs. 43,000 and mortgaged to her 10 of the 22 villages of the zemindari. In 1885 S sued L to have her debt declared a first charge on the money paid into Court by the zamindari. The Subordinate Judge held that L had a prior claim on the fund and dismissed the suit:—*Held* on appeal, following the principle of decision in *Gokaldas v. Puranmal* (L. R., 11 I.A., 126) that L was entitled to a first charge on the fund to the extent of Rs. 27,000 which had been applied to pay off the mortgage of January 5th, 1875. In the suit brought by B's successor against S to recover the zemindari L was a party, but S was not. In that suit L obtained an order for payment of Rs. 1,00,000 of the sum paid into Court by the zemindar. It was contended by L that S could have no decree for repayment of this sum, and (2) that if the money was wrongly paid under the order of the Court to L it was wrongfully seized within the meaning of art. 29 of sch. II of the Indian Limitation Act:—*Held*, that the Court had power to order a refund and that art. 29 of sch. II of the Limitation Act was not applicable.—I. L. R., 11 Madr. 345.

A suit to recover money wrongly taken under a decree is a suit for compensation to which the limitation of one year under art. 29 of Act XV of 1877, sch. II, applies. The same limitation under the same provision applies if to the above demand a claim be added to recover damages for the loss of gain or interest upon the money.—8 Bom. 17.

#### Part V.—Two years.

30.—Against a carrier for compensation for losing or injuring goods.	Two years	When the loss or injury occurs.
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#### Notes.

Where a plaintiff brings a suit for breach of contract for non-delivery of goods under a bill of lading, it is not open to the defendants, after having denied receipt of the goods, to set up, or for the Court, after finding that the goods had been shipped but not delivered, to assume, without evidence, that the goods were lost in order to bring the case within Art. 30. *Per Garth O. J.*—*Semble*, where a plaintiff sues for breach of contract and proves his case, the three years limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful act of theirs, to which the shorter limitation would apply. *Mohansing Chawan v. Conder* I. L. R., 7 Bom. 478, and *British India Steam Navigation Co. v. Hajee Mahomed Esack*, I. L. R., 3 Madr. 107 approved.—I. L. R., 12 Cal. 477.

Where a suit is brought against a Railway Company by the consignee of goods (not sent on sample or for approval) for compensation for non-delivery, the period of limitation is not two years (Article 30), but three years (Article 115, Schedule II of the Limitation Act, 1877), inasmuch as the consignor contracts with the company as agent for the consignee, and

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part V.—Two years.—(*continued.*)

the property in the goods passes to the consignee on delivery to the Company.—5 Madr. 388.

An action against a Railway Company for loss of goods, when there is no contract, is governed by this article.—3 Madr. 240. Also 3 Madr. 107.

563 bags of grain were made over to the defendants at Cawnpur and Nagpur for carriage to Sholapur. All that was proved was that the defendants delivered to the plaintiff, the owner of the grain, 512 bags only, having previously obtained from his agent receipts for the full number as arrived at Sholapur. In a suit by the plaintiff to recover the price of the bags not delivered, brought after more than two, but within three years of the time when the rest of the goods were delivered, the defendants claimed that the suit was barred by the provisions of article 30 of Schedule II of Act XV of 1877, has not having been brought within two years of the time "when the loss occurred." *Held* that mere non-delivery of the bags was no proof of their loss, the *onus* of proving which as an affirmative fact lay on the defendants before they could claim the benefit of the special limitation of two years provided in article 30 of Schedule II of Act XV of 1877; and that the suit, therefore, was in time.—7 Bom. 478.

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| <b>31.</b> —Against a carrier for compensation for delay in delivering goods.                                     | Two years | When the goods ought to be delivered.                                  |
| <b>32.</b> —Against one who, having a right to use property for specific purposes, perverts it to other purposes. | Ditto.    | When the perversion first becomes known to the person injured thereby. |

#### Note.

A suit by a zamindar for removal of trees planted in a certain waste land of his village by persons who have no right to plant them, is governed by art. 120, schedule ii of the Limitation Act, and not by art. 32, schedule ii of the Act. Where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit has to be instituted for any relief in respect of any injurious consequences arising from such perversion, such a suit will be governed by art. 32, schedule ii of the Limitation Act. *Gangadhar v. Zahurriya* distinguished.—I. L. R., 10 Al. 634.

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| <b>33.</b> —Under Act No. XII. of 1855 ( <i>to enable executors, administrators, or representatives to sue and to be sued for certain wrongs</i> ) against an executor, administrator or other representative. | Two years | When the wrong complained of is done.    |
| <b>34.</b> —For the recovery of a wife.  | Ditto.    | When possession is demanded and refused. |

#### Notes.

The refusal of a wife to return to her husband, and allow him the exercise of conjugal rights, constitutes a continuing wrong giving rise to constantly recurring causes of action on demand and refusal. Suits for the

Description of suit.	Period of limit- ation.	Time from which period begins to run.
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### Part V.—Two years.—(continued.)

recovery of a wife or for the restitution of conjugal rights, though governed by articles 34 and 35 of Schedule II of the Limitation Act (XV of 1877), are not thereby taken out of the operation of sec. 23 of the Act.—16 Bom. 714.

The texts of the Hindu law relating to conjugal cohabitation and imposing restrictions upon the liberty of the wife, and placing her under the control of her husband, are not merely moral precepts, but rules of law. The rights and duties which they create may be enforced by either party against the other and not exclusively by the husband against the wife. The Civil Courts of British India, as occupying the position in respect of judicial functions formerly occupied in the system of Hindu Law by the king, have undoubtedly jurisdiction in respect of the enforcement of such rights and duties. The Civil Courts of British India can therefore properly entertain a suit between Hindus for the restitution of conjugal rights, or for the recovery of a wife who has deserted her husband. It is not necessary, as a condition precedent to such suits, the parties being Hindus, that there should be any demand by the plaintiff and refusal by the defendant. The provisions of arts. 34 and 35 of the second schedule of the Limitation Act cannot be taken as applicable to suits of this description. To hold that they did apply would be to introduce serious innovations into the personal law of the Hindus (and of the Muhammadans) which could not have been contemplated by a statute of the nature and scope of the Limitation Act. The limitation applicable to suits of the present nature is that of art. 120 of the second schedule, read with sec. 23 of the Limitation Act. Desertion by a wife of her husband is permitted by the Hindu Law under certain circumstances, but the insanity of the husband will not justify his desertion by the wife. In any case desertion does not terminate the relation of husband and wife. A suit for restitution of conjugal rights could in such case only be effectually met by establishing a plea of some matrimonial offence on the part of the complainant such as would entitle the defendant to a separation. Legal cruelty on the part of the complainant may be a ground for refusing restitution of conjugal rights, or for imposing terms on the complainant.—13 Al. 126.

**35.**—For the restitution of conjugal rights. Two years

When restitution is demanded, and is refused by the husband or wife, being of full age and sound mind.

**Note.**—See I. L. R., 13 Al. 126 and 16 Bom. 714, noted under art. 34.

**36.**—For compensation for any malfeasance, misfeasance, or nonfeasance independent of contract, and not herein specially provided for. Two years

...! When the malfeasance, misfeasance, or nonfeasance takes place.

### Notes.

Suit for the value of crops carried away by the defendant while in possession under his decree afterwards reversed, does not fall under this Article, but under Art. 109.—I. L. R., 4 Cal. 625.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part V.—Two years.—(continued.)

Plaintiff sued on the 9th of February 1880 for compensation for loss of crops caused by the defendants' taking possession of his well in January 1877. The District Judge on appeal dismissed the suit on the ground that time began to run against the plaintiff from January 1877, and that the claim was barred by sec. 36, 37, 39 or 40 of Schedule II of the Limitation Act, 1877: *Held* that the plaintiff was entitled to sue for compensation for the trespass within three years from the date on which the defendants' possession ceased, and that the defendants were liable for any loss suffered within three years proceeding the date of the suit.—6 Madr. 176.

Plaintiff was the owner of a house mortgaged to defendants. On the 22nd August 1885 defendants sold the house by auction under a power of sale contained in the mortgage and gave possession to the purchaser. On the 2nd September 1887 plaintiff sued the defendants to recover the value of certain timber which was stored in the house and not mortgaged and which plaintiff alleged the defendants had taken possession of and converted to their own use. It was proved that the timber was in the house when defendants took possession from the plaintiff and defendants did not account for it:—*Held*, (1) that plaintiff was entitled to recover from the defendants the value of the timber, and (2) that the suit was not barred by art. 36 of sch. II of Indian Limitation Act, 1877.—11 Madr. 333.

A suit to recover damages for the loss of a ship caused by collision at sea is an action of tort founded upon the negligence of the defendant or his servants in the management of his vessel, and must be brought within two years under the provisions of article 36 of Schedule II of the Limitation Act XV of 1877. Article 49 of Schedule II of the Limitation Act XV of 1877 applies only to suits in respect of property in the hands of some other person, and not to suits in respect of property in the plaintiff's own possession, and the injury to property there mentioned, is limited to cases of injury to property while in the custody of some person other than the owner. From the provisions of articles 36 and 115 of Schedule ii. of the Limitation Act XV of 1877, the intention of the Act appears to be that not more than two years should be allowed for bringing a suit founded on tort, except in certain well-defined particular instances.—11 Bom. 133.

### Part VI.—Three years.

-For compensation for obstructing away or a water-course.	Three years	The date of the obstruction.
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—See I. L. R., 6 Madr. 176, noted under Art. 36.

38.—For compensation for diverting a water-course.	Three years	The date of the diversion.
39.—For compensation for trespass upon immoveable property.	Ditto.	The date of the trespass.

**Note.**—See I. L. R., 6 Madr. 176, noted under Art. 36.

40.—For compensation for infringing copyright or any other exclusive privilege.	Ditto.	The date of the infringement.
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Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

#### Notes.

A suit for an account of profits obtained by the infringement of an exclusive privilege, is governed by this Article.—I. L. R., 3 Cal. 17.

See I. L. R., 6 Madr. 176, noted under Art. 36.

41.—To restrain waste.	Three years	When the waste begins.
42.—For compensation for injury caused by an injunction wrongfully obtained.	Ditto.	When the injunction ceases.
43.—Under the Indian Succession Act, 1865, Section 320 or 321, or under the Probate and Administration Act, 1881, sec. 139 or 140,* to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Ditto.	The date of the payment or distribution.
44.—By a ward who has attained majority, to set aside a sale by his guardian.	Ditto.	When the ward attains majority.

#### Notes.

K R died in 1844, leaving a widow O T and a minor son G D. In 1847 O T executed in favor of the defendant a *mourasi* izara of certain property, but it did not appear whether she so acted as guardian or mother of G D. G D died in 1855 before attaining majority, and, under an *anumati patro* executed by K R before his death, the plaintiff was adopted in 1858. O T died in 1861. In a suit brought by the plaintiff in 1873 to set aside the alienation by O T in 1847, *held* that, if the alienation was made by O T as guardian of G D, the suit was not barred, it having been brought within three years after the plaintiff attained his majority; if made by her as a Hindu widow, the suit was still not barred, the cause of action not arising until her death, when the plaintiff was a minor.—I. L. R., 4 Cal. 523.

The plaintiff sued to redeem certain land which he alleged had been mortgaged by his father in 1858 to one Bahirji, the grandfather of the first defendant. The defendants alleged that the mortgage was executed, not to Bahirji, but to the father of the second defendant, and that in 1863 the equity of redemption had been sold to the mortgagee by the widows of the mortgagor, the plaintiff being then a minor. The defendants contended that this suit was really to set aside the sale of 1863, and was barred by article 44 of the Limitation Act XV of 1877. The second defendant also pleaded adverse possession. The plaintiff contended that the second defendant and his father had possession of the land merely as the agents or trustees of the mortgagee. *Held*, that clause 44 of the Limitation Act (XV of 1877) did not apply, and that the suit was not barred. The necessity of impugning the sale of 1863 to the second defendant arose from the second defendant's resisting the plaintiff's claim to redeem the mortgage. *Held*,

\* See Act V. of 1881, sec. 156.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(*continued.*)

also, that the second defendant, having entered into possession as mortgagee, could not afterwards set up an adverse possession as owner so as to defeat the plaintiff's right to redeem.—14 Bom. 279.

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| <p><b>45.</b>—To contest an award under any of the following Regulations of the Bengal Code:—<br/>           VII of 1822,<br/>           IX of 1825, and<br/>           IX of 1833.</p> | <p>Three years</p> | <p>The date of the final award or order in the case.</p> |
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#### Notes.

In a suit brought by the plaintiff in 1880 to recover possession of certain lands from which his predecessor in title had been dispossessed, in which suit the Court of first instance found that the defendant had dispossessed the plaintiff's father in 1860, during the unexpired term of a lease granted by the plaintiff's father to a ticcadar, *Held*, that the preponderance of authority in India was in favour of the view that limitation ran from the date of the expiry of the ticca, and not from the time when the defendant had been held by the Court of first instance to have dispossessed the plaintiff's father.—I. L. R., 10 Cal. 577.

Where the proceeding of a Settlement officer was not an award under Reg. VII of 1822, he not having acted judicially as required by the Regulation, it was held that the suit was not barred by limitation under this Article.—3 Al. 738.

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| <p><b>46.</b>—By a party bound by such award to recover any property comprised therein.</p>   | <p>Three years</p> | <p>The date of the final award or order in the case.</p> |
| <p><b>47.</b>—By any person bound by an order respecting the possession of property made under the Code of Criminal Procedure, Chapter xii,* or the Bombay Mamlatdars' Courts Act, or by any one claiming under such person, to recover the property comprised in such order.</p> | <p>Ditto.</p>      | <p>The date of the final order in the case.</p>          |

#### Notes.

In a dispute between A and B concerning the possession of a certain taluq, the Criminal Court made an order under sec. 530 of the Code of Criminal Procedure retaining B in possession; and this order was, in a proceeding under secs. 295 and 296 of the Code of Criminal Procedure confirmed by the Court of Session. *Held* that a suit by A for the recovery of the land must be brought within three years from the date of the Magistrate's order, and not from the date of the order passed by the Court of Session. Art. 47 of sch. II, Act XV of 1877, refers to immoveable as well as moveable property.—I. L. R., 6 Cal. 709.

\* See Act X. of 1882, sec. 3.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

A zemindar on the 3rd May 1876 agreed to let lands on lease to A and his co-sharers, who on the zemindar's failure to carry out the terms of the agreement, brought a suit for specific performance and obtained a decree against him in 1879. The zemindar having neglected to perform the agreement, the Court in December 1881 made an order for the execution of a pottah, and directed that the pottah should take effect from the date of the original agreement. The pottah was executed on the 19th December 1881. In 1880 A instituted a proceeding under sec. 530 of the Criminal Procedure Code (X of 1872), which corresponds with sec. 145 of Act X of 1882; but the application was dismissed in December 1880, A having failed to establish possession. B, having purchased the interests of two of the co-sharers, instituted a suit on the 11th May 1888 against certain persons who had been let into possession by the zemindar, the other co-sharers being added as plaintiffs. *Held*, that Article 47, Schedule II, of the Limitation Act did not apply, no right to sue in ejectment being in existence in December 1880, the right with which A was clothed under the decree not having been perfected till December 1881 when the pottah was executed. *Held* further, that the suit was not barred under Art. 144, as limitation did not commence to run until the pottah had actually been executed. Article 47 of the Limitation Act contemplates a right to sue in ejectment being in existence at the time of the passing of an order under sec. 145 of the Code of Criminal Procedure.—19 Cal. 646.

A dispute having arisen between plaintiff and defendant as to the ownership of certain landed property, the Magistrate being informed of the dispute held an enquiry under the provisions of Chapter XXII, Act XXV of 1861, and finding himself unable to "determine who was in actual possession of the lands" placed them in charge of the Sub-Magistrate. *Held* that this was not an order respecting "the possession of property" but an attachment proceeding recorded because the Magistrate was unable to determine which party was in possession. The limitation of three years prescribed by this article was therefore inapplicable.—1 Madr. 309. See also A. H. C. R., 1875, page 35.

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| <p>48.—For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.</p> | <p>Three years .</p> | <p>When the person having the right to the possession of the property first learns in whose possession it is.</p> |
| <p>49.—For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.</p>  | <p>Ditto.</p>        | <p>When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.</p>      |

### Notes.

A testator bequeathed certain specific moveable property to A. B applied for and obtained a certificate under Act XXVII of 1860 on behalf of the testator's widow, and took possession of the property bequeathed. A appealed, and the case was remanded for retrial. On the 27th March 1873,

Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part VI.—Three years.—(continued.)**

the former order was cancelled and a certificate was granted to A. On the 19th of August 1873, B was directed to deliver up the property to C, who had purchased it from A. On the 22nd of March 1878, C instituted a suit to recover the property. *Held*, that the suit was barred under art. 49 of the Limitation Act.—I. L. R., 9 Cal. 79.

After the redemption of a mortgage, the title-deeds of the mortgage premises were left with the mortgagee, who refused to return them on demand made by the mortgagor. The mortgagor now sued to recover possession of them :—*Held*, the Limitation Act, sched. II, art. 49, was applicable to the case and that time began to run from the date of the mortgagee's refusal.—15 Madr. 157.

Where a final decree had been made for specific performance of an agreement of sale, held, that the suit was not time barred, as the right to possession of both the moveable and immoveable property accrued on the date of such final decree, as from the detainer's possession became unlawful.—5 Bom. 554.

See I. L. R., 7 Bom. 478, noted under Art. 30 ; 11 Madr. 333, noted under Art. 36.

<b>50.</b> —For the hire of animals, vehicles, boats, or household furniture.	Three years	When the hire becomes payable.
<b>51.</b> —For the balance of money advanced in payment of goods to be delivered.	Ditto.	When the goods ought to be delivered.
<b>52.</b> —For the price of goods sold and delivered where no fixed period of credit is agreed upon.	Ditto.	The date of the delivery of the goods.
<b>53.</b> —For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Ditto.	When the period of credit expires.
<b>54.</b> —For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Ditto.	When the period of the proposed bill elapses.
<b>55.</b> —For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Ditto.	The date of the sale.
<b>56.</b> —For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Ditto.	When the work is done.
<b>57.</b> —For money payable for money lent.	Ditto.	When the loan is made.

**Note.**—See I. L. R., 15 Madr. 380, noted under sec. 19.

<b>58.</b> —Like suit when the lender has given a cheque for the money.	Ditto.	...  When the cheque is paid.
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Description of suit.	Period of limit- ation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

59.—For money lent under an agreement that it shall be payable on demand.	Ditto.	When the loan is made.
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#### Notes.

The manager of A, the proprietress of an indigo factory, on the 20th December 1869, paid into the *kothi* or bank of B, a banker, the sum of Rs. 1,200 to the credit of A, and from that time on wards sums of money were drawn by A's manager, out of B's bank, and applied to the purposes of A's factory; the balance, though generally against A, fluctuated, A's account being usually overdrawn, but there being sometimes a balance in her favour, created by payments made on her account into B's bank. The 2nd of July 1872 was the last occasion that any balance was due from B to A. Payments continued to be made on behalf of A into B's bank up to the 12th of June 1873, when a sum of Rs. 1083-8 was paid into her account, but, notwithstanding this payment, the balance of account was on that date against her. After the 12th of June 1873, B continued to make payments on behalf of A, and also to render monthly accounts in which he charged A with such payments, and also with the principal of, and interest upon, the balance due on previously rendered accounts. This continued till the month of January 1874, when B for the last time rendered a monthly account to A, the last item in which was a payment made on the 6th January 1874. On the 23rd December 1876, B instituted a suit against A to recover the balance of principal and interest due to him on the footing of the last account rendered by him to A. *Held*, that the account between A and B was not, and never had been, a mutual, open, and current account, and that the suit was, therefore, barred by limitation; and that the payments made by B on behalf of A within the period of limitation, even if authorised, did not have the effect of keeping alive his previous claim against her. *Held* also, that even if the dealings and transactions, between A and B could be so construed as to show that there had been at any time a mutual, open, and current account between them, that mutual relation terminated on the 2nd July 1872, or if not, then on the 12th June 1873, when the last payment was made on A's account into B's bank.—I. L. R., 5 Cal. 759.

The plaintiff deposited from time to time with the firm of the defendant, who carried on a banking business, various sums of money, the amounts deposited bearing interest, and at times certain sums being withdrawn by the plaintiff, and an account of the balance of principal and interest being struck at the end of each year and presented to the plaintiff. The date of the first deposit was not known, but it was some time previous to 1282 (1875). A demand was made for the whole amount of the principal and interest in Bhadro 1292 (August—September 1885). and the demand not having been complied with, a suit to recover the money was brought on the 8th March 1886. *Held*, that sec. 60 and not sec. 59 of the Limitation Act was applicable to the case; the cause of action therefore arose at the date of the demand and the suit was not barred. The *dictum* of WHITE, J., in the case of *Ram Sukh Bhunjo v. Brohmoyi Dasi*, 6 C. L. R., 470, that "the word 'deposit' in the Limitation Act as distinct from 'loan' points to cases

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

where money is lodged with another under an express trust or under circumstances from which a trust may be implied," dissented from.—16 Cal. 25.

See I. L. R., 3 Al. 328, noted under Art. 63; 13 Bom. 338, noted under sec. 20.

<b>60.</b> —For money deposited under an agreement that it shall be payable on demand.	Three years	When the demand is made.
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#### Note.

See I. L. R., 3 Al. 328, noted under Art. 63; 16 Cal. 25, noted under Art. 59; 13 Bom. 338, noted under sec. 20.

<b>61.</b> —For money payable to the plaintiff for money paid for the defendant.	Three years	When the money is paid.
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#### Notes.

In the year 1867 the plaintiff, who was then living jointly with the defendant who was his brother, executed a bond to secure the re-payment of monies advanced to him, which monies were applied by him for the joint benefit of himself and the defendant. In the year 1868 the plaintiff executed another bond for the same purpose. In 1870 the plaintiff and defendant separated, and the lender, thereupon, sued the plaintiff upon the bond executed, in 1867, and obtained a decree. In 1874, the plaintiff executed a fresh bond in favour of the decree-holder, in order to avoid execution of the decree and to retire the bond of 1868. In 1877 (within three years from the date of the fresh bond), the plaintiff sued his brother to recover a moiety of the sum secured thereby,—*held*, that the date on which money was paid by the plaintiff for the defendant must have been before 1870, and that, therefore, the suit was barred.—I. L. R., 5 Cal. 321.

On the 29th May 1873 one T drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person his heirs sued the shroff to recover the sum deposited, and on the 30th January 1878 obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February 1884 the shroff sued T the heirs of the third party and another person (who owned to having received sum of the money from T), to recover the sum he had been compelled to pay under the decree of 1878 :—*Held*, that the plaintiff's cause of action arose at the time when he actually paid down the money on the 15th January 1883, and that the suit therefore was not barred.—13 Cal. 155.

The plaintiff, a purchasing agent, sued the Secretary of State for India in Council to recover certain sums of money alleged to be due to him for the purchase of stores, etc., for the Second Cabul Campaign. This suit was brought more than three years after the termination of the plaintiff's agency and more than three years after the last supply made by him as purchasing agent, but within a few months after the final refusal of the Commissariat Department to pay him the amount claimed; *held*, that it was doubtful if art. 61 of the second schedule of the Limitation Act would

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(*continued.*)

apply, as against the Secretary of State for Council in India, but even if not the suit was barred by art. 115.—14 Cal. 256.

62.—For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years	When the money is received.
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#### Notes.

The period of limitation for a suit to recover money deposited by the plaintiff with the defendant, upon the understanding that it will be returned in a certain event, should be calculated, not under art. 115, but under art. 62. Such period begins to run on the happening of the event.—I. L. R., 5 Cal. 830.

A, a Hindū widow, granted without legal necessity, a mokurari lease of certain mouzas, portion of her husband's estate, to B. During B's possession part of the lands comprised in the granted mouzas were taken up by Government, and the compensation money was lodged in the Collectorate. A having afterwards died, the next heirs of A's husband, on the 7th October 1871, sued B to recover possession of the mouzas, but not being aware of the facts, did not in that suit claim the compensation money lying in the Collectorate. While this suit was still pending, B, in March, 1872, drew the compensation-money out of the Collectorate. The heirs, after obtaining a decree against B for possession of the mouzas, on the 13th September 1875, instituted a fresh suit against him to recover the compensation money wrongfully drawn out by him from the Collectorate. *Held* that this art. did not apply, but that under art. 120 the suit was not barred.—5 Cal. 597.

Purchase money paid for a consideration which has wholly failed is money received for the use of the buyer, and a suit to recover back the money is thus governed by art. 62 of the 2nd Schedule to the Limitation Act. A purchased a share of joint property from a member of a Mitakshara family, but his suit to recover possession of it was dismissed on the ground that the sale having been made without the consent of the other coparceners was void under the law. A then brought a suit to recover back the purchase money by reason of failure of consideration. *Held*, that the failure of consideration, although it did not become apparent until the former suit was brought and failed, was a failure from the beginning, and time ran from the date when the purchase money was paid.—15 Cal. 51.

A sale, which a member of a joint-family (Mithila) had attempted to make, went off upon the objection made by other co-sharers, but not before the purchase-money had been paid. It might have been that the agreement for sale was not void from the beginning, but was only void upon objection being made; and if it was only voidable, the consideration did not fail at once at the time of the receipt of the purchase-money, so as to render it money had and received, to the use of the payer within the meaning of article 62 of schedule II of Act XV of 1877. But it failed, at all events, when the purchaser being opposed found himself unable to obtain possession. He would have had a right to sue at that time to recover his purchase-money upon a failure of consideration. And, therefore, the case



peared to fall within article 97. It must fall either within that article or within article 62.—19 Cal. 123.

An *inamdar*, in a suit against his tenant, established his right to the money value of a fixed quantity of grain to be paid to him yearly by his tenant, and subsequently brought this suit to recover from his tenant the arrears of such payments for ten years at the market rate prevailing in the last month of each of those years. The defendants contended that arrears for only three years were recoverable under the Limitation Act (XV of 1877), and that the rates applicable to ascertain the amount were the Government auction rates. *Held* that the plaintiff's right would, under the Hindu law, be "*nibandha*", and would under that law rank for many purposes as immoveable property, but that a different principle applied to sums realized and become payable in the hands of him who realized them to the intended recipient. The interest or jural relation of right of such recipient was *nibandha*, but the particular sum due to him was either money received to his use, or payable on a contract, and money which would remain due, though the grant constituting the *nibandha* were cancelled and had ceased to exist after the realization of the money. It being thus distinguishable from the original right which produced it, the claim in this suit was barred by limitation after three years.—8 Bom. 234.

Where a person having previously obtained a decree declaratory of his title sues his co-sharer in a *deshpande vatan*, who is bound by the decree to recover arrears, his suit is a suit for money had and received by the defendant to the plaintiff's use; and the period of limitation is three years as prescribed by article. 62. Non-participation of profits by the plaintiff for more than twelve years from the date of the previous decree does not extinguish his title and he can recover arrears for three years preceding the date of his suit to recover them.—9 Bom. 111.

Certain immoveable property was attached in execution of a money-decree held by A, dated the 22nd August, 1871, on the 1st April 1872. The same property was subsequently attached in execution of a decree held by B, dated the 19th August, 1871, which directed the sale of the property in satisfaction of a charge declared thereby. The property was sold in execution of this decree. The Munsif directed that the proceeds of the sale should be paid to B. A, who claimed them on the ground that he had first attached the property, appealed against this order. The Judge, declaring that A was entitled to the proceeds, reversed the Munsif's order. A then obtained an order from the Munsif directing B to refund the money, which he did, and it was paid to A. B sued A to recover the money by establishment of his prior right to the same, and for the cancelment of the Judge's order, alleging that the same was made without jurisdiction. *Held* (by a majority of the Full Bench) that the suit was one for money received by the defendant for the plaintiff's use.—1 Al. 333.

The holder of a decree for money which had been sold in the execution of a decree against him sued the auction-purchaser, the sale having been set aside for the money he had recovered under the decree. *Held* that the suit was not one of damages but for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.—2 Al. 354.

C, the proprietor of a certain "mohalla," sued K, who had purchased a house situated in the mohalla at a sale in the execution of his own decree, for one-fourth of the purchase-money, founding his claim upon an ancient custom obtaining in the mohalla, under which the proprietor

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

thereof received one-fourth of the purchase-money of a house situated therein, whether sold privately or in the execution of a decree. *Held* that the period of limitation applicable to such a suit was that prescribed by article 120, and not by art. 62 or 132.—2 Al. 358.

See I. L. R., 2 Cal. 393. See 18 Cal. 234, noted under sec. 10 ; 15 Madr. 382, noted under sec. 135 of the Transfer of Property Act 3 Al. 170, noted under sec. 18 ; 15 Bom. 135, noted under art. 131 ; 15 Bom. 438 noted under sec. 295 of the Civil Procedure Code.

63.—For money payable for interest upon money due from the defendant to the plaintiff.	Three years	When the interest becomes due.
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#### Note.

The plaintiff in this suit deposited certain money with the defendants, a firm of bankers, on the 30th August, 1863. On the 2nd January, 1867, an account was stated and a balance found to be due to the plaintiff consisting of the original deposit, and interest on the same, calculated at 6 per cent. per annum. On the 11th February, 1876, the defendants having proposed to pay the plaintiff such balance, together with interest on the original deposit, from the 2nd January 1867 to the 15th February 1876, calculated at 4 per cent. per annum the plaintiff demanded that she should paid such interest at the rate of 6 per cent. per annum. The defendant refused to accede to this demand on the 14th February, 1876, and on the 17th of the same month they paid the plaintiff such balance with such interest, calculated at the rate they proposed, viz, 4 per cent. On the 11th February, 1879, the plaintiff brought the present suit against the defendants, in which she claimed the sum representing the difference between such interest calculated at 4 per cent. and 6 per cent., alleging that her cause of action arose on the 14th February, 1876. *Held* that the suit could not be regarded as either one for money deposited under an agreement that it should be payable on demand, but must be regarded as one for a balance of money payable for interest, for money due.—I. L. R., 3 Al. 328.

64.—For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
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#### Notes.

The period of limitation for suits on accounts stated is the same whether the accounts are stated verbally or in writing, and is governed by art. 64.—7 Cal. 256.

A being the holder of a decree against B, B, on the 7th July, 1875, entered into a kistibandi, and filed it in Court, setting out that he would

pay off the debt due under the decree by certain instalments, and that, in default of payment of one instalment, the whole amount of the debt might be recovered by taking out execution of a decree. By the kistibandi certain immoveable property was pledged to secure the debt, but the kistibandi was not registered. B failed to pay the first instalment, which fell due on the 14th August, 1875; and A on the 19th June 1878, applied for execution of his decree, but the application was refused, and A referred to a regular suit. In a suit brought by A on the 29th January, 1879, against B for the whole debt due under the decree: *Held* that, inasmuch as no appeal had been preferred against the order disallowing execution, A was bound by that decision; but that the suit might be taken to be one for an account stated in writing with an agreement for payment at a certain stated period of time as regards the instalments due, which were not barred by limitation; the suit as regards the instalments which had not fallen due being premature, and those previous to the 29th January, 1876, being barred by article 64 of the Limitation Act.—8 Cal. 912.

The plaintiffs claimed on a statement of account in writing dated the 18th October 1877: this statement of account was not signed by the defendant. The date of the institution of the suit was the 30th September 1880. A Division Bench of the High Court held on the appeal on the case coming up before them on the 18th October 1877, that the suit was not based upon any express contract made between the parties; and that the transaction which took place on that date did not constitute an implied contract, and that, therefore, these contentions were not open to the plaintiffs, but the Court referred the question whether the plaintiffs' claim, so far as it was based on the statement of account on the 18th October 1877, fell within article 64 of sch. II of Act XV of 1877. *Held*, by MITTER, PRINSEP, and McDONELL, JJ.—That the question referred was a matter of limitation arising in the case which had not been decided in the order of reference, and without such a decision the case could not be disposed of, and as to that point, that the statement of account not being signed by the defendant, did not fall within the terms of article 64 of sch. II of Act XV of 1877. *Held*, by GARTH, C. J., and TOTTENHAM, J.—That the Division Bench having held that the transaction afforded no basis for a suit had disposed of the case, and the question referred was therefore immaterial.—10 Cal. 284.

The plaintiffs and the defendants entered into a partnership agreement, which was registered, whereby it was, among other things, provided expressly that each partner should bear the loss, if any, incurred in the business in proportion to his share. The plaintiffs, alleging that loss had been incurred and borne by them, sued to recover the defendants' share of the loss:—*Held*, that since the partnership agreement was registered, the suit was governed by Limitation Act, sched. II, art. 116.—14 Madr. 465.

A simultaneous verbal agreement cannot extend the ordinary period of limitation for a suit on an account stated. An agreement to extend the period must be in writing, and signed by the defendant or his agent.—8 Bom. 542.

Money due on an account stated which would, as such, have been barred in three years from the statement, under Act XV of 1877, sch. II. art. 64, becomes, for purposes of limitation, a debt of another character, when, it having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable, and so declared by decree. In contemplation of a sale of land by the debtor

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

to the creditor, it was agreed that the book-debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed, on the ground that no effectual agreement had been made. *Held* that this decree brought about a new state of things, and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of art. 97. The matter might also be regarded as falling under sec. 65 of the Contract Act, IX of 1872, under which, when the agreement was decreed ineffectual, the debtor, having previously received an advantage under it, was made liable "to restore" that advantage, or "to make compensation for it."—11 Al. 47.

See I. L. R., 3 Al. 148, noted under sec. 2; 5 Cal. 759, noted under Art. 59; 7 Bom. 414, noted under sec. 19.

<b>65.</b> —For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.
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#### Notes.

The vendor of a certain land agreed in the conveyance, which was registered, that, in case the land actually conveyed proved to be less than that purporting to be conveyed, he should make a refund to the purchaser of the purchase-money in proportion to the value of the quantity of land deficient. The land actually conveyed having proved to be less than that purporting to be conveyed, and the vendor having failed to make a refund of the purchase-money in proportion to the value of the quantity of land deficient, the purchaser sued the vendor for the value of the quantity of land deficient. *Held* by SPANKIE, J., that the suit was one of the nature described in art. 65, to which, the agreement being in writing registered, the limitation provided by art. 116 was applicable. *Held* by OLDFIELD, J., that art. 116 was applicable to the suit.—I. L. R., 3 Al. 712.

See I. L. R., 5 Cal. 830, noted under Art. 62.

<b>66.</b> —On a single bond where a day is specified for payment.	Three years	The day so specified.
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#### Notes.

Where a bond, by its terms, stated that money advanced should be repaid on the 30th Pous 1283 B. S., and it so happened that, in the year 1283 the month of Pous consisted only of 29 days (the 29th Pous, answering to the 12th January 1877) *held* that a suit brought on the 13th January 1880 was in time. See sec. 25.—I. L. R., 239.

The defendant executed a bond, which provided that interest should be payable monthly, and that the principal should become due within 6

months from the date of execution ; the bond contained a clause to the effect that if the interest should not be paid according to the terms of the bond, or if the creditor should feel any doubts as to his being able to realize the principal, he should not be bound to wait until the expiry of the six months in order to bring his suit, but should be at liberty to realize the principal and interest in any manner he might choose. *Held* that a suit on the bond brought within 3 years from the date of the day specified therein for payment was not barred by limitation, as the case fell under this article and not under 65.—5 Cal. 21.

The defendant, having borrowed money from the plaintiff, gave him a bond, dated the 4th July, 1872, for the payment of such money, with interest, within two years, or on a certain contingencies contemplated and defined in such bond. Such bond did not specify a day for payment. It was duly registered. On the 30th June, 1880, the plaintiff sued the defendant, stating in his plaint that he had lent the defendant such money ; that it was payable on the 4th July, 1874 ; that on that day he had demanded payment ; that the cause of action arose on that day, as the defendant did not pay ; and that he claimed such money accordingly. The plaint did not make any mention of such bond. *Held* that the suit was not one which fell within the scope of article 66, but one to which art. 116 was applicable, and it might proceed on the plaint without any amendment thereof.—3 Al. 276. See also 6 Cal. 94 ; 6 Bom. 95.

B and S executed a bond, dated the 15th August, 1874, in favor of plaintiff, in consideration of a loan of Rs. 15,000, agreeing to repay the same within 3 years from the above date, and covenanting to pay every half-year interest on the same, at the rate of 8 per cent. per annum, and also to pay the premia on certain policies of insurance made over to plaintiff by way of collateral security. In the event of failure in payment on due date of interest and premia, the obligors made themselves liable to pay the full amount of the bond debt. The bond also contained the stipulation that it should be optional with the obligee to claim, and, if necessary, to sue for the full amount of the bond on the failure of any one or more stipulated payment, or on the full expiry of the period of three years. *Held* that the bond was not an instalment bond, and, therefore, article 75 was inapplicable. *Held* by STUART, C. J., that limitation commenced after the expiration of the 3 years allowed by the bond for payment of the debt. *Held* by SPANKIE, J., that article 80 applied to the suit, and limitation would run from the date when the bond became due ; that, according to the stipulation in the bond, it would become due on failure in payment on date of both the interest and premia, and not on failure in payment of either of them only. *Held*, further, that arts. 67 and 68 were not applicable to the suit.—2 Al. 322.

On the 3rd February, 1871, the defendants, having borrowed Rs. 1,000 from the plaintiffs, executed in favour of the latter an instrument in which they mortgaged, by way of conditional sale, certain immoveable property as security for the loan, and in which it was provided that they should pay certain interest on such sum annually and should pay such sum on the expiration of five years from the date of such instrument, and in the event of failure in these respects that the plaintiffs might apply for foreclosure. On the 18th January, 1879, the plaintiffs sued the defendants for the balance of such sum and interest, waiving their claim on such property, and suing for such balance as a simple debt, as such instrument was not registered. *Held*, following *Sheo Dial v. Prag Dat Misr*, I. L. R., 3 Al. 229, that, inasmuch as such instrument involved a personal obligation of the defendants distinct and severable from the obligation in respect of such pro-

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

perty such instrument, notwithstanding it was not registered, was admissible as evidence in support of the claim to enforce the money-obligation; and it was also admissible in proof of the fact that the debt was not exigible from the defendants until on and after the expiration of five years from the date of the loan. *Held* also that the limitation period in No. 66, sch. ii of Act XV of 1877, was not applicable, as the claim of the plaintiffs was not based on a single bond, that is to say a bill or written engagement for the payment of money, without a penalty.—4 Al. 3.

A bond containing a stipulation “that if the principal and interest is not paid up at the stipulated period, then the obligee will be at liberty to recover the whole of his money, together with the interest fixed, by instituting a suit from my moveable and immoveable property, my own ‘milk,’ does not create a mortgage upon any property of the obligor. To such a bond art. 66 of sch. ii. of the Limitation Act (XV of 1877) is applicable; but where the instrument is registered, art. 116 may be applied to a suit for failure to pay the bond debt.—14 Al. 162.

See I. L. R., 6 Cal. 94, noted under art. 116.

67.—On a single bond where no such day is specified.	Three years	The date of executing the bond.
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**Note.**—See I. L. R., 2 Al. 322, noted under Art. 66.

68.—On a bond subject to a condition.	Three years	When the condition is broken.
69.—On a bill of exchange or promissory note payable at a fixed time after date.	Ditto.	When the bill or note falls due.
70.—On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Ditto.	When the bill is presented.
71.—On a bill of exchange accepted payable at a particular place.	Ditto.	When the bill is presented at that place.
72.—On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years	When the fixed time expires.
73.—On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Ditto.	The date of the bill or note.

#### Notes.

*Held*, that a suit, brought in March 1881 upon a promissory note, dated the 12th of September 1875, payable at any time within six years upon demand was not barred by limitation, being governed not by article 120 of Schedule II of the Indian Limitation Act of 1877.—I. L. R., 6 Madr. 290.

See I. L. R., 2 Madr. 113, noted under sec. 2.



Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years. (continued.)

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| 74. On a promissory note or bond payable by instalments. | Three years . | The expiration of the first term of payment, as to the part then payable; and, for the other parts, the expiration of the respective terms of payment. |
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**Note.**—See I. L. R., 18 Cal. 515 noted under Art. 116.

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| 75.—On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one instalment, the whole shall be due. | Three years | When the first default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver. |
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#### Notes.

When default was made in payment of several instalments, but subsequently payments were made and accepted on account of them, it was held that limitation ran from the date of first default of which there was no waiver.—Al. H. C. R., 1874, p. 88.

Waiver must be an intentional act with knowledge, and it is incumbent on any party insisting on a verbal agreement in substitution of a written contract to show that both the parties understood the substituted agreement.—L. J. 36 Exch., 404.

A entered into a verbal agreement with B to pay a debt due in monthly instalments, B reserving to himself the right to claim payment of the whole sum due on default of three successive instalments. A failed to pay any instalment. Four years after the first instalment was due, B sued A to recover the sum due on the various instalments not barred by limitation. *Held*, that B was not bound to sue for the whole amount due directly on A's failure to pay the three successive instalments. *Semble*.—Art. 75, Sched. II of Act XV of 1877, does not apply according to its strict terms to a suit brought upon a verbal contract.—I. L. R., 3 Cal. 619.

When a debt is made payable by instalments, with a proviso that, on default of payment of any one instalment, the whole debt, or so much of it as may then remain unpaid, shall become due, limitation runs from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver, and suspends the operation of the law of limitation; but merely allowing the default to pass unnoticed does not.—5 Cal. 97.

The mere fact that a creditor has done nothing to enforce a condition in an instrument, under which the whole debt became due on failure in the payment of one instalment, is no evidence of waiver within the meaning of art. 75 of the Limitation Act.—14 Cal. 397.

A bond, payable by instalments, provided that if default was made in paying one instalment the whole debt should become due. The amount of the third instalment was paid five days after it became due. The Lower Court found that this payment was accepted by the obligee as a payment made on account or in satisfaction of the third instalment, and not as a mere part payment on reduction of the whole debt, and that the circumstances indicated an intention to waive the forfeiture though there was no express waiver: *Held*, that the acceptance of the amount of the third in-



instalment constituted a waiver within meaning of art. 75, of sch. II of the Limitation Act, 1877.—12 Madr. 192.

Where a bond is payable by instalments, and expressly stipulates for the payment of the whole debt on failure in the payment of any instalment, the law of limitation runs on the whole amount of the bond against the obligee from the day on which the obligor first makes default in the payment of any instalment, unless the obligee waive the default, and afterwards from the day on which any fresh default is made in respect of which there is no waiver. The obligee may waive the default under Acts IX of 1871 and XV of 1877, sch. II, art. 75, but the Courts have no authority to compel him to waive it. Neither Act VIII of 1859, sec. 194, nor Act X of 1877, sec 210, confers any authority on the Courts to relieve a contracting party from such an express stipulation in a bond payable by instalments as to the consequence of default in punctual payment of the instalments. A debt being presently due, an agreement to pay it by instalments, with a stipulation that, on default, the creditor may demand immediate payment of the whole balance due with interest, is not to be relieved against in equity. Such a stipulation is not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner. The defendant executed to the plaintiff a bond payable by instalments, and expressly stipulating for the payment of the whole amount on failure to pay any instalment on the day fixed. He paid the first instalment, but made default in paying the second, which fell due on the 3rd August, 1878. On the 20th August plaintiff sued to recover the whole balance due on the bond. Defendant admitted the bond, but pleaded tender of the amount of the second instalment soon after the due date, and prayed for payment by instalments without any interest. The first Court passed a decree in the plaintiff's favour for the amount claimed with costs, but ordered defendant to pay Rs. 100 and the costs at once, and the balance by yearly instalments of Rs. 100 each, with interest at 6 per cent. till payment. The District Judge, in appeal, affirmed the decree, with a slight variation as to interest, which he directed the defendant to pay on over-due instalments only. *Held*, by the High Court on second appeal, that neither of the lower Courts had jurisdiction, without the consent of the parties, to substitute, for the contract made by them, terms which the Court preferred. *Held* also that plaintiff was entitled to sue on the day after that on which the default was made, viz., on the day after that fixed for the payment of the instalment, and that the Subordinate Judge had no power to rule the contrary.—4 Bom. 96.

The mere acceptance by the obligee of a bond payable by instalment, which provides that in case of failure to pay one or more instalments the whole amount of the bond due shall become payable, of instalments after default, does not constitute a "waiver" of the obligee's right to enforce such provision. In the case of such a bond the cause of action arises on the first default, and limitation runs from the date of such default.—2 Al. 857.

L obtained decree against U, dated the 24th September, 1867, for possession of a certain estate subject to this provisions, viz., that if U paid in cash into the treasury of the Court, year by year, for L's maintenance, so long as she might live, an allowance of Rs. 15 per mensem, in three instalments of Rs. 60 each, the decree for possession should not be executed, but if default were made in payment of three such instalments, L should be entitled to delivery of possession of such estate. The first default was made on the 18th January, 1874, but L waived the benefit of the provision. A fresh default was made, and on the 23rd January, 1880, L applied for

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

possession of such estate. *Held* that the provisions of column 3, art. 75, sch. ii. of Act XV of 1877, were not applicable to this case, but art. 179 (6) of that schedule contained the law which must govern it; and the date upon which such decree become capable of execution for possession being the 18th January, 1874, the date of the first complete default, the application of 23rd January, 1880, was barred by limitation.—I. L. R., 4 Al. 83.

See I. L. R., 5 Cal. 21 and 2 Al. 322, noted under Art. 66.

76.—On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years	The date of the delivery to the payee.
77.—On a dishonoured foreign bill, where protest has been made and notice given.	Ditto.	When the notice is given.
78.—By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance.	Ditto.	The date of the refusal to accept.
79.—By the acceptor of an accommodation-bill against the drawer.	Ditto.	When the acceptor pays the amount of the bill.
80.—Suit on a bill of exchange, promissory note or bond not herein expressly provided for.	Ditto.	When the bill, note or bond becomes payable.

### Notes.

The defendant executed, in favour of plaintiff, a bond hypothecating certain moveable properties. The bond was not registered. Possession of the moveable properties had not been given to plaintiff. The suit was brought more than three years, but within six years, from the date fixed in the bond for repayment of the loan. It was contended for the defence that the suit was barred by limitation and that the article applicable to the case was art. 80 or art. 115 of the Limitation Act. For the plaintiff it was argued that a suit on a bond hypothecating moveable properties not being otherwise provided for, the suit fell within art. 120, whereby a period of six years is provided. *Held*, that the suit is governed by art. 80 of the Act. "The power to bring the moveable property to sale is an incident in the nature of an accessory to the right to recover the debt, and, if that right becomes incapable of being enforced owing to the lapse of three years, the power to sell the security must likewise cease to be capable of being exercised. In the absence of a special provision applicable to a suit brought to enforce the sale of the security we must hold that the period of limitation is three years and that the suit is governed by art. 80."—I. L. R., 11 Madr. 153.

See I. L. R., 2 Al. 322, noted under art. 66.

81.—By a surety against the principal debtor.	Three years	...   When the surety pays the creditor.
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Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part VI.—Three years.—(continued.)**

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| 82.- By a surety against a co-surety.      | Three years | When the surety pays anything in excess of his own share. |
| 83.- Upon any other contract to indemnify. | Ditto.      | When the plaintiff is actually damaged.                   |

**Notes.**

Where defendant executed a bond of indemnity in case of the misbehaviour of a third party, who subsequently embezzled, it was held that the date of embezzlement was the date when the plaintiff was damaged.—12 Bom H. C. R., 238.

In 1864 a lease of a house was granted to A for a term of 10 years. The lease contained a covenant to repair. A died, and B, his administrator, assigned the lease to another, and it ultimately became vested in the plaintiff. In 1872 the plaintiff assigned the lease to the defendants, "under and subject to the covenants" therein contained. The defendants failed to repair, and after the term had expired, C, the representative of the lessor, sued B for arrears of rent and damages for non-repair. B defended the suit, but C obtained a decree against him for Rs. 6,167-3 and costs, amounting in all to Rs. 8,328-3. His own costs amounted to Rs. 1,491-1. In 1876 B paid C the Rs. 8,328-3. In 1877 B sued the plaintiff for the amount which he had been compelled to pay C, and for the amount of his own costs. The plaintiff gave notice to the defendants to intervene and defend, if they desired; but they did not reply, and the plaintiff consented to a decree for Rs. 6,932-12-11 with costs. Thereupon the plaintiff instituted the present suit to recover from the defendants the sum recovered from him by B, together with his own costs of defence. *Held* that the suit was not barred under art. 83, as the time when the plaintiff was actually damaged was when B recovered against him.—I. L. R., 5 Cal. 811.

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| 84.—By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid. | Three years | The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance. |
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**Notes.**

The termination of the suit means the date when judgment is given.—I. L. R., 7 Bom. 518.

A solicitor was retained in July 1871 to execute a decree. In November 1871 a prohibitory order was made in the cause, after which the solicitor did nothing more in the matter. In June 1872 the decree-holder and judgment-debtor settled the matters in dispute between them without the knowledge of the solicitor, but this compromise was not made through, or certified to, the Court which passed the decree. In a suit brought in December 1875 by the solicitor against the decree-holder to recover the amount of his bill of costs, *held* that the plaintiff's claim was not barred, because there was no discontinuance by the solicitor of the business which he was conducting for the defendant, nor was that business terminated. The compromise between the defendant and her judgment-debtor cannot be recognized by the Court and therefore the Court cannot hold that that com-

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

promise was the “termination of the suit or business” in respect of which these costs became due.—1 Bom. 505.

<b>85.</b> —For the balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.
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#### Notes.

There must be cross-demands, the striking of the balance between which constitutes a new consideration for the promise on the part of the person against whom the balance is found to pay it.—9 Bom. H. C. R., 429.

The article 85 is intended to apply to cases where an account has been going on between two parties, and balances have been struck from time to time, showing the amount due from one of such parties to the other; and the suit to which that article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account. A creditor who does not openly assent to an amount acknowledged by his debtor to be due to him, is nevertheless entitled to take advantage of such acknowledgment so long as it remains uncontradicted and unexplained by his debtor. See sec. 19.—I. L. R., 6 Cal. 447.

A employed B as his agent. B alone kept written debit and credit accounts. A sued B for a balance due on the account between them:—*Held*, that the debit and credit account showed reciprocal demands between plaintiff and defendants, and that the account was a mutual open and current account within the meaning of Limitation Act, 1877, sch. II. art. 85.—10 Madr. 199.

From the month of September, 1873, until the month of May, 1874, the plaintiffs at Bombay and the defendant at Karachi had dealings with one another. It was the practice for the defendant at *Karachi* to draw *hundis* upon the plaintiffs at Bombay; which the plaintiffs duly accepted and paid at Bombay; and, in order to put the plaintiffs in funds, the defendant was in the habit of drawing *hundis* upon other firms in Bombay in favour of the plaintiffs, the amount of which *hundis* the plaintiffs realised from time to time at Bombay. Until the 8th January, 1874, the balance of the account was sometimes in favour of the plaintiffs and sometimes in favour of the defendants. After that date the balance of the account was always in favour of the plaintiffs, who continued to make advances up to the 10th May 1874. The last payment made by the defendant was on the 27th April, 1874. The last advance made by the plaintiffs was on the 10th May, 1874. On the 10th May, 1874, the total balance due by the defendant was Rs. 8,514 12 2. The plaintiffs calculated interest on this sum up to the 9th April, 1877, and on the 19th April, 1877, filed the plaint in this suit to recover the said amount. The defendant pleaded limitation. The plaintiffs contended that the account between them and the defendant was a mutual account, and that, under clause 87 of Schedule II of the Limitation Act, XV of 1877, the period of limitation dated from the day of the last advance made by them to the defendant, viz., 10th May 1874. *Held*

Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part VI.—Three years.—(continued.)**

on the authority of *Ghaseeram v. Manohar Doss*, that the account between the plaintiffs and the defendant was a mutual, current and upon account within the meaning of clause 87 and that the suit was not barred. Literally construed, clause 87, would apply only to those cases in which both parties have in the course of their dealings made *actual* demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties; in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other.—6 Bom. 134. -

See I. L. R., 10 Madr. 259, noted under sec. 19; 3 Al. 523, noted under sec. 19; 5 Cal. 759, noted under art. 59.

<b>86.</b> —On a policy of insurance when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers.	Three years	When proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff, or any other person.
<b>87.</b> —By the assured to recover premia paid under a policy voidable at the election of the insurers.	Ditto.	When the insurers elect to avoid the policy.
<b>88.</b> —Against a factor for an account.	Ditto.	When the account is, during the continuance of the agency, demanded and refused, or where no such demand is made, when the agency terminates.
<b>89.</b> -By a principal against his agent for moveable property received by the latter and not accounted for.	Ditto.	Ditto. ...

**Notes.**

In the year 1857, A died, leaving a son, the plaintiff B, and the defendants C and D, his widows, surviving him. C took possession of all A's property. The plaintiff B was the son of D, and shortly after A's death, D gave birth to another son, the plaintiff E. In 1865 D instituted a suit against C, and B and E, alleging that A had left a will. In this suit, C claimed to be the heiress of A. No decree was made in the suit, which was compromised. In November, 1877, B and E entered into possession of a shop, which had belonged to their father, and which had been managed, during their minority, by the defendant C. In 1879 the plaintiffs instituted the present suit, claiming to recover from C the property of A come to her hands. *Held* that, so far as the immoveable property was concerned, the case fell either under art. 120 or art. 144; and as to the moveable property, under art. 89 or 90.—I. L. R., 5 Cal. 692.

A suit to recover from the representatives of a deceased Agent certain sums of money which had been received by such Agent in the course of his duties and misappropriated by him, will be governed by the limitation prescribed by art. 116, when the contract under which the Agent was em-

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

ployed is contained in a duly registered instrument. In a suit for compensation for breach of a contract in writing and registered, whether such compensation be for a liquidated or unliquidated sum, the limitation applicable is six years as prescribed by art. 116.—12 Cal. 357.

Where an agent for the sale of goods receives the price thereof, the agency does not terminate, with reference to secs. 201 and 218 of the Contract Act (IX of 1872), until he has paid the price to the principal: and a demand made by the principal for an account of the price is made "during the continuance of the agency" within the meaning of sch. ii, art. 89 of the Limitation Act (XV of 1877): and a suit by the principal to recover the price is therefore within time if brought within three years from the date of such demand. The agency does not terminate immediately on the sale of the goods. It does not terminate at the time when the plaintiff obtained knowledge of the defendant's breach of duty.—12 Al. 541.

90.—Other suits by principals against agents for neglect or misconduct.	Three years	When the neglect or misconduct becomes known to the plaintiff.
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#### Note.

See I. L. R., 12 Cal. 357, noted under art. 89; 5 Cal. 692, noted under art. 89.

91.—To cancel or set aside an instrument not otherwise provided for.	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.
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#### Notes.

A Hindu family being heavily oppressed with debts, ancestral and otherwise, the two elder brothers of the family, for themselves and as guardians of their minor brother, under Act XL 1858, applied to and obtained from the District Judge an order, under sec. 18 of the Act, for the sale of several portions of the ancestral estate, and sold the same under registered, deeds signed by the Judge. Within twelve years after the registration the adopted son of the minor brother brought several suits against the purchasers to set aside the sales and recover back his share of the property, alleging that the two elder brothers had made the sale fraudulently and illegally to satisfy personal debts of their own. *Held*, that a suit of this nature is not a suit "to set aside an order of a Civil Court" under art. 15, sched. ii. of Act IX of 1871 (art. 13 of Act XV of 1877); nor is it a suit "to cancel or set aside an instrument not otherwise provided for" under art. 92 (91 of Act XV of 1877), but that it is governed by art. 145 (144 of Act XV of 1877).—I. L. R., 5 Cal. 363.

In a suit instituted in 1884 by a husband and wife to have a deed, granting land, which was executed by the husband in 1872, set aside on the ground that it had been obtained from the latter by fraud and undue influence, the facts relied upon were known to the co-plaintiff husband from the date of the deed. Although in another suit a sale by the husband, effected in 1879, was set aside in 1882, on the ground of his having been unduly influenced, he was not at the time of the previous transaction, nor for some years after it, mentally incompetent or unable to allow that knowledge

to operate on his mind. *Held* that, therefore, the suit, falling within sec. 91 of Schedule II of Act XV of 1877, was not maintainable by either of the plaintiffs.—15 Cal. 58.

One D died in 1849, leaving an ikrarnamah or will. His widows entered into possession of his property, and the survivor died on the 23rd April 1886. The predecessors in estate of the plaintiffs brought a suit to set aside the ikrarnamah, which suit was dismissed in 1864, on the ground that they had no cause of action during the lifetime of the surviving widow. On the 29th June 1889 the plaintiffs, as the heirs of D after the death of the surviving widow, instituted a suit to recover possession of the property of D from the defendants, who claimed to have come into possession thereof under the ikrarnamah upon the death of the widow. *Held*, that the suit was governed by the limitation of three years for a suit to set aside an instrument, and not by the general limitation prescribed for suits to recover immoveable property, as after the widow's death the parties in possession were those claiming under the ikrarnamah, who could not be displaced except by setting it aside. *Raghubar Dyal Sahu v. Bhikya Lal-Miseer* approved. *Jagadamba Chaodhrani v. Dakhina Mohum Roy Chaodhri & Janki Kunwar v. Ajit Singh* referred to.—19 Cal. 629.

The period of limitation for suits to declare title is six years from the date when the right accrued, under Indian Limitation Act, 1877, sch. II, art. 120; and this period is not affected by art. 91, though the effect of the declaration is to set aside an instrument as against the plaintiff.—10 Madr. 213.

On 23rd March 1878 plaintiff executed to defendant a document purporting to be a deed of gift. In 1886 plaintiff sued to cancel the document alleging that defendant on 11th May 1881 had agreed to execute a release but had not done so: that suit was dismissed for non-payment of duty due under the Court Fees Act. The plaintiff now sued in 1887 for a declaration that the document "was executed for nominal purposes and was not intended to take effect":—*Held*, (1) that since the cause of action in the suits of 1886 and 1887 were not the same, the claim in the latter suit was not *res judicata*; (2) that the suit was not barred by limitation.—13 Madr. 44.

Articles 91, 92, and 93 of schedule II of the Limitation Act (XV of 1877) apply only to suits brought *expressly* to cancel, set aside, or declare the forgery of, an instrument; but they do not apply to suits where substantial relief is prayed, and where the cancellation or declaration is merely ancillary and not necessary to the granting of such relief.—16 Bom. 186.

K, to whom B had given a usufructuary mortgage of certain land, promising to put him in possession, sued B for the mortgage-money, B having failed to put him in possession. The suit was instituted on the 22nd November, 1875. On the 25th of the same month K, learning that B was about to dispose of his property, caused a notice to issue to him directing him not to transfer any of his property. This notice was served on B on the 29th November. On the 1st December, 1875, B transferred certain land to T by way of sale. K's suit was dismissed by the lower Courts, but the High Court, on the 7th August, 1876, gave him a decree. Certain property belonging to B was sold in execution of this decree, but the sale-proceeds were not sufficient to satisfy the amount due on the decree. Kheret-upon, on the 1st July, 1879, sued T to cancel the conveyance to him by B on the ground that it was fraudulent and without consideration. *Held* that the words in No. 91, sch. ii. Act XV of 1877, "when the facts entitling



the plaintiff to have the instrument cancelled or set aside became known to him," must be construed to mean "when, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit," and consequently the period of limitation for K's suit began to run, not merely when he had knowledge of the fraudulent character of the conveyance to T, but when, having such knowledge, it had become apparent to him that there was no other property than that conveyed to T available for the realization of the unsatisfied balance of his decree, and the suit was within time.—3 Al. 394.

The plaintiff sued to set aside a mortgage by conditional sale of certain immoveable property belonging to him, made on his behalf during his minority, and for possession of the property. *Held* that the suit was one described in No. 142, sch. ii. Limitation Act, 1877, and not in No. 91 of that sch.—5 Al. 490.

The plaintiffs sued for possession of certain immoveable property, "by avoidance of a spurious deed of gift" executed by one N, deceased, in favour of the defendant. H, one, of the plaintiffs, joined in the suit under an agreement with the other plaintiffs that he should defray the costs of the suit from the Court of first instance up to the Privy Council, and that he should then become proprietor of one-half of the property in suit and be entitled to half the costs. *Per* STRAIGHT, J.—That the suit was governed by No. 144, and not No. 91, sch. ii. of the Limitation Act of 1877. *Per* STUART, C. J.—That the suit was governed by No. 91, and not No. 144, sch. ii. of that Act. *Sikher Chund v. Dulpatty Singh*, I. L. R., 5 Cal. 363, distinguished.—5 Al. 76.

The plaintiff, alleging that he was the proprietor of certain land, that defendant No. 2 had wrongfully and fraudulently mortgaged it to defendant No. 1, and that defendant No. 1 had applied for foreclosure of the mortgage, and notice of foreclosure had issued, claimed "that, the mortgage-deed being set aside, the land be protected from the illegal foreclosure by cancelment of the foreclosure proceedings." *Held* that the suit was not strictly one for the cancelment or setting aside of an instrument to which the limitation in No. 91, sch. ii. of the Limitation Act, 1877, would apply, (which relates to suits of the nature of those referred to in sec. 39 of the Specific Relief Act), but rather one for a declaratory decree.—5 Al. 322.

One of the heirs of a deceased Muhammadan sued for her share under the Muhammadan Law of the estate of the deceased, and to set aside a gift of his estate by the deceased, as invalid under that law, by reason that possession of the property transferred by the gift had not been delivered by the donor to the donee. *Held* that, because the suit was not brought within three years from the date of the gift, it did not necessarily follow that the suit was barred by art. 91 of the Limitation Act, 1877, inasmuch as the plaintiffs title to impeach the gift could only accrue from the moment when, by receipt of possession, the gift had become operative by law.—6 Al. 207.

The plaintiff in a suit claimed possession of villages said in the plaint to be "detailed below." No details of the villages were given in the plaint itself, but a separate paper containing a list of villages was filed with the plaint. The plaintiff obtained a decree for possession of "all the villages claimed," but there was no indication in the decree what those villages were. *Held* that the Court executing the decree was not justified in reading the contents of the list of villages attached to the plaint into the decree, and awarding the decree-holder possession of the villages named in such

Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part VI.—Three years.—(continued.)**

list. S. A. No. 310 of 1882, decided the 11th August, 1882, followed.—6 Al. 30.

A Muhammadan who in October, 1875, executed a deed of gift of his property, under which possession was taken by the donees, died in June, 1885, never having taken any steps to have the deed of gift set aside. In February, 1886, a suit was brought by his nephew, claiming a share in the donor's estate by right of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was found that the plaintiff was aware of the existence of the deed soon after its execution, and that if there were any facts entitling him to have it cancelled, those facts were known to him more than three years before the institution of the suit. *Held* that the plaintiff had, during the donor's lifetime, no reversionary or vested interest in the estate, but a mere possibility of inheritance, and consequently the donor, when he executed the deed, had full disposing power over his property, and the right which, at his death, accrued to the plaintiff, came to the latter affected by the donor's acts and dispositions; and that as a suit by the donor to set aside the deed would, at the time of his death, be barred by art. 91 of the Limitation Act (XV of 1877), such a suit was also barred against the plaintiff who claimed through him, the cancelment of the deed being a substantial and necessary incident of the claim, and the necessity which rested upon the plaintiff for obtaining such cancelment before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. *Abdul Wahid Khan v. Nuran Bibee and Jagadamba Chaodhrain v. Dakhina Mohun* referred to.—11 Al. 456.

See I. L. R., 15 Madr. 6, noted under sec. 13 of the Civ. Pro. Code; 16 Bom. 186, noted under art. 91.

92.—To declare the forgery of an instrument issued or registered.	Three years	When the issue or registration becomes known to the plaintiff.
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**Note**—See I. L. R., 13 Cal. 629 & 16 Bom. 186, noted under art. 91.

93.—To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three years	... The date of the attempt.
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**Notes.**

In a suit in which the plaintiff had obtained a decree and the defendant had appealed to her Majesty in Council, a third party applied to be added as a respondent, on the ground that, by registered deed, the plaintiff had conveyed to him a share of the property decreed. The defendant objected that the deed was a forgery, but an order was made that the applicant should be joined as a respondent, without deciding whether the deed was or was not genuine, and "without prejudice," in the words of the order, "to any action or proceeding by the defendant." *Held*, that the setting up the deed and insisting upon it for this purpose constituted "an attempt to enforce" it, and that a suit brought, more than three years after the making of that order, by the appellant against the party so joined

Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part VI.—Three years.—(continued.)**

as a respondent, to have the deed set aside as being false and fabricated was barred by limitation.—I. L. R., 8 Cal. 178.

See I. L. R., 19 Cal. 629, noted under art. 91.

<b>94.</b> —For property which the plaintiff has conveyed while insane.	Three years	When the plaintiff is restored to sanity, and has knowledge of the conveyance.
<b>95.</b> —To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	Ditto.	When the fraud becomes known to the party wronged.

**Notes.**

Art. 95 was not intended to apply to suits for possession of immovable property when fraud is merely a part of the Machinery by which the defendant has kept the plaintiff out of possession. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of such act.—I. L. R., 3 Cal. 504.

Certain of the grantees of lands, granted for the maintenance of the grantees and the support of a mosque and other religious purposes, sued for the removal of the superintendant of the property from his office. The parties to this suit entered into a compromise, which made certain arrangements for the management of the property, and a decree was made in accordance with the compromise. The grantees who were not parties to this suit then sued the grantees who were to set aside the compromise and decree on the ground of fraud. *Held* that the suit fell within the terms of No. 95, sch. ii. of the Limitation Act, 1877, and there was nothing about it which made the exemption of sec. 10 of that Act applicable to it.—5 Al. 294.

Certain members of a joint Hindu family partitioned the family property among them in such a way as to give one member of the family, who at the time of the partition was a minor, less than the share to which he was entitled. The minor was represented in the partition by his uncle, though the uncle was not the natural guardian of the minor, nor in any other way entitled to deal with the minor's property. The minor on attaining majority brought a suit for recovery of the full share to which he was entitled. *Held* that this was not a suit for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstances affect in any way the rights of the minor. The suit was therefore not subject to the limitation of three years prescribed by Arts. 95 and 96 of the second schedule of Act No. XV of 1877.—14 Al. 498.

See I. L. R., 6 Al. 30, noted under art. 91; 12 Madr. 168, noted under sec. 6; 13 Bom. 221, noted under art. 12; 14 Bom. 222, noted under sec. 28; 16 Bom. 1, noted under sec. 280 of the Civil Pro. Code.

<b>96.</b> —For relief on the ground of mistake.	Three years	...	When the mistake becomes known to the plaintiff.
<b>97.</b> —For money paid upon an existing consideration which afterwards fails.	Ditto.	...	The date of the failure.

Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part VI.—Three years.—(continued.)**

**Note.**

See I. L. R., 19 Cal. 123, noted under art. 62; 11 Al. 47, noted under art. 64; 14 Al. 498, noted under art. 95.

<b>98.</b> —To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years	The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.
<b>99.</b> —For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers.	Ditto.	The date of the plaintiff's advance in excess of his own share.

**Notes.**

A suit for recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale, where the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, is governed by art. 132, and not by art. 99.—I. L. R., 6 Cal. 549.

The plaintiffs and defendants were the proprietors of two separate plots of land, separately assessed with Government revenue, but covered by the same towzi number. Plaintiffs paid the Government revenue, due from the defendants in respect of their plot from September 1873 to June 1885, in order to prevent the two plots being brought to sale, and on the 28th September 1885 instituted a suit to recover the amount. It was contended on behalf of the plaintiff, that art. 132 of sch. II of Act XV of 1877 applied to the facts of the case, and that the plaintiffs were therefore entitled to recover all amounts so paid within twelve years of date of suit. *Held* that, as on the authority of *Kinu Ram Doss v. Muzaffer Hosain Shaha*, I. L. R., 14 Cal., 809, the plaintiffs had no charge upon the property in respect of which the payment had been made, and as on the authority of *Ramdin v. Kalka Pershad*, L. R., 12 I. A., 12; I. L. R., 7 Al. 502, art. 132 only applied to cases where the money sought to be recovered is a charge upon the property, the limitation applicable to the case was that provided by art. 99, and the plaintiffs' claim in respect of all payments made more than three years before suit was barred.—I. L. R., 15 Cal. 542.

One of two persons, having a joint holding from a mittadar, paid the whole of the mittadar's dues for one year, and more than three years after the date of payment he sued the other for contribution :—*Held*, the payment did not create a charge on the land, and the suit was consequently barred by limitation.—15 Madr. 258.

In 1868, the uncle of the plaintiff brought a suit, (No. 176 of 1868), against five members of the undivided family, to which the defendants in the present suit belonged, and obtained a money-decree. In execution of that decree, he attached and sold certain land, in which all the members

Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part VI.—Three years.—(continued.)**

of the defendants' family were interested. At the sale he purchased the land himself, and was put into possession. In 1873, he began to pay the assessment upon the whole property. Subsequent litigation took place between him and the defendants' family, pending which the plaintiff separated from his uncle, and obtained the property in question as his share. The result of that litigation was a decree by the High Court, on the 23rd September, 1879, declaring that the plaintiff's uncle was only entitled to the interest of the five members of the family who had been defendant in his suit (No. 176 of 1868) in execution of the decree in which the property had been sold. The plaintiff brought the present suit, in 1883, against the other members of the family to recover their proportionate share of the assessment for the years 1875-1878, during which period he had paid the whole assessment. He prayed for a sale of their interest in the land. Both the lower Courts held that the payment of assessment did not create a charge on the property, and that the plaintiff having omitted to sue within three years from the date of the payments made by him, the present suit was barred. On appeal by the plaintiff to the High Court. *Held*, confirming the lower Court's decree, that the suit was barred. The plaintiff paid the assessment as full owner of the property, and it was entirely by his own action that the defendants had been excluded from the property, and did not pay their quotas of the assessment. Under those circumstances, the payments could not be regarded as salvage payments so as to make them a charge, according to equity, justice, and good conscience, upon the shares of the other co-owners.—11 Bom. 313.

See I. L. R., 11 Bom. 133, noted under art. 36.

<b>100.</b> —By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years	When the right to contribution accrues.
<b>101.</b> —For a seaman's wages.	Ditto.	To end of the voyage during which the wages are earned.
<b>102.</b> —For wages not otherwise expressly provided for by this schedule.	Ditto.	When the wages accrue due.
<b>103.</b> —By a Muhammadan for exigible dower ( <i>mu'ajjal</i> .)	Ditto.	When the dower is demanded and refused, or (where during the continuance of the marriage no such demand has been made) when the marriage is dissolved by death or divorce.
<b>104.</b> —By a Muhammadan for deferred dower ( <i>mu'wajjal</i> .)	Ditto.	When the marriage is dissolved by death or divorce.
<b>105.</b> —By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee.	Ditto.	When the mortgagor re-enters on the mortgaged property.
<b>106.</b> —For an account and a share of the profits of a dissolved partnership.	Ditto.	...  The date of the dissolution.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(continued.)

#### Note.

See I. L. R., 4 Al. 437, noted under sec. 215 of the Civil Procedure Code.

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| <b>107.</b> —By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate. | Three years | The date of the payment.  |
| <b>108.</b> —By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.  | Ditto.      | When the trees are cut down.  |
| <b>109.</b> —For the profits of immovable property belonging to the plaintiff, which have been wrongfully received by the defendant.                | Ditto.      | When the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession. |

#### Notes.

A claim for mesne profits during a period preceding the three years next before the filing of the plaint is barred by Act XV of 1877, Sch. II, Art. 109. An under-proprietor having been dispossessed by a manager of the superior estate, appointed under the Oudh Taluqdars' Relief Act, 1870, recovered possession under a decree, and afterwards sued for mesne profits. *Held*, that a person who had not himself received the mesne profits having come into possession of the taluq upon its being released from management under the above Act, would not be chargeable with sums, which, as it was alleged, might have been received by way of mesne profits, but had not been received in consequence of the manager's wilful default; there being nothing to show that such taluqdar could be charged with anything more than was actually received by him. There being no rule of law obliging the Court to allow interest upon mesne profits, it is a matter for the discretion of the Court, upon consideration of the facts, whether to allow interest or not.—I. L. R., 10 Cal. 785.

See I. L. R., 4 Cal. 625, noted under art. 36.

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| <b>110.</b> —For arrears of rent.  | Three years | When the arrears become due.   |
| <b>111.</b> —By a vendor of immoveable property to enforce his lien for unpaid purchase-money. | Ditto.      | The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance. |
| <b>112.</b> —For a call by a company registered under any Statute or Act.                      | Ditto.      | When the call is payable.  |
| <b>113.</b> —For specific performance of a contract.   | Ditto.      | The date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.              |

**Notes.**

In a suit for the specific performance of an agreement entered into in 1858, to grant a putta when required, it appeared that the plaintiffs applied to the defendants for a putta in 1874, and in March, 1875, the defendants finally refused to make the grant, and the plaintiffs thereupon instituted their suit for specific performance. *Held* that they were not barred by limitation.—I. L. R., 5 Cal. 175.

Two brothers, V and R, in 1861 agreed together that part of their house should be divided and part enjoyed in common. Each brother was to occupy an assigned division, and have the use in common of the rest. If either wished to leave the house, he was bound to offer his share to the other at a fixed price; or, if he wished to purchase the share of the other, and the other refused to sell, then the party refusing to sell at a fixed price was bound to buy the share of the other brothers who wished to purchase. V called upon R in 1877 either to pay Rs. 418 or give up the house. *Held* that this was an agreement enforceable by law; that until demand no cause of action arose and limitation only began to run from the demand; that specific performance should be granted in the alternative.—3 Madr. 87.

On the 27th October, 1865, the vendor of some immoveable property executed a conveyance of such property to the purchasers. On that date, the vendor was not in possession of the property, although his title to it had been adjudged by a decree against which an appeal was pending. The conveyance did not contain any express promise or undertaking on the vendor's part to put the purchasers into possession. On the 24th February, 1870, the vendor obtained possession of the larger portion of the property, and, on the 23rd August, 1872, of the remainder. On the 5th October, 1877, the purchasers sued the vendor for the possession of the property, stating that "possession was agreed to be delivered on the receipt of possession by the vendor," and that the cause of action was that the vendor had not put them into possession. *Held* that the suit was not one for the specific performance of a contract to deliver possession to which Art. 113 was applicable, but one to obtain possession in virtue of the right and title conveyed to the purchasers to which either Art. 136 or 144 was applicable, and that whichever of them was applicable, the suit was within time.—2 Al. 718.

A suit for money based on an award which directs, its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced; and, as by sec. 30 of the Specific Relief Act, 1877, awards are placed on the same footing as contracts, No. 113, sch. ii of the Limitation Act, 1877, is applicable to such a suit.—5 Al. 263.

A contract was made for the sale of certain immoveable property, in the event of the vendor obtaining a decree establishing his title to the property, in a suit which had been brought for that purpose. The vendor obtained such decree in that suit. The purchaser subsequently brought a suit "to have a sale-deed executed and completed," and for the possession of the property. It was contended that the limitation applicable to the suit was that provided by art. 144 of the Limitation Act, 1877, and not art. 113. *Held* that the suit was essentially one for specific performance of contract, and the limitation applicable was art. 113. The contention that, so far as the suit was for possession of immoveable property, it should be governed by art. 144 was invalid. The right to possession sprang out of the contract of sale, and the relief by giving possession was comprised in the relief by specific performance of the contract of sale, and could not be governed in this suit by any but art. 113. But assuming the suit might, so far as limitation was concerned, be entertained, still as the right to possession was



Description of suit.

Period of limitation.

Time from which period begins to run.

**Part VI.—Three years.—(continued.)**

dependent on the contract of sale, if the suit could not be maintained for specific performance of the contract, it could not be maintained for possession of the property sold under the contract.—6 Al. 231.

In 1871, the plaintiffs and the defendants executed a deed whereby they effected an exchange of certain lands, and each party agreed to resist by legal process or by bringing an action any claim or interference with the other in respect of the property exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that if as a result of such proceedings either of the parties were deprived of the lands exchanged or any part of them, the other should make it up out of certain of his own land. In 1881 the plaintiffs brought an action against a third party who claimed title to some of the exchanged lands, and joined the defendants as defendants, the latter admitting the plaintiffs' title. The plaintiffs were defeated in that suit in 1882. In 1885 (within three years from the time the defendants refused to give them other land) they sued on the deed of 1871 to have the exchange therein provided for carried out. *Held* by the Full Bench that the cause of action arose in 1882, when there was a loss to the plaintiffs in the sense contemplated in the deed, and the defendants were called upon specifically to perform their covenant, and that the present suit having been brought within three years after their refusal to perform it, was within the time fixed by art. 113, sch. ii of the Limitation Act (XV of 1877).—11 Al. 27.

A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by the Limitation Act (Act XV of 1877, sch. ii, No. 113 (for specific performance of a contract) is applicable. The period of limitation applicable to such a suit is that prescribed by No. 116 of sch. ii. of the said Act (for compensation for the breach of a contract in writing registered); and the time from which limitation will run against the mortgagor is, in the absence of any specific provision to the contrary, the date of the execution of the mortgage-deed. *Gauri Shankar v. Surju*; *Husain Ali Khan v. Hafiz Ali Khan*; *Nobocomar Mookhapadhaya v. Siru Mullick*; *Vythilinga Pillai v. Thetchanamurti Pillai*, and *Ganesh Krishn v. Madhavrav Ravji*, referred to.—13 Al. 200.

See I. L. R., 2 Cal. 323, noted under sec. 10.

—For the rescission of a contract. Three years

When the facts entitling the plaintiff to have the contract rescinded first become known to him.

115.—For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.

Ditto.

When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.

**Notes.**

A suit to recover money lent with interest upon a verbal agreement that the loan should be repaid with interest one year from the date of

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VI.—Three years.—(*continued.*)

loan, is governed by art. 115 of Sch. II. of Act XV of 1877, which virtually provides for all contracts, which are not in writing, registered, and not otherwise specifically provided for.—I. L. R., 10 Cal. 1033.

A suit for loss and damaged goods based on breach of contract to deliver is governed by this article.—3 Madr. 107.

The plaintiff sued the defendant who had married the plaintiff's deceased brother's widow, to recover, by way of compensation, the money expended by his deceased brother's family on his marriage founding his claim upon a custom prevailing among the Jats of Ajmere, whereby a member of that community marrying a widow was bound to recoup the expenses incurred by her deceased husband's family on his marriage. *Held* that the suit was one of the character described in art. 115 and not in art. 120.—3 Al 385.

Upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment, breach of the contract to pay is committed, and there is no "continuing breach" within the meaning of sec. 23 nor "successive breaches" within the meaning of art. 115 of the Limitation (Act XV of 1877).—10 Al. 85.

See I. L. R., 15 Madr. 380, noted under sec. 19; 12 Cal. 477, noted under art. 30; 5 Madr. 388, noted under art. 30; 7 Bom. 478, noted under art. 30; 8 Bom. 234, noted under art. 62; 5 Cal. 830, noted under art. 62; 13 Cal. 155, noted under art. 61.

### Part VII.—Six years.

116.—For compensation for the breach of a contract in writing registered. Six years

When the period of limitation would begin to run against a suit brought on a similar contract not registered.

#### Notes.

A suit to recover money due upon a registered bond is a suit for compensation for breach of contract in writing registered, within the meaning of art. 116 and must be brought within 6 years from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered.—I. L. R., 6 Cal. 94.

The suit was for recovery of arrears of rent due under a lease deed in writing registered. The suit was instituted more than three years, but within 6 years, from the date on which the rent was due. It was argued for the defence that the suit was not one for *compensation* so as to fall under art. 116 but one for *rent* due and that, *as such* it fell under art. 110. The High Court, on a reference to all the decisions on the point, held that a suit of this kind was covered by art. 116 of the Act and not by art. 110.—15 Cal. 221.

Article 116 of the limitation Act is applicable to a suit on a registered instalment bond, notwithstanding the express provisions of Article 74. That Article (116) is intended to apply to all contracts in writing registered, whether there is or is not an express provision in the Limitation Act for similar contracts not registered.—18 Cal. 506.

After the date fixed for payment of principal and interest, how claimable when not expressed to be payable under deed.—19 Cal. 19.

Suits for rent, founded on contracts in respect of lands subject to the provisions of the Bengal Tenancy Act, are governed by the limitation provided in that Act.—19 Cal. 1.

Where there is no stipulation in a deed of conditional sale to pay interest after the day fixed for the repayment of principal and interest, a claim for interest after due date is a claim for compensation for breach of contract, and a suit for the recovery of such compensation must be brought within six years from the date of the breach.—19 Cal. 19.

A registered lease granted for building purposes and for establishing a coal depot does not come within the purview of the Bengal Tenancy Act, not being a lease for agricultural or horticultural purposes. The limitation applicable to a suit for the rent reserved in such a lease is that prescribed by Art. 116 of the Limitation Act.—19 Cal. 489.

A suit to recover arrears of rent upon a registered contract is governed by art. 116. Compensation is used in the same sense in that article as in the Contract Act, sec. 73.—3 Madr. 76.

In a suit upon a registered bond payable in eleven yearly instalments, to recover instalments 5-10 from the representatives of two deceased co-debtors, (who, as managing members of an undivided Hindu family, had contracted the debt for family purposes) the plaintiff impleaded G, the son-in-law of one of the deceased co-debtors and his two brothers on the ground that they, in collusion with the widow of such deceased co-debtor had, as volunteers, intermeddled with, and possessed themselves of, substantially, the whole property of the family of the deceased co-debtor: *Held* that G and his brothers were properly joined as co-defendants and were liable for the debt of the deceased to the extent of the assets received by them. *Held* also that even if there had been a misjoinder the plea could not be allowed in second appeal as the defendants had not been prejudiced. *Held* also that, as the plaintiff had shown that some property of the deceased co-debtors had passed to G and his brothers, the burden of proof lay on G and his brothers to show that they had not received so much of the deceased debtors property as would satisfy the debt. *Held* also that as the bond was a registered bond and the property had been misappropriated within three years of the date of the suit, the suit was not barred by Limitation. *Held* also that interest, in the nature of damages, from the date of suit was properly awarded.—3 Madr. 359.

A sued as assignee of a bond (payable in 1872), hypothecating land in the mofussil. B, A's assignor, was a vakil practising in the High Court. B had obtained an assignment of the obligee's interest in the bond sued on, and also another bond for Rs. 3,000 between the same parties after the 1st July 1882, for Rs. 4,500. B had previously purchased the two bonds at a sale in execution of the decree of a Mofussil Court for Rs. 5 each. A's assignment from B purported to be made to A in payment of certain debts owed to him by B. No interest has been paid on the bond and no tender had been made to the plaintiff:—*Held* that the creditor's personal remedy was passed by art. 116 and on the evidence, that there was no consideration for the bond sued on or that it had failed.—11 Madr. 56.

A suit to recover a specific sum of money due upon a registered bond or other written contract is a suit for compensation for breach of contract in writing registered, within the meaning of article 116 of Schedule II of Act XV of 1877, and may be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract which is not registered.—6 Bom. 75.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VII.—Six years.—(continued.)

*Held* that No. 116, sch. ii. of Act XV of 1877, is applicable to a suit on a registered bond for the payment of money.—3 Al. 600.

The defendant, having borrowed money from the plaintiff, gave him a bond, dated the 4th July, 1872, for the payment of such money, with interest, within two years or on certain contingencies contemplated and defined in such bond. Such bond did not specify a day for payment. It was duly registered. On the 30th June, 1880, the plaintiff sued the defendant, stating in his plaint that he had lent the defendant such money; that it was payable on the 4th July, 1874; that on that day he had demanded payment; that the cause of action arose on that day, as the defendant did not pay; and that he claimed such money accordingly. The plaint did not make any mention of such bond. *Held* that the suit was not one which fell within the scope of No. 66 of sch. ii. of Act XV of 1877, but one to which No. 116 of that schedule was applicable, and it might proceed on the plaint without any amendment thereof.—3 Al. 276.

A suit on a registered bond for the payment of money, which has not been paid on the one date, is a suit for compensation for the breach of a contract in writing registered, and therefore the limitation applicable to such a suit is that provided by art. 116.—4 Al. 255.

A contract to pay interest *post diem* on a mortgage ought not to be implied when the parties to the written contract have not expressed therein any such intention. This is particularly the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage. *Narain Lal v. Chajmal Das* followed. *Chhab Nath v. Kamta Prasad* and *Baldeo Panday v. Gokal Rai* referred to. Damages given after the due date of a mortgage for non-payment of the principal money upon the due date, are damages for breach of contract, and not interest payable in performance of a contract; and under art. 116, sch ii., of the Limitation Act (XV of 1877), a suit to recover such damages must be brought within six years from the time when the contract for the breach of which they are claimed was broken. It cannot be said that such damages are, from the date when the contract was broken, and even before they have been ascertained or decreed, a charge upon the property hypothecated, so as to make art. 116 inapplicable. *Price v. The Great Western Railway Co.*, *Morgan v. Jones*, *Cordillo v. Waguelin*, in re *Kerr's Policy*, *Lippard v. Ricketts*, *Cook v. Fowler*, and *Bishen Dyal v. Udit Narayan* distinguished. In such cases there is one breach of the contract, namely, the nonpayment on the date agreed upon; and there is no question of continuing or successive breaches. *Mansab Ali v. Gulab Chand* referred to.—11 Al. 416.

See I. L. R., 12 Cal. 357, noted under art. 89; 10 Al. 85, noted under art. 115; 14 Madr. 465, noted under art. 64; 14 Al. 162, noted under art. 66; 3 Al. 712, noted under art. 65; 13 Al. 200, noted under art. 113; 15 Madr. 157, noted under art. 49.

117.—Upon a foreign judgment | Six years  
as defined in the Code of  
Civil Procedure.

The date of the judgment.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VII.—Six years.—(continued.)

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| 118. To obtain a declaration that an alleged adoption is invalid, or never in fact took place. | Six years. | When the alleged adoption becomes known to the plaintiff. |
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#### Notes.

A purchaser at an execution sale is not as such the representative of the judgment-debtor within the meaning of sec. 115 of the Evidence Act. A Hindu, governed by the Mitakshara School of Law, died on the 12th May, 1867, leaving him surviving a widow B and A brought R, who was admittedly the next reversioner. In July, 1867, B purported to adopt a son D to A, and subsequently in September, 1867, obtained a certificate under Act XL of 1858. In 1872 B obtained a loan from the plaintiff M of Rs. 9,000, and to secure its repayment executed a mortgage of seven mouzahs in favor of M as guardian of D. The money was advanced and mortgage executed at the instigation of R and with his consent, and upon his representation that D was the duly adopted son of A, and it was admitted that the money was specifically advanced for, as well as applied towards, the payment of decrees obtained against A in his lifetime and against his estate after his death. B died in 1878. On the 14th August, 1880, M instituted a suit against D upon his mortgage, and in that suit he made S a party defendant as being the purchaser of the mortgagor's interest in one of the mouzahs included in his mortgage. On the 26th June, 1882, M obtained a decree declaring that he was entitled to recover the amount due by sale of the mortgaged mouzahs. In the proceedings taken in execution of that decree M as opposed by L, who was afterwards held to be a *benamidar* for S, who claimed that he had on the 8th November, 1880, purchased five out of the seven mouzahs at a sale in execution of certain decrees against R. On the 29th February, 1884, L's claim was allowed, and on the 11th Aug., 1884, M brought this suit against L, S, R and D, and the decree-holders in the suits against R, for a declaration of his right to follow the mortgaged property in the hands of S. It was found as a fact that the adoption of D was invalid; that the advance by M to B was justified by legal necessity; and that L was the *benamidar* of S. It also appeared that M had himself become the purchaser of one of the mortgaged mouzahs. The Lower Court gave M a decree declaring him to be entitled to recover the full amount of the mortgage money from the five mouzahs in the hands of S. L and S appealed, and M filed a cross appeal, alleging the adoption to be valid and binding on S. It was contended that S as the representative of R was estopped from denying the validity of D's adoption, and thus having been a party to M's first suit the question as to the liability of the mouzahs to satisfy the mortgage lien was *res judicata* as against him. It was also contended that the five mouzahs should not be saddled with the whole of the mortgage debt, but that the mouzah in the hands of M should bear its proportionate part thereof. *Held* that, as S was merely a party to M's original suit as purchaser of one mouzah, and as he, subsequently to the institution of that suit, acquired R's interest in the five mouzahs, and as R was not a party to that suit nor was his interest represented in any way, the decree was in no way binding against R, and therefore S was not barred by *res judicata* from setting up the interest of R in

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VII.—Six years.—(continued.)

the five mouzahs so acquired by him. *Held*, further, that, though R was estopped by his conduct from disputing the validity of the adoption, or of M's right as mortgagee, S being an auction-purchaser was not bound by R's acts, and was not estopped from disputing the adoption, as he derived his title by operation of law adversely to R, and was thus in a different position from a person claiming under a voluntary alienation. *Held*, also, that, though B purported to execute the mortgage as guardian for D, though D was not the adopted son of A, the substance of the transaction and not the form had to be looked at, and as B had full power to alienate for legal necessity the mortgage was still binding on the estate of A; and further that even if there had been no legal necessity having regard to the fact that it was made with the consent of R, the next reversioner, it equally created a valid charge upon the property, but that the mouzah in the hands of M must bear its share of the mortgage debt, and that the decree of the lower Court was wrong in declaring that the five mouzahs in suit were to bear the whole amount of the debt. It was further contended that D had acquired an absolute title by more than twelve years' adverse possession from the date of his adoption in 1867 before the purchase by S in 1880. *Held* that, as B died within twelve years of the alleged adoption, although under art. 118, Sch. II Act XV of 1877 (which came into force before the adoption could become perfected by efflux of time), a suit for a declaration that an adoption was invalid should be brought within six years from the date when the adoption becomes known to the plaintiff, still having regard to the provisions of arts. 140 and 141, the next reversioner was not thereby prevented from suing to obtain possession within twelve years from the date of the widow's death or when the estate fell into possession, and therefore that S was not barred by limitation from disputing D's title. *Quære*.—Whether the ruling in the Collector of Madura v. Moothoo Ramalinga Sathupathy, 12 Moore's I. A., 397, applies to cases governed by the Mitakshara Law in Northern India, and whether an adoption made by a widow after the death of the husband without his express consent, but with the consent of his near kindred, is valid, or whether the recognition of the adopted son by the next reversioner would likewise render the adoption valid.—I. L. R., 14 Cal. 401.

Where, in a suit brought in 1885, for a declaration that an adoption alleged to have taken place in 1871 was null and void, the *factum* of an adoption was disputed, and it was not shown that the alleged adoption became known to the plaintiff before 1881, *held*, with reference to art. 118 of sch. ii. of the Limitation Act (XV of 1877), that the suit was within time. Jagadamba Chaodhrani v. Dahhtna Mohun Roy Chaodhri distinguished.—9 Al. 253.

119.—To obtain a declaration that an adoption is valid.	Six years	...   When the rights of the adopted son as such are interfered with.
120.—Suit for which no period of limitation is provided re in this schedule.	Ditto.	When the right to sue accrues.



## Notes.

In a suit brought in 1875, in which the plaintiff claimed, as heir of her husband, a share in a certain taluq, together with exclusive right of worship of an idol A, and the right to the worship of an idol B, for one-sixth of every year, from the possession and enjoyment of which she alleged she had been dispossessed by the defendants in 1866 : *Held* that her claim, as to the idol B, came under the provisions of art. 131 and was not barred ; but as to A the claim was governed by art. 120.—4 Cal. 683.

The defendant took certain land from the plaintiff under a registered lease, which contained a clause prohibiting the defendant from digging a tank on the land without the plaintiff's permission. The defendant having, nevertheless, constructed a tank without such permission, the plaintiff brought a suit to compel him to fill up the tank, or in case he should fail to do so, for compensation. *Held* that art. 120 was applicable.—6 Cal. 34.

Sec. 27 of the Bengal Act (VIII of 1869) only relates to such suits as could be brought either by the landlord or tenant under Act X of 1859, and will not apply to an alternative claim, put forward in a suit for ejectment, to compel the defendant to remove trees from certain lands leased to him for agricultural purposes. Art. 120 applies to such claims.—9 Cal. 147.

Previous to 1825 dearah X accreted to mouzah Y, and sometime before 1860 the malik of Y executed two conveyances in favour of A and B respectively. In 1860 A sued B in the Munsiff's Court for possession of a share in X which B claimed under his conveyance. In that suit A succeeded on the ground that B's conveyance did not cover the share claimed by him in X, but merely covered the share in the mouzah itself, whereas by his conveyance A had acquired the right to the share in X which he claimed. In 1866 the Collector refused to recognize B's right to malikana payable in respect of the share in X, which had been the subject of the suit in 1860, or to register his name in respect thereof, but acknowledged A's right thereto, relying on the decision of the Civil Court in the suit between A and B. Subsequently B's representatives, C and D, in 1876, sought to have their names registered in respect of the same malikana, but they were opposed by E, who alleged that A had been acting throughout as his benamidar. The Collector referred the case under sec. 55 of Act VII of 1876 to the Civil Court, and the application of C and D was eventually disallowed. C and D thereupon, on the 5th November 1880, instituted the present suit against E, in the Court of the Subordinate Judge, for a declaration of their right to the malikana, and for a reversal of the order refusing to allow their names to be registered in respect thereof. *Held*, that, inasmuch as the allegation made by E, in the proceedings held in 1876 on the application by C and D before the Collector, and afterwards upon the reference before the Civil Court, that A had been acting in the matter merely as his benamidar, was uncontradicted by C and D in their plaint in the present suit, there was sufficient evidence upon which to hold that that fact was true. *Held, also*, that the suit was barred as *res judicata* on the ground that the right to malikana was substantially the same question as the proprietary right to the share in the dearah, and that this issue had been tried and decided in the suit in 1860 in favour of A, who must be taken to be E ; that the fact that the previous suit had been brought in a Munsiff's Court, whereas the present suit was brought before a Subordinate Judge, did not affect the question, inasmuch as the property was the same, and it was not shown that the present suit, if brought in 1860, would not have been within the jurisdiction of the Munsiff, nor was it alleged that the suit in 1860 was beyond his jurisdiction. *Held, further*, that the suit was barred by limitation, being



governed either by arts. 120, 131, or 144 of the Limitation Act (Act XV of 1877), because—(1) there being no allegation of dispossession if it were contended that the suit was one for possession of an interest in immoveable property, art. 144 would apply; (2) if it were contended that the suit was for the purpose of establishing a periodically recurring right, pure and simple, art. 131 would apply, and the period must be reckoned from 1866, when the plaintiff was first refused the enjoyment of the right; (3) if, however, it were said to be a suit to establish a periodically recurring right, and something in addition, inasmuch as the right carried with it a right to the property itself, if the parties consented to take a settlement when the time for concluding the next temporary or permanent settlement came, art. 120 must be held to apply. But that, in any event inasmuch as in the year 1866 the Collector refused to recognise B's right to the malikana and adverse possession, so far as possession could be taken of such an interest in immoveable property, was then taken by A, or in other words by E, because it must be taken that the Collector since that date had been holding for A, whose right he had then recognised, after refusing to recognise the right claimed by B, the present suit having been instituted in 1880 was equally barred which ever of the above articles was held to apply. *Rao Karan Singh v. Rajah Bakur Ali Khan*, L. R., 9 I. A. 99, referred to and distinguished.—10 Cal. 697.

Where A made a deposit as security for the discharge of his duties as Manager of an estate under the Court of Wards, which deposit was liable for all sums not accounted for by A; and a suit was, after his dismissal from his appointment, brought for the recovery of the deposit:—*Held*, that the period of limitation allowed was certainly not less than six years, and began to run not from the date of his dismissal, but from the time when the account of charges due against the deposit was made and sent in to him.—12 Cal. 113.

A suit to oust a shebait from his office, the appointment to which has been made by nomination, is one for which no period of limitation is specially provided, and is therefore governed by article 120 of Schedule II of the Limitation Act. The plaintiff, as shebait of a certain Hindu endowment, instituted a suit to set aside to certain leases and alienations created by one who had formerly been shebait, but who it was alleged had relinquished and abandoned the office, on the ground that such leases and alienations were void and not binding on the endowment, and he sought to obtain khas possession of the lands occupied by the defendants under such leases and alienations. Although it was admitted that the plaintiff had held possession as shebait, and managed the properties connected with the endowment for more than ten years, on the nomination of the Hindu residents of the locality, the defendants put the plaintiff to proof of his title, as shebait. The lower Courts found that the plaintiff had failed to prove his title, and holding that on this ground he had no *locus standi*, dismissed the suit. *Held*, that as a suit to oust the plaintiff from his office would have been barred by limitation, by reason of his having held the office for a period exceeding that provided by the law of limitation, he had acquired a complete title for the purposes of any litigation connected with the affairs of the endowment, and that the suit had been wrongly dismissed on the ground that the plaintiff had failed to prove his title.—19 Cal. 776.

A suit for recovery of instalments of profession tax under the provisions of the 'Towns' Improvement Act, 1871, is governed by art. 120.—3

Suit in 1887 by a daughter to recover her share of Government promissory notes, being stridhanam of her mother who died in 1880. The property in question had been in the possession of a son of the deceased since her death. He claimed the property under a will, but the will was set aside by the Court as false in 1884:—*Held*, that Limitation Act, sch. II. art. 123, is applicable only to cases in which the defendant lawfully represents the estate of the deceased, and that the suit was accordingly barred by limitation.—I. L. R., 12 Madr. 487.

In a suit by the holder of one share against the holders of other shares in inam land, included in a single patta and assessed in an entire sum, for apportionment of the assessment, it appeared that the plaintiff had asked for the apportionment to be made more than six years before suit:—*Held*, that the suit was not barred by limitation.—15 Madr. 492.

The directors of the P. Company made a call of Rs. 100 per share upon its shareholders on the 1st October 1882. On the 8th March, 1886, the company was ordered to be wound up by the Court, and an official liquidator was appointed. On the 7th March, 1886, the official liquidator filed this suit against the defendant, who was a holder of twenty-one shares in the company, to recover (along with other calls) the amount of the said call of 1st October, 1882. As to this part of the claim, the defendant pleaded limitation:—*Held* that the suit being brought, not by the company, but by the liquidator, article 120 applied, and that the claim was, therefore, not barred.—10 Bom. 483.

D died leaving him surviving a widow and a daughter who was plaintiff's mother. Defendant No. 2 obtained a decree against the widow, and in execution put up D's property to sale. Defendants 3, 4 and 5 purchased the property and took possession in 1869. In 1883 the plaintiffs sued as D's reversionary heirs for a declaration that they were entitled to the property in dispute on the widow's death, alleging that the decree, in execution of which the property was sold, was a collusive and fraudulent decree, and that they were not bound by the sale in execution. They further alleged that the cause of action arose in 1879, when their mother died. *Held*, that the suit was barred by limitation. The cause of action giving any reversioner the right to sue for a declaration was that given to the plaintiffs' mother in 1869, both by the sale and the dispossession, and it was not revived in favour of the plaintiffs on her death in 1879. All right to sue for a declaration was, therefore, barred in 1875 under article 120 of Schedule II of the Limitation Act (XV of 1887).—14 Bom. 512.

A, sued for a declaration that she was the daughter of B, who died in 1870. On B's death his *kulkarni vatan* was attached, and C. was appointed to officiate on behalf of Government. In 1882 A. applied for a certificate of heirship to B., with a view to get her name entered as a *vatandar* in place of her deceased father's. C. opposed her application, denying that she was the daughter and heiress of B. Her application being rejected, A. filed the present suit against C., in 1877, to obtain a declaration that she was the daughter and heiress of B. The Court of first instance granted the declaration sought. The appellate Court rejected the claim as barred under article 120 of the Limitation Act (XV of 1887), holding that time should be computed from the date of B's death. *Held*, that A.'s cause of action accrued, not on B's death, but on the denial of her status by C. in the certificate proceedings. The suit, having been brought within six years from that time, was not barred under article 120 of Limitation Act (XV of 1887).—15 Bom 422.

The Bombay Land Revenue Code (Bombay Act V of 1879) applies to *talukdari* villages in the Ahmedabad district. Such villages fall within the description of "alienated holdings" as defined by the Code. When a *talukdari* village is attached under sec. 159 of the Code for arrears of land revenue, so long as the attachment subsists, an order of forfeiture under sec. 153 is illegal. The plaintiff was the *talukdar* of the village of Kathini Aniali. At the end of the revenue year 1878-79, *i.e.*, on 31st July, 1879, the plaintiff was a defaulter in respect of the assessment payable to Government for that year. In November, 1879, a punitive police post was established in the village, under sec. 16 of Bombay Act VII of 1867, on account of the turbulent conduct of the inhabitants. Between January and April, 1880, the Collector sold certain property of the *talukdar* for arrears of revenue, and realized by the sale a sum of Rs. 1,608-12-8. This sum was more than sufficient to cover the arrears due for 1878-79 as well as the assessment payable for 1879-80. But the Collector, after deducting the arrears due for 1878-79, applied the rest of the sale-proceeds towards the payment of the cost of the punitive post. The assessment for 1879-80 having remained unpaid, the village was attached on the 1st of July, 1880, under sec. 159 of the Bombay Land Revenue Code (Act V of 1879). The attachment was followed on the 6th January, 1881, by an order declaring the village to be forfeited under section 153 of the Code. In 1886 the plaintiff filed the present suit against Government to recover possession of the village, and for a declaration that the order of forfeiture was illegal and *ultra vires*. The defendant pleaded (*inter alia*) that the suit was barred under sec. 4, clause (c) of the Bombay Revenue Jurisdiction Act X of 1876, that it was also barred by limitation, and that the order of forfeiture was legal and valid. *Held*, that the village having been attached for arrears of land revenue under sec. 159 of Bombay Act V of 1879 on the 1st July, 1880, the plaintiff had twelve years' time from the date of the attachment within which he could apply for the restoration of the village, under sec. 162 of the Act. The order of forfeiture of the 6th January, 1881, was, therefore, null and void. *Held*, also, that the plaintiff's claim for a declaration that the order of forfeiture was illegal was not barred by sec. 4, clause (c) of Act X of 1876, as the order of forfeiture could not be considered "a proceeding for the realization of land revenue." The proceeding authorized by law for the realization of land revenue, *i.e.*, the attachment of the village, having been taken, no other proceeding could legally be taken, as against the plaintiff, till the expiration of twelve years from the date of the attachment. *Held*, further, that the claim for a declaration that the order of forfeiture was illegal was not time-barred, as it was governed by article 120 of Limitation Act (XV of 1877). *Held*, (per Birdwood, J.) that the Collector had no power, under section 16 of Bombay Act VII 1867, to recover the cost of the punitive post from the *talukdar*, (1) as he was not an inhabitant of the village, and (2) because the cost could only be defrayed by a local rate imposed on the inhabitants of the district in which the punitive post was established.—16 Bom 455.

The limitation for a suit to enforce a right of pre-emption in respect of a mortgage by conditional sale is that provided by art. 120. Where the mortgagee by conditional sale is not in possession under the mortgage, and after foreclosure had to sue for possession, the right to sue to enforce a right of pre-emption accrues when he obtains a decree for possession.—  
Al.

One A P, having certain moneys lying at his credit in Calcutta, empowered A L to receive the same and hold them on his behalf. A P died at

Description of suit.	Period of limitation.	Time from which period beings to run.
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### Part VII.—Six years.—(continued.)

Moradabad, and subsequently to his death the said moneys, which remained in the hands of A L, were attached by one of the creditors of A P in execution of a decree. The decree-holder sold his rights under the decree in respect of the moneys in the hands of A L to the plaintiffs, who sued to obtain the same from A L. *Held* that the period of limitation applicable to such a suit was that prescribed by art. 120 of the second schedule of the Indian Limitation Act (Act XV of 1877). *Gurudas Pyne v. Ram Narain Sahu* (I. L. R., 10 Cal. 860), referred to.—13 Al. 368.

Where a mortgage by conditional sale had been duly foreclosed in accordance with the procedure laid down in secs. 7 and 8 of Regulation XVII of 1806 and at the expiration of the year of grace a portion of the mortgage money remained unpaid:—*held* in a suit for pre-emption of the mortgaged property that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the plaintiff's right of pre-emption accrued and limitation began to run against him from the expiration of such year of grace. *Forbes v. Ameeroonissa Begum* distinguished: *Raisuddin Chowdhry v. Khodu Newaz Chowdhry*; *Jaikaran Rai v. Ganga Dhari Rai*; *Moonshee Syud Ameer Ali v. Bhabo Soonduree Debia*; *Mohunt Ajoodhya Pooree v. Sohun Lal*; *Jeorakhun Singh v. Hookum Singh*; *Buddree Doss v. Durga Parshad*; *Musammat Tara Kunwar v. Mangri Meea*; *Hazari Ram v. Shankar Dial*; *Tawakkul Rai v. Lachman Rai and Ajaib Nath v. Mathura Prasad* referred to. *Prag Chaubey v. Bhajan Chaudhry*; *Rasik Lal v. Gajrej Singh and Udit Singh v. Padarath Singh* overruled.—14 Al. 405.

See I. L. R., 13 Cal. 155, noted under art. 61; 10 Madr. 213, noted under art. 91; 14 Cal. 493, noted under art. 127; 14 Cal. 761 & 4 Al. 218, noted under art. 10; 10 Al. 634, noted under art. 32; 3 Al. 385, noted under art. 115; 6 Madr. 290, noted under art. 73; 5 Cal. 692, noted under art. 89; 5 Cal. 597, 2 Al. 358, & 13 Al. 126, noted under art. 62; 3 Al. 170, noted under sec. 18; 8 Bom. 17, noted under art. 29; 4 Al. 437, noted under sec. 215 of the Civil Procedure Code; 15 Madr. 6, noted under sec. 13 of the Civil Pro. Code; 15 Madr. 382, noted under sec. 135 of the Transfer of Property Act.

### Part VIII.—Twelve years.

121.—To avoid incumbrances or undertenures in an entire estate sold for arrears of Government revenue, or in a <i>patni taluq</i> or other saleable tenure sold for arrears of rent.	Twelve years	When the sale becomes final and conclusive.
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#### Notes.

The interpretation which should be put on the word “avoid” is to do something in exercise of the right of avoidance.—I. L. R., 4 Cal. 860.

See I. L. R., 8 Cal. 230 as to the discussion of the Law of Limitation as applicable to the resumption and assessment of lakhiraj lands.

122.—Upon a judgment obtained in British India, or a recognition.	Twelve years	The date of the judgment or recognition.
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Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years. (continued.)

#### Notes.

The plaintiff's father obtained a decree in the Court of the agent for Sirdars in 1848 against the defendant's grand father, a third class Sirdar. The decree gave an option to the Sirdar to pay up the debt at once, or year by year, out of the revenues of a village. The Sirdars choose the latter alternative and execution proceeded accordingly on that footing till his death in 1862. His son survived him, and died in 1867, when the defendant, who was not himself a Sirdar, succeeded. The Subordinate Judge of Khed to whom, on the cessation of the Sirdarship in the defendant's family, the Agent referred the decree for further execution, proceeded with the execution up to the year 1876, when these proceedings were pronounced to be irregular. The plaintiff thereupon, in the year 1877, filed the present suit on the strength of his decree in 1848. *Held* that the period of limitation applicable was that of twelve years from the date of the decree, but that the decree should be viewed as analogous to an instalment decree, and made as against the Defendant in 1867—down to which time the proceeds were regularly realised,—because it then on his father's death became first operative against him. In the case of a decree payable by instalments, as the command of the Judge prescribes a term for the performance of the several parts of his order, it is to be construed as becoming a judgment for purposes of limitation as to each instalment only on the day when payment is to be made.—I. L. R., 3 Bom. 193.

<b>123.</b> —For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate.	Twelve years	When the legacy or share becomes payable or deliverable.
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#### Notes.

A by his last will and testament gave his property to trustees, partly in trust for religious and other purposes, and partly to pay thereout to certain persons and their heirs for ever certain annuities, being fixed portions of the net profits of a certain estate called the Hurro estate, which amounted to Rs. 3,150. A died in November 1863. On the 11th of August 1879, the heir of one of the annuitants instituted a suit claiming a share under the will, and asking for a partition of that share. The plaintiff alleged besides, that certain of the trusts and provisions in the will were invalid in law; that, consequently, a large portion of the testator's property remained undisposed of at his death, and she claimed a share of this residue as one of the heirs of the testator. *Held* that, under the circumstances, the gift of the share of the rents and profits amounted to a gift of a share in the *corpus* of the estate; and that, in respect of that portion of the plaintiff's claim, the suit was not barred by limitation. *Kherodemoney Dossee v. Doorgamoney Dossee*, 2 C. L. R., 112; S. C. on appeal, *Greender Chunder Ghose v. Mackintosh*, I. L. R., 4 Cal. 897; *Anund Moya Debi v. Grish Chunder Myti*, I. L. R., 7 Cal. 772, *Mannox v. Greener*, I. L. R., 14 Eq., 456, and *Sookmoy Chunder Dass v. Monohair Dossee*, I. L. R., 7 Cal. 269, cited. Where an estate is given by will to trustees for religious and other purposes some of which are invalid or fail, the heirs of the testator may be barred by li-

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(*continued.*)

mitation from recovering the portion undisposed off, though they might still bring a suit against the trustees to compel them to properly administer the trusts which had not failed.—I. L. R., 8 Cal. 788.

Article 123 of the Limitation Act only applies to cases in which the property sought to be recovered is not only a legacy but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator.—9 Cal. 79.

The widow of a Mapilla, who had died intestate more than fourteen years before suit, sued to recover a one-sixteenth share of the property left by him and his brother :—*Held*, that although the parties were Mapillas the suit was governed by art. 123 of the Limitation Act and was accordingly barred.—15 Madr. 60.

A certificate of administration granted under Regulation VIII of 1827 only indicates the person who for the time being is in the legal management of the property in respect of which it is granted, but does not constitute the holder of the certificate a representative of the estate for the purpose of distributing it amongst his co-sharers. In 1864, Narayan, the owner of a share in a *deshpande vatan*, died childless and intestate. A certificate of administration under Regulation VII of 1827 was granted to one Gangadhar, a distant relation, who received Narayan's share in the *vatan* up to and including the year 1871. In the meantime, *viz.*, on the 19th November, 1870, two nearer relations, *viz.*, Dhondu and Balaji, succeeded in getting Gangadhar's certificate cancelled, and obtained a certificate to themselves jointly. In 1876 the Collector recognized Dhondu alone as the heir of Narayan Baburav, and paid Dhondu's son Sakharam the share of the deceased Narayan Baburav with arrears from 1872. After Sakharam's death his son Narayan, (defendant No. 1), received it down to the year 1884. In 1883 Keshav, (father of plaintiff No. 1), got the certificate of 1870 cancelled and obtained a certificate to himself jointly, with defendant No. 1. Keshav died, and the plaintiffs, (his son and nephew), brought this suit claiming to be co-sharers in the one anna and four pies share of Narayan Baburav. The defendants contended (*inter alia*) that the suit was barred. The Court of first instance awarded the plaintiffs claim for the three years previous to the suit, and rejected the rest of the claim. The defendants appealed to the District Judge, who held that the plaintiffs claimed was totally barred, under article 123 of the Limitation Act XV of 1877. On appeal by the plaintiffs to the High Court, *held*, reversing the decree of the lower appellate Court, that article 123 did not apply, and that the suit was not barred. There was no cause of action until Narayan and his successors Dhondu and Sakharam in title were recognized by the Collector and paid the arrears of the *hak*. Gangadhar was quite independent of them, and this recognition did not take place until 1876—less than twelve years before the institution of the plaintiffs suit.—14 Bom. 236.

See I. L. R., 12 Madr. 487, noted under art. 120.

**124.**—For possession of an hereditary office.

Twelve years

When the defendant takes possession of the office adversely to the plaintiff.



Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(*continued.*)

124.—For possession of an hereditary office.—*contd.*

*Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

#### Notes.

A suit in which the plaintiff claimed the office of Dharmakarta was held barred.—I. L. R., 1 Madr. 343.

See I. L. R., 19 Cal. 776, noted under art. 120.

125.—Suit during the life of a Hindu or Mohammadan female by a Hindu or Mohammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage.	Twelve years	The date of the alienation.
126.—By a Hindu Governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Ditto.	When the alienee takes possession of the property.
127.—By a person excluded from joint family property to enforce a right to share therein.	Ditto.	When the exclusion becomes known to the plaintiff.

#### Notes.

In a suit to obtain a share by partition of a joint family property, the interest of the plaintiffs' father having been sold in execution of a decree, limitation is to be computed from the time when exclusion from his share first becomes known to the plaintiffs.—I. L. R., 3 Cal. 653.

Art. 127 presupposes the existence of joint family property, and that there has been an exclusion from participation in the enjoyment of such property. *Semble.*—The word "excluded" in that article implies previous inclusion. The right of a Hindu to the possession of immoveable property on the death of a Hindu widow to which art. 141 refers, must be one in *esse* at the time of the death of the widow. The determination, therefore, of such right during her lifetime extinguishes also the right of the reversioner on the death.—5 Cal. 938.

Art. 127 of Sch. II of Act XV of 1877 does not apply to a suit where the plaintiff is a stranger who has purchased a share in joint family property from one of the members thereof.—14 Cal. 544.

A member of a joint Hindu family cannot sue for a share of the profits of the joint family estate as he has no definite share until partition. He



may sue for a partition of such estate unless by a family usage or special law it is impartible, and then is entitled to an account. A talukdari estate, though entered in the name of one member of a joint family in the list prepared in conformity with the Oudh Estates Act, I of 1869, may be subject to a trust, implied from the acts and declarations of the taluqdar, for the joint family as a joint estate. *Hardeo Baksh v. Jowahir Singh*, I. L. R., 3 Cal. 522; L. R., 4 Ind. Ap. 178. In that suit, commenced in 1865 by a member of a joint family for the declaration of his rights, partition not being claimed the order of Her Majesty in Council (1879) directed that the taluqdar should cause and allow the villages forming the taluqdari estate and the proceeds thereof to be managed and applied according to the trust declared in favor of the members of the family. The plaintiff in that suit afterwards obtained entry of his name as a co-sharer in the villages in the register kept under Act XVII of 1876, sec. 56; and then brought the first of the present suits for his share upon partition, both in that estate as it stood in 1865, and also with the addition of villages since acquired out of profits, claiming an account against the taluqdar. The latter alleged, among other defences, that the taluqdari estate was impartible, and brought a cross suit to establish this, and also that it was held by him according to the rule of primogeniture, the right of other members of the family being only to the profits. *Held* that, in regard to the order of Her Majesty above mentioned, which was applicable to an estate held subject to the law of the Mitakshara, the talukdari estate could not be declared to be impartible; also that a declaration in the Judicial Commissioner's decree that a member of the family entitled to a share upon partition should hold it as an under-proprietor under the talukdar could not be allowed to stand. *Held*, also, (a) that the first suit, as one for partition and an account, was not barred by limitation under Act XV of 1877, sec. 120, and must be decreed; (b) that the provisions of the Oudh Rent Act, XIX of 1868, sec. 8, cl. 15, and sec. 106, precluding proceedings in the Civil Court, might be applicable to the proceeds of the villages forming the original estate, the claimant having been recorded in the revenue records as a shareholder therein, but could not be applied to the rest of the joint estate; and (c) that the sections of the Code of Civil Procedure relating to mesne profits were not applicable to a suit for partition or for an account of the proceeds of family estate in which a plaintiff has no specific interest until decree.—14 Cal. 493.

The principle of survivorship under Mitakshara Law is limited to two descriptions of property, viz: (1) That which is taken as unobstructed heritage, and property acquired by means of it; and (2) that which forms the joint property of re-united co-parceners. Property inherited by brothers from their maternal grandfather is not of those descriptions.—17 Cal. 33.

The word 'person' mentioned in Article 127 of Schedule Second to the Limitation Act means some person claiming a right to share in joint family property, upon the ground that he is a member of the family to which the property belongs.—18 Cal. 642.

In 1803 G being in possession of the zamindari of M, the permanent settlement was made with him and a sanad was granted to him as prescribed by Regulation XXV of 1802. In 1827 C, the only son of G, being in possession of the zamindari, got into debt and the zamindari was sold in execution of a decree and bought by Government. In 1835 the zamindari was granted to J, the son of C, by Government and sanad issued in the usual terms as prescribed by Regulation XXV of 1802. J died in 1864 leaving four sons, the three plaintiffs and C, his eldest son. C died in 1869 leaving an only son, J, the defendant. In 1869 the Court of Wards took charge

of the estate on behalf of the infant defendant and allowed his uncle, plaintiff No. 1, to receive the rents of the zamindari as renter J and his three uncles lived in the same house and participated in the joint family property until 1872, when the plaintiffs claimed to have the zamindari divided. By an agreement between the plaintiffs and the Court of Wards all the moveable and immoveable property, except the zamindari taluq, was divided into four shares and distributed in 1874 between the plaintiffs and defendants. In 1884 the plaintiffs sued for partition of the zamindari, alleging that their cause of action arose in 1872, when the Court of Wards denied their right to a partition of the zamindari taluk. The defendant pleaded (1) that the estate was not partible; (2) that the suit was barred by limitation:—*Held* (1) distinguished the Hunsapore case (12 M. L. A., 1) and the Sivaganga case (I. L. R., 3 Madr. 290), and following the principle laid down in the Nuzvid case (I. L. R., 2 Madr. 128) that the zamindari was partible; (2) that the suit was not barred by limitation.—11 Madr. 380.

The words “joint family property” in Limitation Act, 1877, sched. II, art. 127, are intended to refer to joint family property in the Hindu sense of the term. A Muhammadan sued, as heir in 1888, to recover his share in the property of his grandfather, which had been enjoyed jointly by his descendants from his death, which occurred in 1840, up to a recent date. It did not appear that the family was governed by any special custom:—*Held*, that the suit was not governed by Limitation Act, 1877, sched. II, art. 127, and was barred by limitation.—15 Madr. 57.

Where in a suit for partition a District Judge held the plaintiff's claim barred, on the ground that the defendant had been in possession of the property in dispute for more than fifteen years without any claim having been made by the plaintiff: *Held* that under the Limitation Act XV of 1877, article 127, time would not run against the plaintiff until his exclusion (if he was excluded) from the property had become known to him.—6 Bom. 741.

The plaintiff and his four brothers (Gane, Shive, Rama, and Balo) were members of a joint Hindu family. The only one of them who lived at home was Shive. In 1854 the family property, which had been mortgaged, was redeemed by the brothers, and after redemption it was placed under the management of Shive by the eldest brother, Gane. Subsequently, two of the brothers died while absent from the village; and the plaintiff, who was twenty years of age in 1854, joined the army in 1855. He did not return until 1876; but, during the interval, his wife used occasionally to visit her husband's native place, and during these visits resided in the family house with Shive and Gane. In 1872 Gane died. The plaintiff alleged that in 1876 he demanded his share, but was refused. In 1883 he filed this suit for partition. It was contended that the right of the plaintiff had become barred by the Limitation Act XIV of 1859, and was not revived by Act XV of 1877, which was in force at the date the suit was brought. The Court of first instance awarded the plaintiff's claim. On appeal, the Assistant Judge reversed the decree of the Court below, holding that under clause 13 of sec. 1 of the Limitation Act XIV of 1859 the plaintiff had lost his right to sue, and that such right could not be revived by the passing of the subsequent Limitation Acts IX of 1871 and XV of 1877. He was of opinion that the fact that the plaintiff's wife “had put up at Shive's house for a few days, if it were a fact, did not help the plaintiff's title.” *Held*, by the High Court that the occasional residence of the plaintiff's wife with Shive, who was in possession of the property, might be a benefit out of the estate equivalent to a payment so as to satisfy the requirement of clause

13 of sec. 1 of Limitation Act XIV of 1859. If such a benefit had been received by the plaintiff within twelve years previously to the repeal of that Act, the plaintiff had not lost his right to sue at the date of the passing of Act IX of 1871; and that Act would, therefore, have applied to any suit brought by him while it was in force. By article 127 of Schedule II of Limitation Act IX of 1871 the period of limitation dated from the time when the plaintiff claimed and was refused his share which, according to the plaintiff's allegation, was in 1876. Act IX of 1871 was repealed by Act XV of 1877, which governed the present suit, unless the right to sue had expired under Act XIV of 1859. The Court remanded the case for a fresh decision on the question of limitation, having regard to the above observations.—11 Bom 445.

The plaintiffs sued for part of a house as a portion of joint-family, property left undivided on the occasion of a general partition which had taken place about thirty-five years before the suit. The defendant had since then been in sole possession and enjoyment of the house in dispute. The Subordinate Judge dismissed the suit as barred by limitation, on the ground that the plaintiffs had failed to prove participation in possession or enjoyment within twelve years. On appeal, the Assistant Judge held that as no share had been demanded or refused, the defendant's possession was not adverse to the plaintiffs, and as the house in dispute had been admittedly reserved from partition, article 127 of the Limitation Act XV of 1877 did not apply. He, therefore, reversed the decree of the Subordinate Judge, and remanded the case for retrial on the merits. On appeal to the High Court,

*Held*, that the suit was barred. The fact that the house in question had admittedly remained undivided, did not prevent the operation of the Limitation Act, and article 127 of Act XV of 1877 applied. That article applies equally to a portion of joint-family property left undivided as to the whole estate, and a twelve-years' exclusion, known to the excluded sharer, binds him in the one case as in the other. What would bar the operation of the article in question would be a reserve of a part of the joint estate from partition, and a possession of that portion conceded to, and taken by, one of the sharers as the common property of himself and the other sharers.

2. Possession is evidence of title, and is primarily exclusive. It is for him, who impugns this exclusive title, to show that the possession arose in some way which has preserved his own right.

In every case the person who has been out of possession for more than twelve years must make out some *prima-facie* title, and some agreement or acknowledgment of that title, such that possession is deprived of its ordinary effect through being held on a joint right, or a subordinate right.

3. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group.—11 Bom. 216.

Article 127 of the Limitation Act (XV of 1877) applies to a suit by a Mahomedan by partition of joint family property.—14 Bom. 70.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(continued.)

The possession by a Mahomedan co-sharer of property which he has redeemed from a mortgage does not become adverse to the other co-sharers until some exclusive title is set up. *Ramchandra Yashvant v. Sadashiv A'baji*, I. L. R., 11 Bom. 422, and *Bhauddin v. Shekh Ismail*, I. L. R., 11 Bom. 425, referred to.—16 Bom 191.

A Muhammadan family consisting of three brothers and their uncle jointly owned certain immoveable property which the uncle managed. Two of the brothers effected a settlement of accounts with the uncle, with reference to the profits of the estate; the share of the three brothers was appropriated; and the money representing that share was deposited with the uncle. Subsequently the two who had effected the settlement withdrew their portion of the common share, and the third brothers sued the uncle to recover a sum of money as his one-third portion. He alleged that he had been deceived by the defendant into supposing that his portion was included in the amount withdrawn by his brothers; but he did not base his suit upon any allegation of fraud. It was contended that art. 127, sch. ii, of the Limitation Act (XV of 1877) applied to the suit, limitation running from a date whereon the defendant had denied all liability in respect of the plaintiff's demand. *Held* that the amount claimed could not, under the circumstances, be regarded as joint family property, that the defendant's denial of the plaintiff's right to recover that amount was not an exclusion of the plaintiff from such property, and that, consequently, art. 127 did not apply to the suit.—10 Al. 109.

The words "joint family property" in No. 127 of sch. ii of the Limitation Act (XV of 1877) mean "the property of a joint family." Hence the period of limitation prescribed by No. 127 of sch. ii of the Limitation Act will not apply to a case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immoveable property alleged to have been that of the deceased common ancestor of themselves and some of the defendants, and of which they allege they had been dispossessed by the defendants. *Bavasha v. Masumsha* dissented. from.—13 Al. 282.

See I. L. R., 7 Cal. 461, noted under sec. 2; 15 Madr. 60, noted under art. 123; 15 Madr. 186, noted under sec. 42 of the Specific Relief Act.

128.—By a Hindu for arrears of maintenance. | Twelve years ... | When the arrears are payable.

129.—By a Hindu for a declaration of his right to maintenance. | Ditto. ... | When the right is denied.

### Notes.

Art. 129 of Sch. II of Act IX of 1871, the Indian Limitation Act using the expression "suit to set aside an adoption," denoted a suit bringing the validity of an adoption into question; and the rule of limitation, given by that Article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption, in virtue of which the opposite party was in possession. The plaintiffs, as collateral heirs of a childless Hindu, questioned the adoptions purporting to have been made by his widows, in prusuanee of authority from him; such adoptions having been followed by

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(continued.)

continuous possession, and having been recognized in formal instruments, proceedings, and decrees to which the plaintiffs were parties:—*Held*, on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under art. 129 of Sch. II of Act IX of 1871. Part of the language of the judgment in *Raja Bahadar Singh v. Achumbit Lall*, L. R., 6 Ind. Ap., 110, referred to, and that case, in which the plaintiffs' claim was not affected by the widow's adoption, distinguished from the present.—I. L. R., 13 Cal. 308.

130.—For the resumption or assessment of rent-free land.	Twelve years	When the right to resume or assess the land first accrues.
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#### Notes.

Although a grant of a mokenary lease in lieu of maintenance may be resumable by the grantor and his heirs, yet, if the grantor or any of his successors receives distinct notice of a claim on the part of the grantee to hold in perpetuity and not subject to resumption and allows 12 years to go by without contesting such claims, he (such grantor or successor) will be barred for the time of his own enjoyment.—I. L. R., 3 Cal. 793. See also 9 Bom. H. C. R., 260. Al. H. C. Rep. 1870, p. 106

The plaintiff in 1862 obtained a decree for resumption of land held under an invalid *lakheraj* title created before 1790, the decree declaring the land liable to assessment. In a suit brought more than twelve years after the decree against the representatives of the defendant in the suit of 1862 to assess the land: *Held*, that the decree of 1862 did not create the relationship of landlord and tenant between the parties, and that the suit was therefore, barred under art. 130 of the Limitation Act XV of 1877.—16 Cal. 450 note.

The plaintiff brought a suit in 1861 against C for resumption of, and for declaration of his right to assess rent upon, C's lands within his *zemin-dari* which C held as *lakheraj*. That suit was presumably instituted under Regulation II of 1819, sec. 30, which related only to resumption of *lakheraj* lands existing prior to 1790, but there was nothing to show conclusively under what law it was instituted, or whether the *lakheraj* grant was one subsequent or anterior to 1790. In that suit an *ex parte* decree was passed in 1863 that "the suit be decreed, and the land in dispute be declared to be *shukur*, i. e., liable to assessment. In a suit brought in 1886 against the representatives of C, after serving a notice upon them to pay rent for the land at a certain rate, to assess the land at the rate mentioned in the notice, and for the recovery of rent at that rate: *Held*, that the decree of 1863 had not the effect of creating the relationship of landlord and tenant between the parties, and therefore the suit, not having been brought within 12 years from the date of that decree, was barred by art. 130 of the Limitation Act XV of 1877.—16 Cal. 449 note.

See I. L. R., 1 Bom. 586, noted under sec. 28. See also I. L. R., 8 Cal. 230.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(*continued.*)

- 181.—To establish a periodically recurring right. Twelve years ... | When the plaintiff is first refused the enjoyment of the right.

#### Notes.

A suit for *patta*, or right to worship an idol in turn, is a periodically recurring right within the meaning of Art. 131.—I. L. R., 8 Cal. 807.

S, being entitled to a monthly allowance from a zemindari under an agreement, dated 1861, died in that year. In 1867 K, his senior widow, claimed the allowance; the zemindar contended that the allowance was personal to S, and did not descend to his heirs. K obtained a decree. In 1864 R, the junior widow of S, sued K to establish the right of her son M to succeed to the estate of S as his son and sole heir, and obtained a decree from the Privy Council in 1871. In 1872 M demanded and was refused the allowance from the zemindari. In 1875 M came of age, and in 1879 brought a suit against the zemindar to establish his right to the allowance :—*Held*, that the claim by M was not barred by limitation.—7 Madr. 341.

The right to the revenue on certain land having been granted to the trustees of a mosque, the said grant was confirmed by Government in 1866. In 1883, a suit was brought to recover arrears of revenue from the owners of the land. It was found that no payment of revenue had ever been made by the defendants to the plaintiff and the suit was dismissed as barred by limitation under art. 144, sch. II of the Limitation Act:—*Held*, that the suit was not barred and that the plaintiff was entitled to recover 12 years' arrears of revenue.—10 Madr. 115.

In a suit by zemindar against the grantee of an inam to recover arrears of kattubadi, it appeared that no payment had been made in respect of kattubadi, for a period of twelve years before suit. The suit was dismissed in the Court of first appeal on the findings (1) that no exchange of patta and muchalka had been proved, (2) that the plaintiff had not proved his right to the kattubadi, and (3) that his right to it, if any, was barred by limitation. On second appeal by the plaintiff:—*Held*, that the second and third of the above findings should be accepted and the second appeal dismissed *Alubi v. Kunhi Bi* (I. L. R., 10 Madr. 115) distinguished. *Per cur*: We do not think it necessary to consider whether if there had been a grant subject to kattubadi, patta and muchalka ought to have been exchanged.—15 Madr. 161.

A suit by a co-sharer to establish his title to a share in an annual allowance received by the defendant from Government is one falling under article 131, and not 144, of the second Schedule of the Limitation Act (XV of 1877). The plaintiffs sued to establish their title to a half share in the *deshmukhi* allowance annually received by the defendant from the Mamlatdar's treasury, and also to recover six years' arrears. Both the lower Courts found that the plaintiffs had not received their share of the allowance at any time within twelve years before suit, and, therefore, rejected the plaintiffs' claim as time-barred. *Held*, in second appeal, that the plaintiffs' claim for a declaration of their title to the allowance was governed by article 131 of the Limitation Act (XV of 1877), under which article it would not be barred by the mere fact of the plaintiffs' exclusion from enjoyment



Description of suit.

Period of limitation.

Time from which period begins to run.

**Part VIII.—Twelve years.—(continued.)**

of their share for twelve years before suit, unless it were shown that such exclusion was the result of refusal made upon a demand. The period of twelve years provided by that article would run from the time when the plaintiffs were first refused the enjoyment of the right. *Held*, further, that the claim for arrears of the allowance fell under article 62 of the Limitation Act (XV of 1877). *Held*, also, that if the claim for a declaration of title to the allowance were barred, the claim for arrears would also be barred.—15 Bom. 135.

See I. L. R., 4 Cal. 683 and 10 Cal. 697, noted under art. 120 ; 14 Bom. 236, noted under art. 123. See also I. L. R., 8 Cal. 230.

**132.** -To enforce payment of money charged upon immoveable property. Twelve years When the money sued for becomes due.

*Explanation.*—The allowance and fees respectively called *malikana* and *haqqas* shall, for the purpose of this clause, be deemed to be money charged upon immoveable property.

**Notes.**

Malikana is an annual recurring charge on immoveable property and may be sued for within 12 years from the time when the money sued for becomes due.—I. L. R., 5 Cal. 921.

An allowance for the maintenance of a younger member of a family, was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his life time, founded on an *ekrarnama*, did not afford a defence under sec. 3 of the Code of Civil Procedure. *Held*, also, that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced. An objection taken on this appeal, that this suit should have been brought on that agreement, *held* taken too late ; the defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court. A suit for arrears of such maintenance, within twelve years, is within under Act XV of 1877.—9 Cal. 945.

A mortgaged his property to B, in 1867, by a simple mortgage. In 1868 A sold the property to C. In 1870 B brought a suit on his mortgage against A only and obtained a mortgage decree. In 1883 A brought a suit against C to enforce his lien against the mortgaged property. C pleaded that the suit was barred by limitation, under cl. 132. :—*Held*, that the suit was governed by art. 147, and therefore was not barred by limitation.—12 Cal. 111.

By a mortgage bond, dated the 28th Magh 1281 B. S. (9th February 1875), it was provided that, if the mortgagors should fail to pay the money



secured thereby according to the terms thereof, the mortgagees should immediately institute a suit and realize the amount due by sale of the mortgaged property, and that if the proceeds of such sale should not be sufficient to liquidate the debt, the mortgagees should realize the balance from the persons and other properties of the mortgagors. It was further agreed that the principal and interest secured by the bond should be repaid in the month of Magh 1282 (January-February 1876). In a suit instituted on the 9th October 1882 upon the mortgage to recover the amount due by the sale of the mortgaged property and the balance, if any, from the persons of the mortgagors :—*Held*, that the bond in question provided for two remedies in one suit and did not contemplate a second suit being instituted to recover the balance from the persons of the mortgagors in the event of the first remedy against the mortgaged property proving insufficient to pay the debt in full, and consequently that the cause of action against the persons of the mortgagors accrued upon the date on which the mortgage money became due, and as the suit was instituted more than six years after that date, the plaintiff's claim was barred by limitation, so far as the personal liability of the mortgagors was concerned :—*Held*, also, that art. 132, only refers to suits to enforce payment of money charged upon immoveable property *by the sale of such property*.—12 Cal. 389.

A suit on a mortgage bond to enforce payment by sale of premises hypothecated is governed by art. 132 of the Limitation Act. *Brojo Lal Sing v. Gour Charan Sen*, I. L. R., 12 Cal., 111, overruled ; *Shib Lal v. Ganga Pershad*, I. L. R., 6 Al., 551, dissented from. The clear distinction drawn for the first time between “mortgage” and “charge” in the Transfer of Property Act is not observed in the Limitation Act. Article 147 of the Limitation Act relates to a special kind of mortgage known as English mortgage, and includes only that class of suits in which the remedy is either foreclosure or sale in the alternative.—14 Cal. 730.

A will devising immoveables stated that the father of the devisee had lent a sum of money to the testator, and directed the devisee to repay the debt with interest. This was construed to be a charge on immoveables, and it was held that a suit, brought by the auction-purchaser of the creditor's claim, to recover the above-mentioned debt, was within art. 132 of the second Schedule of Act XV of 1877 ; and having been brought within twelve years from the date when the debt was so charged was not barred by time.—15 Cal. 66.

In suits to recover the principal and interest of a loan secured by a mortgage of immoveable property, interest for twelve years is recoverable by virtue of Article 132 of Schedule II of the Indian Limitation Act, 1877.—6 Madr. 417.

In 1884 N sued A to recover the principal and interest due on a registered bond executed in 1870. It was stipulated that the amount should be repaid with interest in 1871 and certain immoveable property was hypothecated as security for repayment of the debt :—*Held*, that the suit did not fall under art. 147 which allows sixty years to a mortgagee to sue for foreclosure or sale from the date the money becomes due, but under art. 132 of the same schedule which allows twelve years to enforce a payment of money charged on immoveable property.—9 Madr. 218.

Article 132 of sch. II of the Indian Limitation Act, 1877, by which a period of 12 years is allowed to enforce payment of money charged on immoveable property, refers only to suits to enforce payment by sale of the property charged and not to a claim to enforce the personal remedy on a

registered bond by which immoveable property is pledged as security for the debt.—10 Madr. 100.

The period of limitation for suits upon hypothecation bonds, which contain no power of sale, or effect no transfer of property, executed before the Transfer of property Act came into operation, is 12 years under sch. II, art. 132, of the Limitation Act of 1877—*Aliba v. Nanu* (I. L. R. 9 Madr. 218) followed. *Per Muttusawmi Ayyar, J.*—"The transaction in suit appears to be of the kind described in sec. 100 of the Transfer of Property Act, which defines how a charge is created ;" but "it seems to me that the Transfer of Property Act does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definition it contains of simple mortgages."—10 Madr. 509.

The plaintiff held a mortgage of certain immoveable property given to him by the defendant to secure the repayment of a loan of money with interest. The plaint stated the fact of the mortgage, but prayed only for a money decree. The mortgage contained a personal undertaking to repay. Plaintiff's counsel, directly upon the case being called on for hearing and before the case had in any way been gone into applied (under sec. 43 of Act X of 1877, Civil Procedure Code,) for leave to reserve his remedies under the mortgage, taking then only a money decree, an application which, it is provided by that section, must be made "before the first hearing". *Held* that the application was not too late. The said mortgage was dated 16th February, 1870, and the plaint in this suit was filed on the 28th April, 1881. The plaintiff maintained that he was not time-barred, as he had twelve years within which to bring the suit under article 132 of Sched. II of Act XV of 1877. *Held* that plaintiff was too late in bringing a suit for a money decree on the promise to pay in the mortgage, inasmuch as the article referred to was meant to apply to suits brought to enforce *against the property* payment of "money charged upon immoveable property," and not, under any circumstances whatever, to a suit for a mere money decree.—5 Bom. 463.

Art. 132 applies to a suit by a mortgagee to obtain a mere money decree, to which suit, therefore, the limitation of 12 years, from the time the money sued for becomes due is applicable.—6 Bom. (F. B.) 719.

The special provision of article 147 applies to all suits properly brought by a mortgagee for foreclosure or sale, while the general provision of article 132 applies to suits for sale by a creditor having a right to realise a *charge* not amounting to a mortgage. Where immoveable property is made by act parties security for the payment of a debt, but no power of sale, without the intervention of a Court, is given to the creditor, there is no transfer to him of an interest in the property until a decree for sale has been made in his favour and the transaction does not amount to a mortgage. When immoveable property has been so made security for the payment of a debt, there can be no foreclosure by the creditor, unless the terms of the contract admit of it.—10 Bom. 519.

In 1867 the defendant borrowed Rs. 125 from the plaintiff and gave him a bond agreeing to pay interest at two *per cent. per month*. The bond provided that the whole debt, including principal and interest, was to be repaid within four years from the date of its execution. It further stated that certain property had been mortgaged to the plaintiff as security for the loan, and that if the principal and interest were not paid within the time fixed, the plaintiff was to take up the management of the property.

It also contained the following clause: "We will redeem the mortgaged property on the day on which we shall pay the amount of the principal and the amount of the interest that may be found due on making up the account." In 1886 the plaintiff sued the defendants to recover, by sale of the property, the sum of Rs. 250 as principal and interest due on the bond. It was contended that the bond created merely a charge upon the property in question, and was not a mortgage, and that the suit was barred by article 132 of Schedule II of the Limitation Act XV of 1877. *Held*, that the document was a mortgage, and that the suit was not barred, being governed by article 147 and not by article 123 of Schedule II of the Limitation Act.—13 Bom. 90.

In a suit by a mortgagee to enforce the mortgage No. 132, sch. ii, of the Limitation Act, 1877, is not applicable, so far as relief against the mortgagor personally is claimed. *Lallubhai v. Naran*, I. L. R., 6 Bom. 719, dissented from.—5 Al. 461.

A suit upon a bond for money payable on demand, by which immovable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest by establishment of the right to enforce the hypothecation by auction-sale of the interest of the obligor in such property, is governed by art. 147, and not by art. 132 of Act XV of 1877 (Limitation Act).—6 Al. 551.

K borrowed from C a sum of Rs. 571, and at the same time executed a bond whereby he mortgaged usufructually to his creditor his "entire right and share" in a particular estate, in lieu of the above mentioned sum; and it was agreed that C might realise the debt from the rents and profits of two years, and that, as soon as it had been realised, his possession should cease:—*Held* that the money borrowed by K was "money charged upon immoveable property," it being charged upon rents and profits *in alieno solo* which, in English law would be classed as "incorporeal hereditaments," but which by the law of India are included in immoveable property; and that therefore the limitation applicable to a suit for the recovery of the money was that provided in No. 132. *Dulbi v. Bahadur and Pestouji Bezouji v. Abdoul Ruhiman* dissented from. *Maharana Fetchsangji Jasmantsanji v. Desai Kullionraiji Hakoonathraji* referred to. *Lallubhai v. Naran* followed.—7 Al. 120.\*

That there is a personal liability upon an instrument charging a debt upon immoveable property, does not carry with it the effect that the period of limitation fixed for personal demands by Act IX of 1871 is extended; by reason of this demand being, thereby, brought within the meaning of art. 132 which applies to claims "for money charged upon immoveable property." A mortgagee of lands sought, after the lapse of more than six years from the date when the mortgage-money was payable, to enforce two distinct remedies, the one against the property mortgaged, and the other against the mortgagor personally, on the contract to repay the mortgage-money:—*Held* that art. 132, above-mentioned, applied only to suits to raise money charged on immoveable property, out of that property; and the twelve years, bar did not apply to the personal remedy, as to which the shorter period prescribed in art. 65 of the same schedule applied.—7 Al. 502.

See I. L. R., 10 Madr. 115, & 15 Madr. 161, noted under art. 131; 11 Bom. 313, 15 Cal. 542, 6 Cal. 549, & 15 Madr. 258, noted under art. 99; 8 Bom. 234, noted under art. 62; 9 Al. 158, noted under sec. 98 of the Transfer of Property Act.

Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part VIII.—Twelve years.—(continued.)**

<b>133.</b> —To recover moveable property conveyed or bequeathed in trust, deposited, or pawned, and afterwards bought from the trustee, depositary, or pawnee for a valuable consideration.	Twelve years	The date of the purchase.
<b>134.</b> —To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration.	Ditto.	... Ditto.

**Notes.**

Suit, in 1885, by the assignee of the equity of redemption to redeem a mortgage of 1826. The mortgagees were put into possession under the mortgage and no interest was paid. In 1885, the mortgage premises were sold at a Court sale in execution of a decree against the mortgagees as if they formed part of their family property, and the defendant derived title from the execution purchaser who had dealt with it as absolute owner:—*Held*, that the suit was barred under Limitation Act, 1877, sch. II, art. 134.—I. L. R., 12 Madr. 316.

*Held*, that the expression “purchaser for valuable consideration,” in article 134 of the Limitation Acts IX of 1871 and XV of 1877, includes a mortgagee as well as a purchaser properly so called. *Semble*.—The words “*bona fide*,” which appeared in article 134, Schedule II of the Limitation Act (IX of 1871), were advisedly omitted from article 134, Schedule II of the Limitation Act (XV of 1877), to exclude the possible inference that absence of notice of the real owner’s claim was necessary to enable a purchaser to avail himself of the article.—15 Bom. 583.

It was not intended that property which would pass on the sale by a mortgagee of his interest should come within the scope of art. 134, schedule ii. of the Limitation Act (XV of 1877). That article was intended to protect, after the expiration of twelve years from the date of a purchase, a person who, happening to purchase from a mortgagee, had reasonable grounds for believing, and did believe, that his vendor had the power to convey and was conveying to him an absolute interest, and not merely the interest of a mortgagee. *Radanath Doss v. Gisborne and Co., Piary Lal v. Saliga, and Kamal Singh v. Butal Fatima*, referred to. Contemporaneously with the execution of a registered deed of sale of zemindari property in 1835 for Rs. 4,000, the vendee executed a deed in favour of the vendors, which also was registered, and by which he agreed that if within ten years the vendors should pay Rs. 4,000 in a lump sum without interest, he would accept the same and cancel the sale, and that he should be in possession during that period. This transaction admittedly amounted to a mortgage by conditional sale. The mortgagee remained in possession, and his name was entered as that of proprietor in the Collector’s register, in which no allusion was made to a mortgage. In 1840 his rights in this property were sold by auction for

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(continued.)

arrears of Government revenue due by him on account of other land and apparently no notice was given by any one at or prior to the sale that it was the mortgagee's interest only which was about to be or was being sold. The property was purchased for Rs. 3,000 by S who took possession, and in 1845 sold it for Rs. 3,000 to T, who took possession and in 1847 sold it for the same sum to C. On the occasion of each transfer, the name of the transferee was entered in the Collector's register as that of proprietor. No application for foreclosure was made at any time. In 1885, the representatives of the mortgagors brought a suit against the representative of C for redemption of the mortgage, and for mesne profits. The defendant pleaded (i) that the suit was barred by limitation under art. 134, sch. II of Act XV of 1877, (ii) that the several transferees were innocent purchasers for valuable consideration without notice, who had purchased in each case from the person who was, with the consent, express or implied, of the person for the time being interested the ostensible owner and had in each case, prior to the purchase, taken reasonable care to ascertain that the transferor had power to make the transfer, and had acted in good faith. *Held* that art. 134 of the Limitation Act did not apply to the case, inasmuch as that article referred only to persons purchasing what was *de facto* a mortgage, having reasonable grounds for the belief and believing that it was an absolute title; and that, having regard to sec. 29 of Regulation XI of 1822, to the presumption that the several transferees knew the law and made inquiries as to the interest they were purchasing, and examined the register in which the deed constituting the transaction of 1835 a mortgage was registered, and also having regard to the fact that Rs. 3,000 only were paid as purchase money in each case, and to the circumstance that it was doubtful whether a purchaser at a formal auction-sale such as that in question could be said to have purchased without notice an absolute interest from the mortgagee, it must be inferred that the transferees knew, or might or ought to, have known, unless they wilfully abstained from inquiry, that the interest which they respectively were purchasing was merely that of a mortgagee. *Sobhag Chand Gulab Chand v. Bhai Chand* referred to. *Held* that as by Regulation XVII of 1866 mortgagors in such a case as the present were entitled to redeem within sixty years, the plaintiffs were entitled to a decree for redemption.—9 Al. 97.

135.—Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immovable property mortgaged.	Twelve years	When the mortgagor's right to possession determines.
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#### Notes.

Under a mortgage deed, which by its express terms allows the mortgagee a right to take possession upon default by the mortgagor in payment of the mortgage money, the mortgagee, as absolute owner of the property, has twelve years from the time at which his right to possession commences, in which he may bring his suit for possession. But where there is no such stipulation in the mortgage, the right of the mortgagee to take possession does not accrue until after the expiration of the year of grace.—I. L. R., 10 Cal. 68.

Under Act XIV of 1859, a mortgagee was ordinarily bound to bring his suit within 12 years from the date of default, and was barred thereafter, unless it could be shown (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagee after the date of default. On the 17th of November 1865 certain property situate in the district of the 24 Pergunnahs was mortgaged by the owner thereof to secure the repayment of Rs. 15,785, with interest at 18 per cent. on the 17th February 1866. The mortgagor and mortgagee were Hindus, and the mortgage was in the ordinary form of an English mortgage, of real property. After the date of the mortgage, and before the 15th February 1872, the mortgagor sold various portions of the mortgaged property. On the 15th February 1872 the mortgagee filed a foreclosure petition in the court of the judge of the district of the 24 Pergunnahs under Regulation XVII of 1806. Notice of the petition was served on the mortgagor alone. Neither principal nor interest was paid by the mortgagor, and on the 6th of September 1882, the assignee of the mortgagee filed a suit for foreclosure against the mortgagor, and the purchasers of the various portions of the property, under the provisions of the Transfer of Property Act, praying for foreclosure and sale :—*Held*, that as against the purchasers from the mortgagor the suit was barred by limitation under art. 135.—12 Cal. 614.

A mortgage by conditional sale, before the operation of the Transfer of Property Act 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined," was barred by art. 135 of sch. ii of Act XV of 1877. This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24 Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional sale), and the proceedings were perfect on or before 31st March 1873 as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwithstanding the determination of the mortgagor's right of possession. In a suit brought in 1882 against these purchasers, as also against the mortgagor, for foreclosure and possession, by a transferee who had acquired the mortgagee's interest in 1879 : *Held*, that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, *viz.*, on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of Property Act 1882 ; and that the title of the plaintiff, made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under art. 135, as against them. The suit therefore was dismissed as against the purchasers ; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed.—16 Cal. 693.



Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(*continued.*)

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| 136.—By a purchaser at a private sale for possession of immoveable property sold, when the vendor was out of possession at the date of the sale. | Twelve years | When the vendor is first entitled to possession. |
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#### Notes.

On the 26th of September 1867, A executed a conveyance of certain land to B for valuable consideration. On the same day A acknowledged the execution of the deed before the Registrar, who afterwards registered the same on the 19th of October 1867; B never entered into possession of the land. On the 14th November 1874, C purchased this land at a sale in execution of a decree which he had obtained against B; C did not enter into possession of the land, but on the 26th of September 1879, brought a suit for the recovery thereof against A, who had all along remained in possession:—*Held* that the suit was barred by limitation, under arts. 136, 137.—I. L. R., 11 Cal. 229.

Limitation Act, 1877, sch. II. art. 138, is applicable to a suit brought by the assignee of a purchaser of land at a Court sale to obtain possession of the land.—15 Madr. 331.

See I. L. R., 2 Al. 718, noted under art. 113. See also 11 Cal. 680.

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| 137.—Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale. | Twelve years | When the judgment-debtor is first entitled to possession. |
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**Note.** I. L. R., 11 Cal. 229, noted under art. 136.

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| 138.—By a purchaser of land at a sale in execution of a decree, for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale. | Twelve years | The date of the sale. |
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#### Notes.

A purchased the right, title, and interest of B, a judgment-debtor, in certain lands, at an auction-sale, in execution of a decree in October, 1863; was put in *formal* possession in January, 1865; and died without ever having obtained *actual* possession. After his decease, a suit was filed in September, 1875, on behalf of his minor son C, against the defendants, who obstructed his taking actual possession. *Held* that, if B was in possession at the time of the sale, that is to say, within twelve years before the institution of the suit, C was not barred by limitation.—I. L. R., 4 Cal. 216.

Where it was shown in a suit by an auction-purchaser at an execution sale that the formal possession obtained by him through the Court had not been followed by any act of possession, and consequently that it had been infructuous. *Held*, that the purchaser was entitled to bring a suit to obtain actual possession, but was bound to bring it within twelve years from



Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(continued.)

the date of the sale, the period prescribed by art. 138, Sch. II of the Limitation Act (Act XV of 1877). The decisions in *Kristo Gobindo Kur v. Gunga Pershad Surmah*, 25 W. R. 372, and *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty*, 10 C. L. R., 258, require such purchaser to obtain possession through the Court before bringing his suit, but they do not preclude him from enforcing his right by suit, when the formal possession given by the Court has failed to put him in actual possession.—10 Cal. 402.

A purchaser at a sale in execution not having applied to the Court for possession under sec. 318 of the Code of Civil Procedure, brought a regular suit to obtain possession of the property purchased : *Held*, that, although a remedy might be open to the plaintiff under sec. 318, still he was not precluded from bringing a regular suit, the remedies being concurrent. The words “the date of the sale,” in the third column of art. 138, Sch. II of the Limitation Act, 1877, signify the date of the actual sale, and not that of the confirmation of such sale.—I. L. R., 14 Cal. 644.

See I. L. R., 6 Al. 30, noted under art. 91; 15 Madr. 331, noted under art. 136.

**139.**—By a landlord to recover possession from a tenant. | Twelve years ... | When the tenancy is determined.

#### Notes.

In a suit to recover possession of a house, the plaintiffs alleged that their predecessor in title had permitted A, the father of the defendants, to occupy the house in question without paying any rent for it, and that since A's death which took place about twenty years before the institution of the suit, the defendants had been permitted to reside therein without paying rent. The defendants contended, that the plaintiffs' predecessor in title had made a gift of the house to A; that he had remained in possession of it until his death; and that since then they had been in possession of the house by virtue of the gift. *Held* that the suit was barred by limitation under Act XV of 1877, sched. ii., art. 142. The meaning of art. 143 is, that where there has been possession followed by a discontinuance of possession, time runs from the moment of its discontinuance, whether there has or has not been any adverse possession, and without regard to the intention with which, or the circumstances under which, possession was discontinued. Articles 139, 142, and 144 of Act XV of 1877 considered.—I. L. R., 5 Cal. 579.

Where a permanent tenure has been granted by a ghatwal, if the successor of such ghatwal, being one of the ghatwals, to whom Regulation XXIX of 1814 applies, wishes to resume that tenure, he must bring his suit within twelve years after succeeding to the ghatwali estate. The possession of the tenant is adverse to him from the time of the decease of his immediate predecessor. Article 193, Sch. II of Act XV of 1877, regarding suits by landlords to recover possession from tenants giving twelve years time from the determination of the tenancy, does not apply to cases in which the plaintiff seeks to recover a tenure permanent in its nature and not determinable by notice.—9 Cal. 411.

The plaintiff stated that in the year 1862 he purchased a talook in some of the defendants then held an ijara for a term of years

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(continued.)

expiring in 1868. The talook had previously been a khas mehal in the possession of the Government, and was bought by the plaintiff at an auction-sale held by the Collector. The plaintiff also stated that the ijaradar defendants, in collusion with the other defendants, had continued in possession of the lands held in ijara after the term of the ijara had expired, and had refused to give up possession thereof to the plaintiff. The Judge of the lower Appellate Court found that the defendants (other than the ijaradars) had been in possession previously to the sale in 1862, and he also found that there was no evidence to support the charge of collusion with the ijaradar defendants. He therefore dismissed the suit, (which was brought in 1880) on the ground of limitation. *Held*, on second appeal, that the plaintiff's cause of action arose on the expiration of the ijara, and that the suit, whether governed by Articles 139 or 144 of the Limitation Act, Act XV of 1877, was not barred on the ground of limitation. *Woomesh Chunder Goopto v. Raj Narain Roy*, 10 W. R., 15, cited.—9 Cal. 367.

Although the English rule of law as to the nature of the possession of a tenant for a term of years, who holds over, has been adopted in British India, the rule of limitation prescribed by 3 & 4 Will. IV, C 27, by which time begins to run against the landlord from the date of his right of entry, has not been adopted in Indian Limitation Act, 1877. If a tenant for years holds over in British India, time does not begin to run against the landlord until the tenancy on sufferance has been determined.—8 Madr. 424.

140.—By a remainderman, a reversioner (other than a landlord), or a devisee, for possession of immoveable property.	Twelve years	When his estate falls into possession.
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#### Notes.

*Seemle*, that, in Hindu law, where a mother succeeds to property as heir of her son, and her right thereto becomes barred by adverse possession, the next heirs of her son on her death will have twelve years therefrom in which to sue for possession of the property.—I. L. R., 11 Cal. 791.

See I. L. R., 8 Madr. 424, noted under art. 139 ; 10 Madr. 115, & 15 Madr. 161, noted under art. 131 ; 14 Cal. 401, noted under art. 118.

141.—Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.	Twelve years ...	When the female dies.
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#### Notes.

In 1846, a widow, under an ikrarnama, made over to her brother-in-law certain properties formerly belonging to the estate of one Luchmi Narain, her late husband. The widow died in 1878. In March 1879, a suit was brought by the daughters of Lutchmi Narain to recover the properties formerly belonging to their father, from the hands of certain vendees. *Held*, that the suit by the reversioners was not barred under art. 141 of Act XV of 1877, there having been no possession adverse to the widow, by dispos-

session for more than twelve years, the widow's cause of action having ceased when she entered into the ikrarnama in 1846, and gave up her right to the property ; nor, under sched. ii of Act XV of 1877, could the right of the plaintiffs be said to be barred by any Act repealed thereby, inasmuch as art. 142 of Act IX of 1871 prescribes the same period of limitation as is prescribed in art. 141 of Act XV of 1877 ; and that although, under Act XIV of 1859, repealed by Act IX of 1871, it was decided in *Nobin Chunder Chuckerbutty v. Guru Persad Doss*, B. L. R., Sup. Vol., 1008 ; S. C., 9 W. R., 505, that adverse possession which bars a widow also bars the reversionary heirs, yet the exception laid down in that case would be applicable, and would save limitation.—I. L. R., 8 Cal. 442.

Under Article 141 of Schedule II, Act XV of 1877, a reversioner who succeeds to immoveable property has twelve years to bring his suit for possession from the time when his estate falls into possession.—9 Cal. 934.

A title by adverse possession for more than twelve years accrues even during the lifetime of a Hindu widow, but if possession arises directly from any invalid alienation on her part, special provision is made for the right to sue on the parts of the reversioners within twelve years from her death and the accrual of their title.—9 Cal. 93.

N, a Mahomedan, died in 1849 leaving immoveable property which was inherited by his mother B, his brother E, and his sister A. It was found that A was never in possession of the share inherited by her, and that she died in 1878 :—*Held*, in a suit against E and his son, brought in 1884 by A's heirs for possession of that share, that art. 141 did not apply, and that the suit as to that share was barred. *Per WILSON, J.*—Art. 141 of Sch. II of Act XV of 1877 refers to suits by persons claiming on the death of a Hindu or Mahomedan female, under an *independent title*, in the same way as in respect of suit by remaindermen, reversioners, and others, Art. 140 does not apply to the case of a person suing on the very same cause of action which accrued to a female, and suing by right of being her heir. *Ahamed*.—12 Cal. 594.

Plaintiff sued in 1887 to recover property as part of the estate of his maternal grandfather, who died about 1845, leaving (1) a widow, who inherited the property and died in 1846, (2) his daughter by her, who took the property on her mother's death and alienated it to the defendants about 1850 and died before suit, and (3) the plaintiff's mother, who was his daughter by another wife. The plaintiff's mother made no claim on the property and died in 1883.—*Held*, the suit was not barred by limitation.—13 Madr. 512.

K died childless in 1869, leaving two widows, C and N, him surviving. By his will he bequeathed certain legacies and gave four immoveable properties to his widows for their lives. The rest of his estate and, on the death of his widows, these four properties also, he left to *dharma*. C died in 1871. N died in 1888. The plaintiff was the son of the testator's brother Govindji, who died in 1884. In December, 1888, he filed this suit, claiming to be entitled, as heir of his uncle the testator, to the said immoveable properties and to such portion of the moveable property as had not been disposed of by the widows. He contended that the bequest in the will to *dharma* was void, and that the residue consequently came to him as heir. The defendants (*inter alia*) pleaded limitation. *Held*—(1) that the bequest to *dharma* was void ; and that there was an intestacy as regards the four immoveable properties after the widows' death ; and as to the residue ; (2) That the suit was not barred by limitation. The article of the Limitation

Act XV of 1877 applicable was article 141. Under that article the plaintiff had twelve years from the death of N, which took place in 1888. As long as either C or N lived, the plaintiff had no right of action. He could not sue for possession, and he had no right whatever to interfere in the management or disposition of the income of the property.—14 Bom. 482.

In a suit by a person who had objected to an attachment of immoveable property in execution of a decree, and whose objection, had been disallowed, to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance :—*Held* that the limitation applicable to the suit was art. 141 and not art. 118 of the Limitation Act (XV of 1877), the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immoveable property for which there was a special limitation.—8 Al. 644.

The plaintiffs sued for possession of certain zemindari property as reversioners to the estate of one C, their right to sue having, accrued as alleged, by them on the death of the widow of C, which took place on 14th Oct., 1884. The defendant, alleging himself to be the adopted son of C, and being in possession of the property in dispute since the death, contended that the claim was barred. The Court of first instance dismissed the claim as barred by art. 118 of the Limitation Act, and in appeal the District Judge held the claim was barred by defendants adverse possession over the property for more than twelve years. On second appeal it was contended that the suit being by a Hindu entitled to possession as a reversioner on the death of a female, was governed by art. 141 of the Act and therefore not barred. *Held*, that as on the facts found the adopted son held adversely to the widow, adverse possession which barred the widow barred also the reversioners and therefore the claim was barred. The Shiva Ganga Case was referred to. The following cases were cited in the course of the argument, Raj Bahadoor Singh v. Achambit Lal Jagadamba, Chowdhrani v. Dakhina Mohun, Rajendranath Holder v. Jogendro Nath Banerjee.—10 Al. 485.

Plaintiffs sued for their share in the estate of their deceased father and mother. The defendants were the brother and a sister and a step-mother of the plaintiffs. As regards the claim of the plaintiffs to their shares in the estate of their mother, the defendants pleaded that the same was barred by limitation, inasmuch as their mother died on the 22nd Jan. 1873, and the suit was not instituted till the 29th of January, 1885. The Court below finding that the mother died on the 22nd January, 1873, held that art. 141, sch. ii. Limitation Act, barred the claim and dismissed the suit. *Held* that art. 141 of the Limitation Act does not apply to a suit by an heir at-law for possession of immoveable property in that character, but to a suit by a Hindu or Muhammadan who, prior to the death of a female, occupied the position of a remainder-man, or reversioner or a devisee; and on the death of the female sues on the basis of that character.—10 Al. 343.

The daughter of a separated Hindu, who was entitled to succeed to her father's immoveable property upon his widow's death, instituted, after the widow's death, a suit for possession of such property against certain persons who, upon the Hindu's death, had obtained possession and held it adversely to the widow. *Held* by the Full Bench that art. 141 of sch. ii of the Limitation Act (XV of 1877) was applicable, and that limitation ran from the date of the widow's death. Srinath Kur v. Prosunno Kumar Ghose, followed.—14 Al. 156.

Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(*continued.*)

See I. L. R., 11 Cal. 791, noted under art. 140; 14 Cal. 401, noted under art. 118.

<b>142.</b> —For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
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#### Notes.

A suit for the recovery of immovable property against a person who had originally been in mere permissive occupation or possession accorded on the ground of charity or relationship, is governed by Act XV. of 1877, sch. ii., cl. 144, and not by cl. 144 of the same schedule. In such a case the owner of the property, who has accorded the permissive occupation, cannot be said to have “discontinued” the possession.—I.L.R., 6 Cal. 311.

On the 7th November 1868, certain property was purchased by by one Gopal Doss Banerjee at a sale held in execution of a decree obtained against one Jogodanund Gossami. On the 8th January 1873, the purchaser obtained a sale certificate, and, on the 10th August 1873, was put into symbolical possession of the property through the Court. On the 3rd March 1875 the plaintiff in execution of a decree obtained against Gopal Doss Banerjee purchased this property, symbolical possession of the property being given to him by the Court on the 31st March 1875. On the 7th August 1885, the plaintiff brought this suit to recover possession of this property, alleging that he had been dispossessed therefrom on the 13th July 1885 by the defendant No. 2, who had taken an izara of the property from the son of Jogodanund. The defence set up was limitation. *Held*, that on the principle laid down in *Juggobundhu Mukerjee v. Ram Chunder Bysack*, I. L. R., 5 Cal. 584, the suit was not barred. *Krishna Lall Dutt v. Radha Krishna Surkhel*, I. L. R., 10 Cal. 402, overruled.—16 Cal. 530.

The claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants; but they had been dispossessed, or their possession had been discontinued, some years before this suit was brought by them, and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years (prescribed by Art. 142 of Sched. ii. of Act XV of 1877) next preceding the suit. That the claimants certainly showed an anterior title was not enough, without proof of their possession within twelve years, to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession.—16 Cal. 473.

Article 144 of sched. ii of Act XV of 1877, as to adverse possession, only gives the rule of limitation where there is no other article in the schedule specially providing for the case. The proprietary right would continue to exist until, by the operation of the law of limitation, it has become extinguished; but if a claim comes within the terms of Art. 142 (enacting that when the plaintiff, while in possession of the property, has been

dispossessed, or has discontinued possession, limitation shall run from the date of the dispossession or discontinuance), in such a case, by the law of Act XV of 1877, and previously of Act IX of 1871, adverse possession is not required to be proved in order to maintain a defence. At the regular settlement in the Delhi District (1843) the plaintiffs' ancestors *ex-majidars* of a plot on which the rent-free tenure had been resumed in 1838, declined to engage for the revenue; and the plot was assessed along with the village in which it was; the village-proprietors through the *lambardars* engaging for and obtaining the land. At the revision of settlement, more than thirty years after, the plaintiffs claimed possession, alleging their title, and that the village co-parceners held only in farm from the Collector for the period of settlement: *Held*, that there had been a dispossession, or discontinuance of possession, within the meaning of Art. 142; and that whether any proprietary right had existed or not in the plaintiff's ancestors, the twelve years limitation ran from the date of the dispossession or discontinuance.—17 Cal. 137.

In suits relating to disputed boundaries where the decision of the lower Court as to the ownership involves questions of the correctness of surveys, maps, recorded description, and other such evidence, the appellant should do more than show points requiring explanation. He should be prepared to show in what respect the decision has been wrong in regard to the evidence, and what other course would be right. The question was as to the ownership of land reclaimed from a *bhil* within the confines of one or other of two adjoining revenue mehals, the one belonging to the plaintiff, the other to the defendants, and involved the identification of the land in suit with some that had been covered with water, but of which the plaintiff's possession, with title, had been affirmed in proceedings of the revenue survey in 1857. In consequence of the nature and condition of the land there was no evidence of any act of possession done by either party during the first two years of the twelve immediately preceding the date of the institution of the suit, and during the last ten years the defendants had been in possession. The latter having tried and failed to establish adverse possession in themselves, contended that even if the plaintiff's possession had been shown to have existed in 1857, he could not succeed without his showing that his possession remained till later than the 9th April 1869, the suit having been filed on 9th April 1881, or unless he proved some act of dispossession by the defendants within that period. *Held*, that the presumption was in favour of the plaintiff's possession, which had been with apparent title, having in fact continued over the two years in question, as to which continuance there was no evidence to the contrary. If the burden was on the plaintiff to show possession down to within twelve years of suit, it had been discharged.—19 Cal. 660.

The plaintiff, who was the sister of the defendant, sued in 1888 to recover from him a moiety of a paramba purchased by them jointly in 1877. In 1878 the plaintiff went to live elsewhere, but, from time to time, returned and spent a few days with the defendant on the land in suit. The defendant pleaded limitation:—*Held*, that Limitation Act, sch. II, art. 144, applied to the suit, and the burden of proving adverse possession lay on the defendant.—14 Madr. 96.

In cases falling under article 142 of the Limitation Act (XV of 1877) the plaintiff must at the outset show possession within twelve years, and cannot rest merely on a proof of title, while in cases falling under article 144 the plaintiff may not rest content with proof of title only in the first instance, and the burden lies on the defendants to show that they have had



Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part VIII.—Twelve years.—(continued.)

a possession inconsistent with the title of the plaintiff for more than twelve years before suit. The plaintiff sued to recover possession of certain land, together with mesne profits, until recovery of possession, alleging that he had obtained possession under his sale, and that his possession was obstructed by the defendants. *Held*, that the suit fell under article 142, and not 144, of the Limitation Act (XV of 1877), and that it was for the plaintiff to show that he, or those under whom he claimed, had been in possession within twelve years before suit.—14 Bom. 458.

In a suit brought by a vendee to recover possession of immoveable property which was not in the possession of his vendor at the time of the sale, the defence having raised the point of adverse possession for more than twelve years, *held* that the *onus* lay upon the plaintiff to show that the claim was not barred by the defendant's adverse possession by proving that his vendor had been in possession within twelve years before the date of sale under article 142, Schedule II of the Limitation Act (XV of 1877).—16 Bom. 343.

The plaintiff sued to set aside a mortgage by conditional sale of certain immoveable property belonging to him, made on his behalf during his minority, and for possession of the property. *Held* that the suit was one described in No. 142, sch. ii, Limitation Act, 1877, and not in No. 91 of that schedule.—5 Al. 490.

See I.L.R., 5 Al. 490, noted under art. 91; 5 Cal. 579, noted under art. 139; 14 Bom. 279, noted under art. 44; 18 Cal. 642, noted under art. 127.

143.—Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	Twelve years	When the forfeiture is incurred or the condition is broken.
144.—For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Ditto.	When the possession of the defendant becomes adverse to the plaintiff.

### Notes.

Where a certain period is allowed by the law of Limitation, within which an instrument affecting a person's rights or immoveable property must be impugned, and the person whose rights or property are affected fails to impugn such instrument within that period:—*Held*, that he will not be precluded from availing himself of the longer period allowed for the recovery of immoveable property, provided that he can prove that such instrument is null and void so far as his interests are concerned.—I. L. R., 12 Cal. 69.

Possession taken by a trespasser during the currency of an *Ijara* lease does not become adverse to the zemindar (lessor) until upon the expiration of the term, and a suit for possession may be brought within 12 years of that date under the provisions of art. 144 of the Limitation Act. *Krishna Gobind Dhur v. Hari Churn Dhur*, I. L. R., 9 Cal. 367, followed.—13 Cal. 101.

After the sale of a share in an estate under the provisions of Act XI



of 1859, a suit was brought to establish a mokurari lease, as an incumbrance under sec. 54, upon the share in the hands of the purchaser. This share having been held by several successive benami holders, the main question was whether those who had granted the mokurari were entitled to all or to any, and what part, of the land comprised in their grant; and as to this point the most important fact was the actual possession or receipt of the rents; this being also material in regard to limitation under Act XV of 1877, sch. II, Art. 144, the twelve years' bar commencing from the date of possession first held adversely. The mokuraridar having granted a dur-mokurari lease of part of his holding, which was afterwards surrendered for good consideration, ikrarnamas to this effect were executed, but not being registered were not receivable in evidence. *Held*, that to prove a formal deed of reconveyance was not necessary—the receipt of the money and the relinquishment of possession sufficiently showing what had become of the dur-mokurari interest. The mokurari lease having been established as to so much only of the lands as were covered by the title proved, the decree below, although no question of apportionment had been raised, was conditional that the whole rent reserved should be paid: *Held*, that this condition should have been omitted, the amount of rent being determinable by a future proceeding if necessary.—14 Cal. 109.

The plaintiff Gossain Dalmar Puri's predecessor in title, one Gossain Lachmi Narain Puri, acquired the share of 2 annas and 8 pies in certain mouzabs by purchase at a sale held in execution of his own decree against one Het Narain Singh, and in September 1874 obtained symbolical possession. In December 1874, Het Narain Singh, and his co-sharers, granted a perpetual lease to one Gokulanund, reserving a nominal rent. Subsequently Gossain Lachmi Narain Puri brought a suit for possession of the 2 annas and 8 pies share against Het Narain Singh and his co-sharers, and after the death of Gossain Lachmi Narain Puri, Gossain Dalmar Puri obtained a decree. In March 1882, Gossain Dalmar Puri obtained symbolical possession in execution of that decree. On the 29th January 1887, Bepin Behari Mitter purchased at a sale in execution of a decree against Gokulanund, the right of the latter as lessee, and obtained, through the Court, symbolical possession of the same. Gossain Dalmar Puri then instituted this suit to recover possession of the said 2 annas and 8 pies share against Bepin Behari Mitter, and Gokulanund in December 1887, that is, 13 years after the grant of the lease by Het Narain Singh and his co-sharers to Gokulanund. The defence set up was limitation. *Held*, that the suit was barred by limitation. *Held* also, that when the lease purports to be a perpetual lease without reversion to the grantors, and no rights reserved to them, but only a nominal rent, symbolical possession as against the grantors would not be effective against the lessee, and thus save the bar in limitation.—18 Cal. 520.

The manager of a Nambudri family in Malabar having demised certain land on kanam in 1868, was removed from his position as manager in 1875. In 1883 his successor sued to eject the kanam-holders:—*Held*, that the suit was barred by limitation.—9 Madr. 244 and 482.

In a family of three undivided brothers, an estate was purchased by the eldest as manager, on whose application a fourth party, a sister's husband, was recorded in the revenue records as a co-proprietor with them. The latter, even if he by joining in the purchase had become entitled to an undivided fourth share in the estate, did not thereby become a member of the undivided family; and the members of it would not have had a right to succeed to his fourth share, which would have descended to his own

heirs; the other three-fourths which he would not have inherited going by survivorship among the members of the family. A son of the eldest brother obtained, by the deaths of his father and uncles, sole possession of the whole estate:—*Held* that he did not take the one-fourth share above mentioned by any right of inheritance, and that, in the absence of proof that his possession of it was by authority of the fourth recorded co-proprietor, his possession must be presumed to have been adverse to the latter and to any one claiming through him. It followed that a suit to obtain from those claiming through the son who was now dead, the one-fourth share, brought more than twelve years after possession taken by the son, by a purchase relying on a title through the fourth co-proprietor was barred by limitation under article 144 of the second schedule of Act XV of 1877.—9 Madr. 482.

A defendant has a right to set up the plea of tenancy, and at the same time to rely on the statute of limitations. The plaintiff sued to recover possession of certain land. The defendant pleaded that it was included in a permanent lease granted to him in 1849 by the plaintiff's predecessor in title, and that the suit was barred by the law of limitation. It was found that the land was not included in the lease. It appeared that there were disputes between the parties about the land since 1856, each asserting his own right to it. It was contended for the plaintiff that inasmuch as the defendant had claimed the land as a tenant, his possession was not adverse under article 144 of the Limitation Act XV of 1877. *Held* that under the circumstances the defendant's possession was adverse. The defendant was a trespasser, setting up a pretended tenancy which the plaintiff denied throughout. The case, therefore, was to be regarded as one against a trespasser and not as one between landlord and tenant. *Dionmoney Dabea v. Doorgapersad Mozoomdar* 12 Beng. L. R., 274, followed. *Tekætni Gowra Kumari v. The Bengal Coal Company and others* 12 Bom. L. R., 282 distinguished.—7 Bom. 96.

In 1877 the plaintiff applied for a certificate of heirship to one T, her husband's uncle, who had died in 1876. The defendant opposed the application, and alleged that T had left a will in her favour. On the 28th July, 1877, the District Judge made an order rejecting the plaintiff's application, and granting a certificate to the defendant. In 1879 the plaintiff brought the present suit, claiming to be entitled to the property left by T. It was contended (*inter alia*) for the defendant that the plaintiff's suit was barred, she having failed to apply to set aside the order granting the certificate to defendant within one year from the date of that order. The Court of first instance overruled the objection, and awarded plaintiff most of her claim. The defendant appealed, and the lower Appellate Court reversed the lower Court's decree, holding the suit barred. On appeal to the High Court:—*Held*, restoring the decree of the Court of first instance, that the plaintiff's suit was not barred. A certificate of heirship confers only the right of management of the property of the deceased, and is intended to give security to third persons in dealing with the person who claims to be the heir. Where the right of the person, to whom the certificate is granted to be the heir of the deceased, is in controversy, there is no necessity to have the order granting him the certificate set aside; and the question, whether the suit to determine the right claimed is in time, is to be determined by the sections of the Limitation Act relating to suits for the possession of property.—10 Bom. 449.

Under sec. 39 of the Dekkhan Agriculturist's Relief Act (XVII of 1879) the conciliator to whom application is to be made for an amicable settle-

ment of a dispute must be the one appointed for the local area in which the agriculturist is residing, and not for the district in which the land in dispute is situated. The plaintiff was an agriculturist residing in the Korpargaon Taluka. He purchased the house in dispute from the defendant on the 30th January, 1872, but did not get possession. On the 12th December, 1883, the plaintiff applied to be put into possession under sec. 39 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the conciliator appointed for the Khatav Taluka where the house in dispute was situated. The proceedings before the conciliator lasted until the 19th February, 1884, on which day a certificate under section 46 of the Act was granted to the plaintiff. On the 20th February, 1884, the plaintiff brought this suit to recover possession of the house. The defendant pleaded limitation. The plaintiff contended that under section 48 of Act XVII of 1879 the time occupied in the proceedings before the conciliator should be deducted in computing the period of limitation. *Held*, that the plaintiff was not entitled to such deduction, as the conciliator, before whom the proceedings had been instituted, was not the one appointed for the local area in which the plaintiff was residing, as required by sec. 39 of Act XVII of 1879, and had, therefore, no jurisdiction to deal with plaintiff's application. *Held*, also, that the certificate obtained by the plaintiff was not such a certificate as is required by sec. 47 of the Act. *Held*, also, that the want of a proper certificate was not fatal to the suit. As soon as a defect in a certificate becomes apparent, the proper course is for a Court to stay proceedings to enable the plaintiff to make good the defect by producing the requisite certificate. *Held*, further, that the objection to the suit, on the ground that a proper certificate had not been obtained, could be taken for the first time in second appeal, as it was an objection affecting the jurisdiction of the Courts below. *Held*, further, that under article 144 of the Limitation Act (XV of 1877) it is not for the plaintiff to prove that he has been in possession within twelve years before suit, but it is for the defendant to show that he has held adversely to the plaintiff for twelve years.—13 Bom. 424.

The plaintiff having brought a suit to recover possession of mango trees growing on his own land, and the lower Courts having found that the defendant had, during twelve years preceding the suit, adverse possession by taking fruits thereof. *Held*, that the claim was for possession of an interest in immovable property and was governed by the limitation of twelve years prescribed by article 144 of the Limitation Act XV of 1877.—16 Bom. 353.

The plaintiff purchased the land in dispute on 20th April, 1876, at a Court sale held in execution of a decree against defendant's father and obtained symbolical possession through the Court on 7th September, 1876. At the date of the sale, and subsequently thereto, the defendant was in actual possession of the land in question. On 5th September, 1888, the plaintiff filed the present suit to recover possession of the land. *Held*, that the suit was time-barred, the defendant's possession having been adverse to the plaintiff for more than twelve years.—16 Bom. 722.

Where under an instrument a debtor allotted to his creditor his "aivaj" on account of Deshpande Hak and Inam recoverable from the villages and undertook not to meddle till the "aivaj" was paid, and the instrument did not describe the lands mentioned therein by metes and bounds, but only as being in the occupation of certain persons paying so much rent, and contained a clause that the "aivaj" of 63 rupees (the sum total of rents) had been allotted and that the creditor might take kabulayats from the occupants and make the recoveries, *held*, that the term "aivaj," although cap-

able of meaning property generally, must from the context of the document mean monies or sums. *Held*, further, that the language of the instrument showed a clear intention to appropriate rents as distinguished from the lands themselves. *Held*, also, that even if the transaction were regarded as a mortgage, it could only be a usufructuary mortgage, which would confer no right to have the property sold. Article 144, schedule II, of the Limitation Act (XV of 1877) applies to the creditor's right of possession, and the defendant not being in adverse possession for 12 years prior to the institution of the suit, his claim was held not barred. It being obligatory upon the lower Court to take accounts in the mode directed in the Dekkhan Agriculturists' Relief Act (XVII of 1879), which requires annual *rests*, and that not having been done, the decree was reversed and the case sent back to the lower Court to take accounts according to the Act.—16 Bom. 172.

I died in 1861, leaving a zemindari estate, a moiety of which, at the time of his death, was in the possession of a mortgagee. On the death of I the defendants in this suit, who were among his heirs, caused their names to be recorded, as his heirs, as the proprietors of such estate, to the exclusion of the plaintiff in this suit, who was his remaining heir; and they appropriated to their own use continuously for more than twelve years the profits of the unmortgaged moiety of such estate, and the malikana paid by the mortgagee of the mortgaged property. In 1877 the defendants redeemed the mortgage of the mortgaged moiety of such estate from their own moneys. In 1878 the plaintiff sued for the possession of her share by inheritance of such estate. *Held* (SPANKIE, J., doubting), with reference to the mortgaged moiety of such estate, that the possession of the defendants in respect of such moiety did not become adverse, within the meaning of art. 144 of sch. ii of Act XV of 1877, on the death of I in 1861, but on the redemption of such moiety in 1877, "adverse possession" under that article meaning the same sort of possession as is claimed, that is to say, in this case, full proprietary possession which was not the nature of the possession of the defendants until the redemption of the mortgage, and the suit, therefore, in respect of such moiety, was within time.—3 Al. 24.

Property sold in execution of a decree of a Revenue Court vests in the purchaser on completion of the sale and payment of the full price. In order to perfect his title it is not necessary that he should obtain a sale-certificate or should be put into possession by the Collector. *Held*, therefore, that a suit by a purchaser at a sale in execution of a decree of a Revenue Court for possession of the property was maintainable, although his sale-certificate might be an invalid document, and the Collector had not put him into possession.—5 Al. 297.

Under a registered deed of mortgage dated in May, 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October, 1869 the mortgagors sold the property, and, thereupon, one R brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree, and got the property and sold it in 1871 to D. In 1883, the mortgagee brought a suit against D to obtain possession under his mortgage:—*Held*, with reference to a plea of adverse possession for more than twelve years set up by the defendant that the possession of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor that the purchaser

Description of suit.	Period of limitation.	Time from which period beings to run.
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### Part VIII.—Twelve years.—(continued.)

was making. There was privity between him and the vendor, and he came in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee v. Dhonendro Chunder Mookerjee* distinguished:—*Held*, also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having notice of it would not otherwise affect his liability, inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bona-fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India:—*Held*, under these circumstances that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase.—8 Al. 86.

In 1828 one of several co-mortgagors redeemed an usufructuary mortgage executed in 1822 and obtained possession. The other mortgagors brought a suit against the heir of the redeeming mortgagor in 1886, for redemption of their shares in the mortgaged property. *Held* that the limitation applicable to the suit was that provided by art. 148 sch. ii. of the Limitation Act (XX of 1877); that time ran not from the date of the redemption in 1828, but from the time when it would have run against the original mortgagee if he had been a defendant, *i. e.*, the date of the original mortgage of 1822; and that the suit was therefore barred by limitation. *Umr-un-nissa v. Muhammad Yar Khan* explained. *Nura Bibi v. Jagat Narain and Ram Singh v. Baldeo Singh*, referred to.—11 Al. 423.

See I. L. R., 2 Cal. 323, noted under sec. 10; 11 Cal. 680, noted under art. 136; 10 Madr. 115, noted under art. 131; 10 Al. 485, noted under art. 141; 5 Cal. 692, noted under art. 89; 19 Cal. 629 & 5 Al. 76, noted under art. 91; 6 Al. 231, noted under art. 113; 5 Cal. 938 & 18 Cal. 642, noted under art. 127; 9 Cal. 367, and 5 Cal. 579, noted under art. 139; 6 Cal. 311, noted under art. 142; 11 Al. 456, noted under art. 91; 13 Bom. 221, noted under art. 12; 19 Cal. 646, noted under art. 47; 17 Cal. 137, 14 Bom. 458 & 14 Madr. 96, noted under art. 142; 15 Madr. 60, noted under art. 123.

### Part IX.—Thirty years.

145.—Against a depositary or pawnee to recover moveable property deposited or pawned.	Thirty years	The date of the deposit or pawn.
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#### Note.

See I. L. R., 18 Cal. 234, noted under sec. 10; 10 Cal. 73, noted under art. 148.

146.—Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged.	Thirty years	When any part of the principal or interest was last paid on account of the mortgage-debt.
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Description of suit.	Period of limitation.	Time from which period begins to run.
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### Part X.—Sixty years.

<b>147.</b> —By a mortgagee for foreclosure or sale.	Sixty years	When the money secured by the mortgage becomes due.
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#### Notes.

By a mortgage bond the first defendant mortgaged on the 1st January 1864, certain property to plaintiffs' deceased father, with an implied power to sell the same if the debt was not satisfied at the expiration of seven years from that date. On the 2nd January, 1883, the first plaintiff filed a suit in his own name, as manager of the family, to have the debt realized by the sale of the mortgaged property. The third defendant insisted upon plaintiff's other two brothers being joined as co-plaintiffs, and they were so joined on the 1st March, 1883, at which date both the lower Courts were of opinion that the suit was barred under sec. 22 and article 132 of the Limitation Act. On appeal by the plaintiffs to the High Court :—*Held*, reversing the lower Court's decrees, that plaintiffs' suit was governed by article 147 and, therefore, not barred. By the instrument sued on, the property in question was mortgaged to the plaintiffs' father with an implied, if not express, power to sell the same in the event of the mortgage debt not being paid at the expiration of seven years from the date of the mortgage. The period of limitation was sixty years from the 1st January 1871.—I.L.R., 10 Bom. 592.

An equitable mortgagee by deposit of title-deeds is a mortgagee within the meaning of article 147, Schedule II of the Limitation Act (XV of 1877), and the period of limitation for a suit by such a mortgagee is sixty years, as therein prescribed. A mortgagee by deposit of title-deeds has the right to sue for foreclosure or sale.—14 Bom. 269.

Where certain land was given as security for repayment of a loan under an instalment bond which contained an express provision for sale of the property in case of default, it was, *Held*, that the bond was a mortgage-bond, and that art. 147 of the Limitation Act (XV of 1877) applied to a suit to recover the instalments due under the bond by sale of the mortgaged property. *Held*, also, that the limitation for the personal remedy against the mortgagor was three years.—14 Bom. 377.

A bond contained the following stipulation as regards the liabilities of the sureties :—"In respect of this we have given to you, in writing, as a *nazar gahan* (*i. e.*, sight mortgage), the fields which belong to ourselves and which we ourselves are enjoying.....If we do not pay according to contract, you may sell the said fields through the Court and recover the amount. If any balance remains, we will pay it off personally or by means of our other property." *Held*, that the above stipulation created a mortgage and not a mere charge on the fields in question, and that article 147 of Schedule II of the Limitation Act (XV of 1877) applied to a suit by the obligee against the surety under the bond to enforce his lien by sale of the property mortgaged.—14 Bom. 578.

See I. L. R., 9 Madr. 218, 12 Cal. 111, 10 Bom. 519, 10 Madr. 509, 13 Bom. 90, 14 Cal. 730 & 6 Al. 551, noted under art. 132.

<b>148.</b> —Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	Sixty years	When the right to redeem or to recover possession accrues : Provided that all claims to redeem, arising under instruments of
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Description of suit.	Period of limitation.	Time from which period begins to run.
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**Part X.—Sixty years.—(continued.)**

**148.**—Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.

mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.

**Notes.**

A right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property, and a suit to establish such right therefore falls under art. 148 and not under art. 145 of the Limitation Act.—I. L. R., 10 Cal. 73.

There is a clear distinction as to the *onus* of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years adverse possession by the defendant. In each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelve years adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted, was lost. In a suit for possession of land by redemption of mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and therefore a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to the property. *Philipps v. Philipps*, *Dawkins v. Lord Penrhyn*, *Radha Gobind Roy Sahab v. Inglis*, *Rao Karan Singh v. Rajah Bakar Ali Khan*, *Rajah Kishen Dutt Panday v. Narendar Bahadur Singh*, *Ram Chandra Apaji v. Balaji Bhaurav*, and other cases referred to. Al. 438.

Where one of several co-mortgagors redeems the whole mortgage he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interests of the other co-mortgagors, and the period of limitation applicable to a suit for redemption brought by the other co-mortgagors is that provided for by Art. 148 of Sch. ii of the Limitation Act (XV of 1877). Such period begins to run from the date when the original mortgage was redeemable and not from the date of its redemption by the aforesaid co-mortgagor. *Nura Bibi v. Jagat Narain* and *Raghubir Sahai v. Bunyad Ali* followed: *Umr-un-nissa v. Muhammad Yar Khan* distinguished: *Ram Singh v. Baldeo Singh* referred to.—14 Al. 1.

See I. L. R., 11 Al. 423, noted under art 144.

**149.**—Any suit by or on behalf of the Secretary of State for India in Council.

Sixty years

When the period of limitation would begin to run under this Act against a like suit by a private person.

**Note.**—See I. L. R., 8 Cal. 230, noted under art. 121.



Description of appeal.	Period of limitation.	Time from which period begins to run.
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### Second Division\* : Appeals.

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| 150.—Under the Code of Criminal Procedure† from a sentence of death passed by a Sessions Judge.   | Seven days  | The date of the sentence.                           |
| 151.—From a decree or order of any of the High Courts of Judicature at Fort William, Madras, and Bombay, “or the Chief Court of the Panjab,”‡ in the exercise of its original jurisdiction. | Twenty days | The date of the decree or order.                    |
| 152.—Under the Code of Civil Procedure§ to the Court of a District Judge.   | Thirty days | The date of the decree or order appealed against.   |
| <b>Note.</b> —See I. L. R., 12 Al. 461, noted under sec. 5.   |             |   |
| 153.—Under the same Code, sec. 601, to a High Court.  | Thirty days | The date of the order refusing the certificate.     |
| 154.—Under the Code of Criminal Procedure§ to any Court other than a High Court.  | Ditto.      | The date of the sentence or order appealed against. |

#### Note.

In computing the period of Limitation prescribed for an appeal from a sentence of a Criminal Court by art. 154, the time taken in forwarding an application by a prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded. In the case of such appeals, presentation of the petition of appeal to the officer in charge of the jail, is for the purpose of the Limitation Act, equivalent to presentation to the Court.—I. L. R., 9 Madr. 258.

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|---|-------------|---|
| 155.—Under the same Code to a High Court¶ except in the cases provided for by No. 150 and No. 157.                | Sixty days  | The date of the sentence or order appealed against. |
| 156.—Under the Code of Civil Procedure   to a High Court except in the cases provided for by No. 151 and No. 153. | Ninety days | The date of the decree or order appealed against.   |

#### Note.

The mere presentation of an application for review where it is not shown that the grounds therefor are reasonable and proper is not a sufficient reason for admitting an appeal after the period of limitation prescribed for such appeal has passed.—I. L. R., 15 Cal. 242.

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\* For amendments in Upper Burma, see Reg. X. of 1887, printed at p. 458, *infra*.

† See Act X. of 1882, sec. 3.

‡ Inserted by the Panjab Courts Act (XVII. of 1877), sec. 18.

§ See Act XIV. of 1882, sec. 3.

§ See Act X. 1882, sec. 3.

¶ See the Burma Courts Act (XVII. of 1875, secs. 37 and 83.

|| See Act XIV. of 1882, secs. 37, 65, 83, and 85.

Description of appeal and application.	Period of limitation.	Time from which period begins to run.
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### Second Division : Appeals.—(continued.)

157.—Under the Code of Criminal Procedure* from a judgment of acquittal.	Six months	The date of the judgment appealed against.
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### Third Division : Applications.†

158.—Under the Code of Civil Procedure‡ to set aside an award.	Ten days	When the award is submitted to the Court.
159.—For leave to appear and defend a suit under Chapter XXXIX of the Code of Civil Procedure.‡	Ditto.	When the summons is served.
160.—For an order under section 629 of the same Code restoring to the file a rejected application for review.	Fifteen days	When the application for review is rejected.
160A.§—For a review of judgment by a Provincial Court of Small Causes or by a Court invested with the jurisdiction of a Provincial Court of Small Causes when exercising that jurisdiction.	Ditto.	The date of the decree or order.
161.—[This number, which was substituted for the original by Act XII of 1879, section 108, has been re-numbered as 173A, and transposed by Act VII of 1888.]		
162.—For a review of judgment by any of the High Courts of judicature at Fort William, Madras, and Bombay, "or the Chief Court of the Panjab,"   in the exercise of its original jurisdiction.	Twenty days	Ditto.
163.—By a plaintiff for an order to set aside a dismissal by default.	Thirty days	The date of the dismissal.
164.—By a defendant from an order to set aside a judgment <i>ex-parte</i> .	Ditto.	The date of executing any process for enforcing the judgment.

### Notes.

An *ex parte* decree was obtained against a defendant who applied to have it set aside under sec. 108 of the Civil Procedure Code. The appli-

\* See Act X. of 1882, sec. 3.

† Nothing in this Act shall bar the right to make an application under the North-Western Provinces Rent Act, 1881, to assess to rent land held rent-free.—See Act XII. of 1881, sec. 30, cls. (e) and (f); or the right of a malguzar in the Central Provinces to demand revenue of land assessed to revenue and held free.—See Act XVIII. of 1881, sec. 117.

‡ See Act XIV. of 1882, sec. 3.

§ This number has been inserted by the Provincial Small Cause Courts Act (IX. of 1887), sec. 36.

|| Inserted by the Panjab Courts Act (XVII. of 1877), sec. 18.

Description of application.	Period of limitation.	Time from which period beings to run.
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### Third Division : Applications.—(continued.)

cation was made more than thirty days from the date of attaching the defendant's property in execution of the decree, but within thirty days of the service of the sale proclamation. *Held*, that the application was barred by limitation under art. 164, Sch. II, Act XV of 1877.—I. L. R., 9 Cal. 869.

An *ex parte* order was made against S, to whom a certificate under Act XL of 1858 had been granted, revoking such certificate, and granting it to A, and directing S to deliver the property of the minor to A and to render an account of all moneys received and disbursed within thirty days. In pursuance of this order a precept or injunction was served on S informing her that the certificate granted to her had been revoked, and had been granted to A, and directing her to deliver the property of the minor to A and to render him accounts of all moneys realized and expended within one month. *Held* that such precept or injunction was a "process for enforcing" such *ex parte* order, and that it was "executed" when it was served on S, within the meaning of art. 164 of the Limitation Act, 1877.—6 Al. 14.

165.—Under the Code of Civil Procedure,* by a person dispossessed of immoveable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.	Thirty days	The date of the dispossession.
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### Notes.

Symbolical possession—such as may be given by the Nazir of a Court by sticking a bamboo into the ground, or the like—of a dwelling-house, or of a share in a dwelling-house, of which actual possession might have been granted, is not such a *bona fide* possession as will save limitation. A purchaser of immoveable property, sold in execution of a decree, must, under Act XV of 1877, sch. ii., art. 165, if obstructed or resisted in endeavouring to obtain possession, apply, within thirty days, to the Court under the directions of which the execution-sale was held, to be put into actual possession; and if he omits to do so within thirty days from the time when his taking possession was first obstructed or resisted, his only remedy is by a civil suit. The plaintiffs, on the 31st January, 1863, purchased a half-share in a certain house at sale in execution of a decree, but took no steps at the time to take possession of it. In 1869, the Nazir of the Court was directed to put them into possession, and gave them symbolical possession. Afterwards, in 1871, the plaintiffs, again with the assistance of the Nazir, entered upon, and for the space of about a minute remained in possession of one of the rooms in the house, until they were turned out by the defendants. On the 18th November, 1876, the plaintiff filed a suit, praying for a declaration of right, and for a partition and to be put into separate possession of the share that might be allowed to them on such partition. *Held*, that neither the symbolical possession given to them in 1869 by the Nazir,

\* See Act XIV. of 1882, sec. 3.

Description of application.	Period of limitation.	Time from which period begins to run.
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### Third Division : Applications.—(continued.)

nor the momentary and partial possession which they had obtained in 1871, was sufficient to save limitation ; and that, as their suit was brought on the 18th Nov. 1876, more than twelve years after the 31st January 1863, when they first became entitled to possession, it was now barred by limitation.—I. L. R., 5 Cal. 331.

A person purchased certain property at a sale in execution of a decree in November, 1878 ; his purchase was confirmed, and he obtained a certificate of sale on the 23rd May, 1879, from which date he remained in possession. The Judgment-debtor applied to have the sale set aside for irregularity, but his application was dismissed both at the hearing and on appeal. He had applied, before the sale took place, to stay the sale, on the ground that the right to apply for execution was barred. This application was dismissed, but was allowed on appeal. It did not appear that the auction-purchaser was a party to the proceeding, or that he was cognizant of the application. Two years from the date of the sale, and one and-a-half year from its confirmation, the judgment-debtor, on a summary application, obtained an order setting aside the sale, and putting the auction-purchaser out of possession. *Held* that the order was erroneous, the Subordinate Judge having no power, after the sale had been confirmed, to set aside the sale by a summary order ; and that, under art. 165, sch. ii., of Act XV of 1877, the application for such an order was barred.—7 Cal. 91.

<b>166.</b> —To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale, “or on the ground that the decree-holder has purchased without the permission of the Court.”*	Thirty days	The date of the sale.
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#### Note.

In 1879 D obtained a decree against S. S gave security for the satisfaction of the decree, where upon D agreed not to take proceedings in execution. In breach of this agreement, D in the same year applied for execution and sold certain immoveable property belonging to S, of which K became the purchaser. K did not apply for possession until 1883, in which year he applied for and obtained possession of the property. S alleged that he then for the first time became aware of the sale and that by the fraud of D & K he had been kept in ignorance of the execution proceedings taken by D in breach of the above-mentioned agreement, and within thirty days after K obtained possession, he (S) applied for a reversal of the orders which had been passed in the aforesaid fraudulent proceedings. The Subordinate Judge held that the application was barred by article 166 and referred the applicant to a separate suit to set aside the sale. On application to the High Court :—*Held*, on the authority of *Paranjpe v. Kanade*, that a separate suit would not lie, and that the relief sought by S could only be obtained, at all events as against D, by an application under sec. 244 of the Civil

\* The words quoted have been added by Act XII. of 1879, sec. 108.

Description of application.	Period of limitation.	Time from which period begins to run.
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### Third Division : Applications.—(continued.)

**Procedure Code:—***Held*, also that article 166 did not apply. That article as amended by sec. 108 of Act XII of 1879 only applies to applications made under sec. 311 or sec. 294 of the Civil Procedure Code seeking to set aside a sale on the ground of a material irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court.—I. L. R., 9 Bom. 468.

<b>167.</b> —Complaining of resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property.	Thirty days	The date of the resistance, obstruction, or dispossession.
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#### Notes.

Where a warrant for possession of land in execution of a decree was not executed owing to the resistance of the judgment-debtors in September 1880 and no complaint was made under sec. 328 of the Code of Civil Procedure, 1877, but a fresh warrant for possession was applied for by and granted to the decree-holders, and resistance was again made in January, 1881. *Held* that a complaint by the decree-holders as to the second obstruction made within thirty days of the second obstruction was not barred by reason of art. 167 of Schedule II of the Limitation Act.—I. L. R., 5 Madr. 113.

In 1877, at a sale held in execution of a decree, certain property was purchased on behalf of the applicant, who was then a minor, by the agent nominated by his guardian. An order for delivery of possession was made; but a third party having obstructed, the order was returned unexecuted. No further proceedings were taken by the agent. The applicant having come of age, applied for delivery of possession within three years from the date of his attaining majority, but more than thirty days after the date of the obstruction and more than thirty days after he came of age. The Subordinate Judge rejected the application as barred, being of opinion that the omission to apply, within thirty days from the date of the obstruction, on the part of the applicant's agent, as well as the applicant's omission to do so within a similar period after he came of age, barred the applicant, whose remedy lay in a fresh suit. *Held*, by the High Court that the application was rightly rejected. It was virtually an attempt to renew the old proceedings, and was barred by article 167 of Schedule II of the Limitation Act. If the applicant intended to proceed summarily under the Civil Procedure Code, he should have taken proceedings within a month after he came of age.—11 Bom. 473.

See I. L. R., 5 Cal. 595, noted under art. 179.

<b>168.</b> —For re-admission of an appeal dismissed for want of prosecution.	Thirty days	The date of the dismissal.
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Description of application.	Period of limitation.	Time from which period begins to run.
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### Third Division : Applications.—(continued.)

<b>169.</b> —For a re-hearing of an appeal heard <i>ex-parte</i> in the absence of the respondent.	Thirty days ...	The date of the decree in appeal.
<b>170.</b> —For leave to appeal as a pauper.	Ditto. ...	The date of the decree appealed against.

#### Note.

Judgment was pronounced by the lower appellate Court, dismissing the appeal of the plaintiff, on the 29th March, 1887. The decree was signed by the Judge on the 1st April, but, in accordance with sec. 579 of the Civil Procedure Code, it bore date the day on which the Judgment was pronounced. On the 15th April the plaintiff applied for a copy of the decree; on the 16th she received notice that the estimate of the costs of preparing the copy was prepared; on the 19th she paid into Court the amount required by the estimate. She had notice to attend on the 23rd for delivery to her of the copy, and on the 25th she attended and received the copy. On the 12th May she presented in the High Court, to the proper officer, an application, under sec. 592 of the Code, for leave to appeal as a pauper. *Held* that the application was barred by limitation under art. 170, sch. ii., of the Limitation Act (XV of 1877), and that sec. 5 of the Act did not apply. *Per* EDGE, C. J.—In computing the period of limitation prescribed for an appeal or for an application for leave to appeal as a pauper, where the decree appealed against is not signed until a date subsequent to the date of delivery of judgment, the intermediate period should, under sec. 12 of the Limitation Act, be excluded if the delay in signing the decree has delayed the appellant or applicant in obtaining a copy of the decree, and not otherwise. *Bani Madhub Mitter v. Matungini Dassi* referred to. A delay caused by the carelessness or negligence of a party applying for copy of decree, such as negligence in coming forward to pay the money required, cannot be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite, within the meaning of sec. 12 of the Limitation Act, does not mean requisite by reason of the carelessness or negligence of the applicant: it means the time occupied by the officer who has got to provide the copy, in making the copy. The important date, with reference to sec. 12 and art. 170, is not the date when the copy of the decree is delivered, but the date when it is ready for delivery to the applicant if the applicant chooses to apply, where he has had notice that the copy will be ready on that date.—I. L. R., 12 Al. 79.

<b>171.</b> —Under section 371 of the Code of Civil Procedure, or under that section and section 582 of the same Code, for an order to set aside an order for abatement or dismissal.*	Sixty days	The date of the order for abatement or dismissal.
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\* As amended by Act VII. of 1888, sec. 66. Previous to the passing of Act VII. of 1888 there were four numbers here, Nos. 171, 171A, 171B, and 171C, by force of sec. 108 of Act XII. of 1879. Nos. 171, 171A, and 171B, as amended by Act XII. of 1879, have been repealed by Act VII. of 1888; and in place of No. 171C, as amended by Act XII. of 1879, the present No. 171 has been inserted.

Description of application.	Period of limitation.	Time from which period begins to run.
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### Third Division : Applications.—

<b>172.</b> —By a purchaser at an execution-sale to set aside the sale on the ground that the person whose interest in the property purported to be sold had no saleable interest therein.	Sixty days	The date of the sale.
<b>173.</b> —For a review of judgment except in the cases provided for by No. 162.	Ninety days	The date of the decree or order.
<b>173A.</b> —For the issue of a notice under section 258 of the same Code to shew cause why the payment or adjustment therein mentioned should not be recorded as certified.*	Ditto	When the payment or adjustment is made.
<b>174.</b> —By a creditor of an insolvent judgment-debtor under section 353 of the Code of Civil Procedure.†	Ditto	The date of the publication of the schedule.
<b>175.</b> —For payment of the amount of a decree by instalments.	Six months	The date of the decree.

### Notes.

A proviso in a decree made payable by instalments, by which the whole amount of the decree is to become due upon default in payment of any instalment, is a proviso enuring for the benefit of the decree-holder alone, and he is at liberty to take advantage of it or to waive it as he thinks fit.—I. L. R., 14 Cal. 352.

An application to execute a decree, dated 30th August, 1880, was made on 25th May, 1881. While the application was pending, the judgment-debtor presented a petition to be allowed to pay the debt by instalments, and the decree-holder consenting to this, the Court made the following orders : “According to the application of both parties it is ordered that the case be struck off, and the decree be returned.” The details of the instalments mentioned in the petition were endorsed on the decree by one of the Amlahs of the Court, but it did not appear when or by whose order this was done. In an application for execution in accordance with this arrangement made on 7th March, 1885 : *Held*, that the order was not one recognising or sanctioning the arrangement within the meaning of sec. 210 of the Civil Procedure Code, inasmuch as the Court at the time it made the order had no power to make any order for instalments, any application for that purpose being then barred by art. 175 of Act XV of 1877. The application for execution was, therefore, barred under art. 179 as not having been made within three years of 25th May, 1881. *Jhoti Sahu v. Bhubun Gir*, I. L. R., 11 Cal., 143, dissented from.—14 Cal. 348.

\* No. 173A was formerly No. 161, which was substituted for the original by Act XII. of 1879, sec. 108; but Act VII. of 1888 transposes No. 161, and numbers it as 173A.

† See Act XIV. of 1882, sec. 3.



Description of application.	Period of limita- tion.	Time from which period begins to run.
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### Third Division : Applications.—(continued.)

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| <b>175A.</b> —Under section 365 of the Code of Civil Procedure by the legal representative of a deceased plaintiff, or under that section and sec. 582 of the same Code by the legal representative of a deceased plaintiff-appellant or defendant-appellant.*   | Six months | The date of the death of the deceased plaintiff or of the deceased plaintiff-appellant or defendant-appellant.   |
| <b>175B.</b> —Under section 366 of the Code of Civil Procedure by a defendant, or under that section and sec. 582 of the same Code by a plaintiff respondent or defendant respondent.*   | Ditto.     | The date of the death of the deceased plaintiff or of the deceased defendant-appellant or plaintiff-appellant.   |
| <b>175C.</b> —Under section 368 of the Code of Civil Procedure to have the legal representative of a deceased defendant made a defendant, or under that section and section 582 of the same Code to have the legal representative of a deceased plaintiff-respondent or defendant-respondent made a plaintiff-respondent or defendant-respondent.* | Ditto.     | The date of the death of the deceased defendant or of the deceased plaintiff-respondent or defendant-respondent. |

**Note.**—See I. L. R., 11 Al. 408 & 16 Bom. 27, noted under sec. 368 of the Civil Procedure Code.

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| <b>176.</b> —Under the Code of Civil Procedure,† section 516 or 525, that an award be filed in Court. | Six months | The date of the award. |
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#### Note.

The act of an arbitrator, in handing in an award to the proper officer of the Court, for the purpose of the award being filed cannot be considered, as an 'application' within the meaning of the Limitation Act.—I. L. R., 7 Cal. 333.

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| <b>177.</b> —For the admission of an appeal to Her Majesty in Council. | Six months | The date of the decree appealed against. |
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**Note.**—See I. L. R., 10 Madr. 373, noted under sec. 12 ; 15 Madr. 169, noted under sec. 12.

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| <b>178.</b> —Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure,† sec. 280. | Three years | When the right to apply accrues. |
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\* Nos. 175A, 175B, and 175C, have been inserted by Act VII. of 1888, sec. 66.

† See Act XIV. of 1882, sec. 3.

**Notes.**

A plaint was filed on 12th March 1875, and the summons to the defendant to appear and answer issued on 13th March 1875. With the exception of an application for substituted service made on 20th March 1875, and which was refused, no further steps were taken in the matter until 21st March 1878, when the plaintiff applied for a fresh summons to issue, the time for the return of the first summons having long since expired. *Held*, that the mere filing of a plaint, or the naked fact that a plaint is on the file, will not of itself prevent the operation of the law of limitation, and that as no steps had been taken to renew the summons for three years, and as no sufficient case to excuse the delay had been made out, the application was out of time, and should be refused.—I. L. R., 3 Cal. 312.

When a decree or order makes a sum of money payable by instalments on certain dates, and provides that, in default of payment of any instalment, the whole of the money shall become due and payable and be recoverable in execution, by art. 178, sch. II of the Limitation Act, limitation begins to run from the date of the first default, unless the right to enforce payment in default has been waived by subsequent payment of the overdue instalment on the one hand and receipt on the other. R obtained a decree against D C and K G for a sum of money on 21st June 1880. On 25th May, 1882, an order was made in terms of the petition of both parties, providing that the amount of the decree should be paid by five instalments, the first instalment being due in July 1882, and that in default of payment of any instalment the whole amount should be due and recoverable in execution. Default was made in payment of the first instalment, nor was there any subsequent payment of that or any other instalment. On 30th July, 1886, R applied for execution of the four last instalments, alleging that the first had been paid. *Held*, that the application was barred by limitation under art. 178, sch. II, Limitation Act, 1877. *Hurronath Roy v. Maheroollah Mollah*, B. L. R., Sup. Vol., 618; 7 W. R., 21; *Dalshook Ruttan Chand v. Chugan Narrun*, I. L. R., 2 Bom., 356; *Ship Dat v. Kalka Persad*, I. L. R., 2 Al., 443; *Cheni Bas Saha v. Kadum Mundul*, I. L. R., 5 Cal. 97; *Asmutullah Dalal v. Kali Churn Mitter*, I. L. R., 7 Cal., 56; *Nil Madhub Chuckerbutty v. Ram Sodoy Ghose*, I. L. R., 9 Cal. 857; *Ram Culpo Bhattacharji v. Ram Chunder Shome*, I. L. R., 14 Cal., 352; and *Chunder Komal Das v. Bisassurree Dassia*, 13 C. L. R., 243, referred to.—15 Cal. 502.

Applications for probate or letters or certificates of administration do not fall within the provisions of article 178 of the Limitation Act.—19 Cal. 48.

Neither article 178 nor article 179 of the Limitation Act applies to an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of sections 211 or 212 of the Code of Civil Procedure.—19 Cal. 132.

Government is not entitled to any exemption from the provisions of the Indian Limitation Act, 1877, relating to applications. *Held*, therefore, that an application by Government under sec. 411 of the Code of Civil Procedure to recover the amount of Court fees from a party ordered by the decree to pay the same was subject to the provisions of art. 178 of the Indian Limitation Act, 1877.—4 Madr. 155.

Article 178 does not affect an application under Act XXVII of 1860 for a certificate to collect debts due to the estate of a deceased person.—8 Madr. 207.

An application by an appellant to make the representative of a deceased respondent party to the appeal does not fall under art. 171B, but under art. 178.—9 Madr. 7.

Where a review of judgment has been applied for, and, after notice to the other side, refused, the period during which such application was pending cannot be excluded in computing the period of limitation for execution of the decree under art. 179 (3) of sch. II of the Indian Limitation Act. *Seemle*.—An application for refund of moneys levied in execution of a decree subsequently reversed on appeal is not governed by art. 179 but by art. 178 of sch. II of the Limitation Act.—10 Madr. 66.

An application for execution of a decree having been made in 1880, certain land was attached as being the property of the judgment-debtor (deceased). His children thereupon claimed the land and the attachment was raised. Upon this, the judgment-creditor sued to establish his right to sell the land in execution and obtained a decree in 1882, which was confirmed on appeal in 1883. In 1885, the judgment-creditor again applied for attachment and sale of the same land :—*Held*, that the application was barred by limitation.—Paras Ram v. Gardner, I. L. R., Al. 355, dissented from.—10 Madr. 22.

A obtained a money decree against B on the 25th January 1872, in execution of which, property belonging to B was sold on the 9th of September 1874, A himself becoming the purchaser. The sale was confirmed on the 9th of October 1874, but the certificate of sale was not issued till the 23rd January 1878. A applied for possession on the 2nd of April 1879. *Held* that the right to apply for possession contemplated in secs. 263 and 264 of the Civil Procedure Code (Act VIII of 1850) corresponding with secs. 318 and 319 of the Civil Procedure Code (Act X of 1877) accrued on the date the certificate of sale was issued, and not on that on which the sale was confirmed, and that, therefore, the period of limitation against the purchaser counted from the former date.—3 Bom. 433.

Where an application for a certificate of sale was made five years and a half after the confirmation of the sale : *Held* that it was barred by Art. 178 of sch. II of Act XV of 1877.—5 Bom. 206.

The applicant purchased certain land at a Court-sale on the 17th February, 1876. The sale was confirmed on the 20th March of the same year. The purchaser did not apply for a certificate of sale until the 10th March, 1880. *Held* that the application was barred by Limitation Act XV of 1877, sch. II, art. 178. *Held* also that the purchaser's right to a certificate of sale accrued to him under secs. 256, 257 and 259 of the Civil Procedure Code, Act VIII of 1859, on the 20th March, 1876, when the sale was confirmed.—5 Bom. 202.

Cl. 178, sch. II of the Limitation Act (XV of 1877) is not applicable to applications for certificates of sale. The provisions of the Indian Limitation Act (XV of 1877) do not apply to applications to a Court to do what it has no discretion to refuse, not to applications for the exercise of functions of a ministerial character.—6 Bom. 586.

An application to amend a decree, which is found to be at variance with the judgment, in accordance with the provisions of sec. 206 of the Civil Procedure Code (Act X of 1877) is an application of the kind mentioned in No. 178 of sch. II of Act XV of 1877, and as such subject to the limitation of three years.—4 Al. 23.

The judgment-debtors against whom a decree had been executed applied for a refund of money which they alleged had been recovered in execution by the decree-holders in excess of what was actually due under the decree. Upon this application, an account was taken by order of the Court:—*Held*, that the limitation applicable to the case was that provided by art. 178, and that the right to apply for the refund of the excess amount paid in execution accrued at the time when the account was taken and stated on the application of the judgment-debtors in the course of the proceedings in execution.—7 Al. 371.

A decree, which was passed on the 8th December, 1881, in a suit on a simple mortgage-bond contained the following provision:—"If the judgment-debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property," On the 17th February, 1885, the decree-holder applied for execution of the decree:—*Held* that, inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, and not of art. 179, should be applied to the case; and the application for execution having been made within three years from the 8th April 1882, when the right to ask for execution accrued, was not barred.—8 Al. 56

Art. 178 of schedule ii of the Limitation Act (XV of 1877) applies only to applications made to a Court to exercise powers which, without being moved by such application, it is not bound to exercise, and not to applications made to a Court to do acts which it has no discretion to refuse to do. It does not govern an application under sec. 206 of the Civil Procedure Code, for amendment of a decree so as to bring it into conformity with the judgment, it being the bounden duty of a Court, of its own motion, to see that its decrees are in accordance with the judgments and to correct them if necessary. *Goya Prasad v. Sikri Prasad* dissented from. The petition of *Kishan Singh, Kylasa Goundan v. Ramasami Ayyan*, and *Vithal Janardan v. Vithojirav Putlajirav* referred to.—9 Al. 364.

Rules of limitation are foreign to the administration of criminal justice, and it is only by express statutory provision that any rule of limitation could be made applicable to criminal cases. Article 178, sch. ii., Limitation Act (XV of 1877), must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis*. A suit was instituted for possession of certain land on which stood a factory. In proof of the claim the plaintiffs filed in Court a *sarkhat* or lease, which was pronounced by the Munsif to be a forgery. Plaintiffs appealed up to the High Court, where on the 24th June, 1886, the Munsif's decree was affirmed. Defendants then applied to the Munsif for sanction to prosecute the plaintiffs for the offence or using a forged document knowing the same to be forged. Munsif refused to sanction the prosecution prayed for; but on application to the Sessions Judge, such sanction was granted. On application to revise the Sessions Judge's order granting sanction it was contended that, after the lapse of nearly three years, sanction to prosecute should not have been granted. *Held*; that there is no fixed period of limitation for making applications for sanctions under section 195 of the Criminal Procedure Code.—10 Al. 350.

See *I. L. R.*, 5 Al. 297, noted under art. 144; 8 Cal. 837, noted under sec. 368 of Civ. P. C.; 8 Cal. 420, noted under art. 171; 5 Cal. 139, noted, under art. 171; 6 Al. 142, noted under sec. 352 of Civ. P. C.; 8 Bom. 257, noted under sec. 318 of Civil Pro. Code.

Description of application.	Period of limitation.	Time from which period begins to run.
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### Third Division : Applications.—(continued.)

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| <p><b>179.</b>—For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure,* section 230.</p> | <p>Three years ; or, where a certified copy of the decree or order has been registered, six years.</p> | <ol style="list-style-type: none"> <li>1. The date of the decree or order, or</li> <li>2. (Where there has been an appeal) the date of the final decree or order of the Appellate Court, or</li> <li>3. (Where there has been a review of judgment) the date of the decision passed on the review, or</li> <li>4. (Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution of the decree or order, or</li> <li>5. (Where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure,* sec. 248, or</li> <li>6. (Where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.†</li> </ol> |
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*Explanation 1.*—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in favour only of such of the said persons or their representatives as it may be made by. But when the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives shall take effect in favour of them all.

Where the decree or order has been passed severally, against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their repre-

\* See Act XIV. of 1882, sec. 3.

† See Act XII of 1879, sec. 108.

Description of application.	Period of limitation.	Time from which period begins to run.
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### Third Division : Applications.—(continued.)

<b>179.</b> —For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure. <span style="display: block; text-align: right;">).—(contd.)</span>	Three years ; or, where a certified copy of the decree or order has been registered, six years.	sentatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.
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*Explanation II.*—"Proper Court" means the Court whose duty it is (whether under section 226 or 227 of the Code of Civil Procedure\* or otherwise) to execute the decree or order.

#### Notes.

An order dismissing an appeal for default is not a new decree from the date of which limitation runs—4. M. H. C. R. 32.

*Per GARTH, C. J., and Markby and Ainslie, JJ. (Kemp and MACPHERSON, JJ. dissenting).*—The periods of limitation prescribed in Sched. II of Act IX of 1871 are to be computed subject to the provisions contained in the body of the Act. An application made on the 8th January, 1875, to execute a decree, the last preceding application having been made on the 8th January, 1872, was held to be within the time allowed by Art. 167, Sched. II, Act IX of 1871. *Per Curiam.*—The word 'suit,' as used in the Act, does not include 'applications'.—I. L. R., 2 Cal. 336.

The words "applying to enforce the decree," in Act IX of 1871, Sch. II, Art. 167, mean the application (under sec. 212, Act VIII of 1859, or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings. In cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter* "to keep the decree in force" may within three years from the date of such last named application, obtain execution of his decree.—3 Cal. 235.

On the presentation of the last of a series of applications made for the execution of a decree, the Court is competent to consider the question whether, on the date of making a prior application for execution, the decree sought to be enforced was barred by limitation, and that notwithstanding the fact that notice of such prior application had been served on the judgment-debtor under sec. 216 of Act VIII of 1859. The time prescribed by the Limitation Act (IX of 1871) within which applications for execution may be made, govern all such applications made during the time that Act, was in force.—3 Cal. 518.

Within 3 years of his first application in execution of a rent-decree A, the judgment-creditor, made a second application to sell certain lands, the alleged property of B, the judgment-debtor. Third parties intervened, who established their claim to the land. A thereupon brought a regular suit, and succeeded in obtaining a decree, declaring the lands in suit to be the property of B. Within a year of the date of this decree, but more than

three years after his first application for execution, A filed a third application for attachment of *other lands* belonging to B. *Held*, the application was barred by limitation.—3 Cal. 716.

G sued K, as the legal representative of her deceased husband, S, on a bond executed by S in his favour, and obtained a decree. Subsequently he sued K on a bond which she had personally executed in his favour, and obtained a decree. On the 7th September, 1875, he applied for execution of both these decrees, and S's landed estate, which stood recorded in K's name, was attached. This estate was sold on the 20th February, 1877, being put up for sale in one lot, in satisfaction of both decrees, in accordance with an application made by G on the 16th February, and was purchased by G for the amount of the decrees. This sale was subsequently confirmed, and on the 10th December, 1877, satisfaction of the decrees was entered up, and the execution proceedings struck off the file. Subsequently three of the heirs of S in one case, and two in another, instituted suits against G, claiming to recover from him such portion of the proceeds of the sale of S's property as had been appointed for the discharge of G's decree against M, and such heirs obtained decrees for certain sums, which G was obliged to pay. G thereupon, on the 16th May, 1879, applied for execution of his decree against M. *Held* that such application was not one in continuation of that made on the 7th September, 1875, but was a fresh application and the application made by G on the 16th February, 1877, was not one for a step in aid of execution, within the meaning of Art. 179, Sch. II of Act XV of 1877, from which limitation could be computed, and the application of the 16th May, 1879, was barred by limitation.—1 Al. 355; 3 Al. 484; 4 Cal. 415.

A, the judgment-debtor, opposed an application made by B, the judgment-creditor, for execution under a decree. This objection was overruled on the 17th January, 1876. The appeal by A from this order (B being represented and opposing A's appeal at the hearing) was dismissed on the 2nd October, 1877. On a second application for execution made by B on the 18th March, 1879 : *Held* that such application was barred under Art. 179, Sch. ii. Act XV of 1877.—5 Cal. 595.

In a suit for possession of land brought by A against B, C, and D, a decree was passed on the 14th of April, 1874, for possession and costs against B, C, and D, jointly. This decree was afterwards reversed on an appeal by B, who alone claimed the property. A then preferred a special appeal in the High Court, and on the 29th June, 1877, the decision of the Judge was reversed, and the decree of the Court of first instance restored. On the 30th December, 1878, A applied to the Court of first instance for execution to issue against C and D for the costs specified in the decree passed on the 14th of April, 1874. C and D successfully objected in the Court of first instance and the lower Appellate Court that more than three years having elapsed since the date of the decree, the decree for costs could not be executed, the application for execution being barred. *Held*, on appeal to the High Court, that inasmuch as B's appeal related to the whole case, and the decree obtained by him dismissing the suit would, if not reversed, have deprived A of his right to any costs at all, A, upon succeeding in getting the original decree restored upon special appeal to the High Court, was entitled to executing such restored decree at any time within three years of the order of the High Court.—6 Cal. 194.

The terms of compromise in a suit for money provided that the debt should be paid by monthly instalments, and that, on the failure to pay any three successive instalments, the entire amount should be recoverable by application to execution the full decree. The decree was dated the 12th



June, 1875 ; the first instalment was due in July, 1875 ; and the last, in October, 1877. Default was made in payment of the first three instalments, but the decree-holder did not apply for execution, and accepted subsequent payments. On the 13th December, 1879, he applied for execution for the amount then remaining due. *Held* that that the period of limitation prescribed by Art. 179, Sch. ii. of Act XV of 1877, began to run on the third default taking place, and that no subsequent payment could stop limitation once begun.—7 Cal. 56.

Where a decree is one for possession, with *wasilat* from the date of dispossession to the date of suit, an application for *wasilat*, if not made within three years from the first application in execution, is barred. An application made by a judgment-creditor to take out of Court certain monies there deposited by his judgment-debtor cannot be considered to be an application to the Court to take a step "in aid of execution," and is not, therefore, within the meaning of cl. 4 of Art. 179, Sch. ii., of Act XV of 1877. *Bunsee Singh v. Mirza Nuxuf Ali Beg* (22 W. R. 328.) distinguished.—8 Cal. 89.

The plaintiff obtained an *ex parte* decree on the 7th February 1876, of which he applied for execution on the 31st May, 1876. Thereupon the defendant applied to set aside the decree, on the ground that he had had no notice of the suit, and an order was made staying the execution of the decree. The defendant's application was rejected on the 15th of November, 1876, and an appeal by the defendant, pending which the stay of execution was continued, was dismissed on the 19th of December 1877. Previously *viz.*, on the 21st of February, 1877, the execution case had been struck off the file. *Held* that, notwithstanding the application was made more than three years after the decree, and the plaintiff was not entitled to any deduction of time during which the execution was stayed by order of Court, an application for execution made on the 10th of December, 1880 was, under art. 179 of Act XV of 1877, not barred, the decree not being final until the order dismissing the appeal on the 19th of December 1877.—8 Cal. 248.

An application for execution of a decree by a mere benamidar is not an application in accordance with law within the meaning of art. 179, cl. 4 of Sch. ii. of the Limitation Act (XV of 1877), such as to afford a fresh starting point for limitation.—9 Cal. 633.

A consent-decree for partition, made between three parties, contained a provision that, if the plaintiffs should not have the property partitioned within two months from the date thereof, any one of the other parties to the suit might obtain partition by executing the decree. One of the parties sued out execution, and obtained partition and possession of his own share. More than three years after the date of the decree, but less than three years from the date of the application just mentioned, another of the parties applied for partition under the decree. *Held* that the application was not barred by limitation under the provisions of the Limitation Act (XV of 1877), Sch. ii., Art 179, cl. 3, *excp. I.*—9 Cal. 568.

On the 28th September, 1877, an application was made for execution of a decree. On the 8th July, 1878, the decree-holder deposited Rs. 2 as *nilamee*-fees, that is to say, costs for bringing certain property to sale in execution of the decree. On the 28th March, 1881, a further application for execution of the decree was made. *Held* that the deposit of Rs. 2 *nilamee*-fees on the 8th July, 1878, was a step in aid of execution of the decree, and that the application of the 28th March, 1881, being within three years from the date of the deposit, was not barred by limitation. *Quære*.—Whether,

inasmuch as Act IX of 1871 is repealed by Act XV of 1877, and the latter Act contains no provision similar to that contained in sec. 1 of Act IX of 1871, or XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April, 1873.—9 Cal. 644.

In execution of a decree, dated the 17th January, 1877, the judgment-creditor applied on the 13th May, 1878, to have the property of his judgment-debtor sold on the 16th September, 1878. Subsequently, on the 2nd June, 1881, he made a further application to have the decree executed. *Held* that the case was governed by the provisions of Art. 167 of Act IX of 1871, and not by those of Art. 179 of Act XV of 1877; and that as the application had not been made within any one of the periods given in the third column of art. 167, it was barred by limitation. *Held* also following *Mungal Pershad Dichit v. Grijā Kant Laburi* (I. L. R., 8 Cal. 51), that although there is no corresponding provision in Act XV of 1877 to that contained in sec. 1 of Act IX of 1871, all applications for execution of a decree are applications in the suit which resulted in that decree. *Held* further that, under sec. 6 of Act I of 1868, the repeal of Act IX of 1871 by Act XV of 1877 does not affect any proceedings commenced before the repealing Act came into force. *Re Ratausi Kalianji* (I. L. R., 2 Bom. 148) followed.—9 Cal. 446.

An application made by a judgment-creditor to take out of Court certain monies, the sale proceeds realized by the sales of certain properties of his judgment-debtor in a previous execution, cannot be considered to be an application to the Court to take a "step in aid of execution," and is not therefore within the meaning of cl. 4, Art. 179 Sch. II of Act XV of 1877. *Hem Chunder Chowdhry v. Brojo Soondury Debee*. I. L. R., 8 Cal. 79; *Venkatarayalu v. Narasinha*, I. L. R., 2 Madr. 174, dissented from.—10 Cal. 549.

An application to a Court to issue a proclamation of sale in respect of property already attached in execution to a decree, is an application, within the meaning of clause 4 of art. 179 Sch. II of Act XV of 1877, "to take some step in aid of execution of the decree." *Chunder Coomar Roy v. Bhogobatti Prosoune Roy*, I. L. R. 3 Cal. 235; 1 C. L. R., 23 explained.—10 Cal. 851.

An application for execution of a decree having been made on the 19th January 1882 within time, but not in the form prescribed by the Civil Procedure Code, inasmuch as it did not contain the right number of the suit in which the decree was passed, an order was made on the 19th January directing the petitioner to amend the application within four days by giving the correct number. That order was not complied with, and the petition was left on the file of the Court without being disposed of in any way till the 21st September 1882; on which date, more than three years having then elapsed since the date of the decree, it was returned to the vakeel of the petitioner for amendment within eight days. The required amendment was made, and the application again placed on the file of the Court on the 22nd September. On an objection being taken that the decree was barred, and the execution could not issue. *Held*, following the principles laid down in the case of *Syud Mohamed v. Syud Abedoolah*, 12 C. L. R., 279, viz., that it was the duty of the Court to dismiss the application when it found that it was informal, and thus to give the applicant an opportunity of putting in a proper application, and that the decree-holder should not be made to suffer for such omission on the part of the Court; that the former application could not, though in-

formal, be treated as a nullity ; and that the application on the 22nd September must be taken as having been presented with the object of amending the original informal application ; and that it was in continuation of the execution proceedings commenced however informally on the 19th January 1882 ; and that consequently the decree was not barred. *Held*, also, that the fact of the application having been returned to the vakeel for amendment instead of being amended while on the file of the Court, made no difference to the application of the above principle.—10 Cal. 541.

A obtained a decree against B in June 1879, and in execution thereof some time in 1879 attached certain monies in Court which belonged to his Judgment-debtor, and obtained an order for payment out to him. Before receiving payment A died, and the execution proceedings were struck off on the 31st January 1880. On the 14th June 1880, and on the 22nd June 1881, the widow of A, who had taken out probate, applied to withdraw this money from Court, and on the 1st of April 1882 applied for a copy of the decree obtained by A, for the purposes of execution. At the time of these three applications the widow had not applied for substitution of her name on the record in the place of her deceased husband. On the 5th January 1884 the widow applied to have her name substituted on the record, and for execution :—*Held*, that the application was barred, as the previous applications were not under the circumstances steps in aid of execution. Cal. 220.

Within the period of three years from the date of a decree for arrears of rent under Rs. 500, the judgment-debtor applied for execution of his decree without giving a list of the properties which he sought to attach, but stating that a list was filed with a previous application, and praying that that application might be put up with the present one. Subsequently upon an order made by the Court a fresh list was filed after the period of a year had elapsed :—*Held*, that though the application was not in strict accordance with the provisions of sec. 237 of the Civil Procedure Code, it was still an application under sec. 235, and that execution of the decree was not barred, but that it must be limited to the property specified in the previous application. *Syud Mahomed v. Syud Abedoollah*, 12 C. L. R., 279, followed.—12 Cal. 161.

On the 19th of March 1880 a decree for money was passed, and on the 19th of February 1881, certain property belonging to the judgment-debtor was sold in execution thereof. On the 22nd of April, 1881 Court passed an order confirming the sale. On the 10th of January 1882, the decree-holder applied to the Court for a copy of the decree, in order that he might make a fresh application for execution. On the 28th of March 1884 he applied for execution. The judgment-debtor appeared and pleaded that execution was barred by limitation. The Court of first instance held that execution was not barred on the ground that the passing of the order of the 22nd of April 1881 was sufficient, under the provisions of art. 179, cl. 4 to keep the decree alive. The lower Appellate Court also held that execution was not barred by limitation, but solely on the ground that the application of the 10th of January 1882 was sufficient to keep the decree alive. It did not appear that the order of the 19th of February 1881 was passed in consequence of any application by the decree-holder, and neither the application of the 10th of January 1882 nor any copy thereof was put in evidence on the present application :—*Held*, on appeal to the High Court, that the decree was barred by limitation.—12 Cal. 441.

An application by a judgment-creditor to bring an execution proceeding on the file and to record his certificate of the payment of a sum of money by the judgment-debtor is an application to take some step in aid of execution of the decree within the meaning of cl. 4.—12 Cal. 608.

Where a decree is made payable by instalments, and contains a provision that, on failure of any one instalment, the whole is to become due, the question whether the decree-holder may waive the benefit of the provision or must execute his decree within three years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case. On an application for execution of a decree made payable by instalments :—*Held*, that the application was barred by limitation, on the ground that the judgment-creditor should have applied for execution within three years from the date of the first default in payment.—13 Cal. 73.

A judgment-creditor applied on the 22nd May, 1882, for execution of a decree, dated 7th November 1881, and certain property of the judgment-debtors was attached. Thereupon a claim was preferred by a mortgagee, and on the 10th August, 1882, the judgment-creditor admitted the claim and applied that the property might be sold subject to the claimant's mortgage, and the proceeds if any paid over to him in part satisfaction of his decree. On the 20th June, 1885, another application was made for execution, and on the 29th November, 1886, a third application was made. To the latter application objection was taken, and it was contended that the decree was barred by reason of more than three years having elapsed between the application of the 22nd May, 1882, and that of the 20th June, 1885. *Held*, that the application of the 10th August, 1882, by the judgment-creditor to allow the sale of attached property subject to the mortgage of the claimant was "a step in aid of execution of the decree" within the meaning of art. 179, Sch. II, Act XV of 1877, and that execution of the decree was therefore not barred.—15 Cal. 363.

The words "*appeal presented*" in the Limitation Act, 1877, mean an appeal presented in the manner prescribed in sec. 541 of the Code of Civil Procedure. The words "*where there has been an appeal*," in Art. 179, cl. 2., of sch. II, of the Limitation Act, 1877, mean where a memorandum of appeal has been presented in Court. In execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court.—16 Cal. 250.

A plaintiff obtained on the 14th September 1881 a decree against two defendants, the decree as against the first defendant being one for partition ; and as against the second defendant (who had set up a julkar right on the lands claimed to be partitioned, and had contended that partition could not be had, and had obtained a partial decree, but had been ordered to pay partial costs to the plaintiff), being one for costs. The first defendant alone appealed against this decree, but unsuccessfully, his appeal being dismissed on the 18th January 1884. The decree-holder applied for execution of his decree as against the second defendant for costs in December 1886. *Held*, that the application was not barred, for that limitation ran from the 18th January 1884.—16 Cal. 598.

In a suit brought for a declaration of the plaintiff's right to hold certain property free of a mortgage decree, which had been purchased by one G on 13th August 1878, in execution of which decree several applications were made to have the name of G substituted for that of the original de-

cree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of G, until 18th July 1885, when after notice under sec. 232 of the Civil Procedure Code G's name was substituted as decree-holder, and execution taken out against the mortgaged property, G was found to be only a benamidar so far as his purchase of the mortgage decree was concerned. *Held*, that G being merely a benamidar, the applications made by him for execution of the decree and for substitution of his name as decree-holder under sec. 232 of the Civil Procedure Code were not applications made in accordance with law within the terms of art. 179 of the Limitation Act, 1877, so as to prevent the operation of the Law of Limitation. Execution of the mortgage decree was therefore barred. *Abdul Kureem v. Chukhun*, 5 C. L. R., 253; *Denonath Chuckerbutty v. Lallit Coomar Gangopadya*, I. L. R., 9 Cal., 633; 12 C. L. R., 145; and *Mis. Ap. 453 of 1885*, unreported, followed. *Purna Chundra Roy v. Abhoya Chundra Roy*, 4 B. L. R., App. 40, and *Nadir Hossein v. Pearoo Thovildarinee*, 14 B. L. R., 425, dissented from.—16 Cal. 355.

The application contemplated by Art. 179 of sched. ii. of the Limitation Act, and described as "an application for the execution of a decree or order of any Civil Court, &c., &c.," is an application within the terms of sec. 235 of the Civil Procedure Code, that is to say, an application setting the Court in motion to execute a decree in any manner set out in the last column of the form prescribed; but, having so set the Court in motion, any further application, during the continuance of the same proceeding, is an application, to take some step in aid of execution within the terms of cl. 4 in the last column of Art. 179 of the Limitation Act. An application, therefore for the sale of property under attachment, is an application merely in aid of an execution then proceeding.—17 Cal. 53.

Clause 4, Art. 179, Sched. ii of the Limitation Act, 1877, does not include a suit to set aside an order passed in a claim case. R and L obtained a decree against B on the 7th March 1881, and in execution of that decree certain property belonging to B was attached on the 11th June 1883. Thereupon a claim was made to the attached property by third parties, and a two-thirds share therein was released by the Court executing the decree. On the 22nd March, 1884, R and L instituted a suit for a declaration that the entire property was liable to be sold under their decree, and obtained a decree on the 29th March 1886. This decree was reversed by the lower Appellate Court which upheld the order releasing a two thirds share of the property, and, on 22nd July, 1887, the High Court affirmed the decree of the lower Appellate Court. On the 15th August, 1887, R and L applied for execution of their decree in respect of the remaining one-third share. B objected that the application was barred. *Held*, that the application of the 15th August, 1888 was not a continuation of the application of the 11th June, 1883; *Pyaroo Tuhovidarinee v. Nazir Hossein*, 23 W. R., 183; *Issuree Dasse v. Abdul Khalak*, I. L. R., 4 Cal. 415; *Chandra Prodhan v. Gopi Mohun Shaha*, I. L. R., 14 Cal., 385; and *Paras Ram v. Gardner*, I. L. R., 1 Al., 355, distinguished. *Held*, also, that the institution of the suit on the 22nd March, 1884, and the appeal to the High Court from the decree of the lower Appellate Court, were not steps in aid of execution, *Akbar Gazee v. Bibee Nufazun*, 8 W. R., 99 distinguished.—17 Cal. 268.

On the 23rd March 1886 the plaintiff obtained a decree in the Court of first instance against five defendants, declaring his right to certain specific immoveable property, which was, however, modified on an appeal



preferred by the defendants, the decree of the lower appellate Court giving the plaintiff a decree for only two-thirds of the property claimed, and dismissing his suit in respect of the remaining one-third in favour of defendants Nos. 2 and 4. The lower appellate Court's decree was dated the 13th July 1886. Against that decree plaintiff preferred a second appeal to the High Court, making all the defendants respondents, which appeal was, however, dismissed on the 16th June 1887. The plaintiff on the 13th June 1890 applied for execution of the decree in his favour in respect of the two-thirds of the property held to belong to him, and defendants Nos. 1 and 5 objected on the ground that the right to execution was barred, limitation running from the 13th July 1886, the date of the lower appellate Court's decree in the plaintiff's favour. *Held*, that limitation ran from the 16th June 1887, and that the application was not therefore barred. All the defendants were parties to the second appeal, and the Court to which the application was made for execution was not bound, before allowing execution, to go into all the circumstances of that appeal and consider whether the decree of the lower appellate Court in favour of the plaintiff for the two-thirds of the property was or was not practically secure; the High Court had all the parties before it, and, if it had been right to do so, might have altered the decree against any of them. *Quære*—Whether under such circumstances the Legislature could have intended the Court executing a decree to go into questions so complicated as to whether in such a case the whole decree was or might have been or become imperilled in the Court of Appeal, and whether the plain words of article 179 might not be followed with less of possible inconvenience and complexity even though in some cases it might result in execution of a decree going against a defendant a little more than three years after such decree was practically secure against him. *Nundun Lall v. Rai Joykishen* cited with approval.—19 Cal. 750.

Execution is a proceeding to enforce a decree of a Court, and comes under the head of purely adjective law. Such being the case, the law of limitation prevailing at the time of the application must govern.—1 *Madr.* 52.

Plaintiff obtained a decree against the defendant on the 24th November, 1875, and on the 14th October, 1876, he got execution, and sold some lands of the defendant. On the 9th February, 1876, he applied to the Court for the payment thereout of monies lodged by the purchaser, and got on that day the money. In the meantime an appeal was presented by the defendant, and dismissed on the 28th March, 1877. The present application for execution was made on the 7th February, 1880. *Held*, that article 179, cl. 2 of the Limitation Act of 1877, which fixes the date of the order of the appellate Court, when there is an appeal, as the point from which the three years is to count, applied, and that the plaintiff was therefore in time. When there is now appeal, the date of the decree or of application is the point from which limitation counts, but not where there is an appeal. *Held* further that the application by plaintiff to the Court (9th February, 1877) for the money paid in by the purchaser was a step taken to aid in the execution of the decree.—2 *Madr.* 174.

An insufficiently stamped application for execution of a decree may, under Art. 179 of Sch. ii. of Limitation Act, 1877, suffice to keep the decree alive.—6 *Madr.* 181.

Certain land having been attached in execution of a decree, the judgment-debtor applied to the Court to postpone the sale of some of the lands until others had first been sold. The vakil for the decree-holder consented in part to this application, but insisted that certain other land should also

be sold in the first instance.—*Held*, that this act of the Vakil was a sufficient application to the Court to take a step in aid of execution within the meaning of Art. 179 of Sch. II of the Limitation Act 1877.—7 Madr. 306.

On the 16th of September, 1879, A, in execution of a decree against V, applied for attachment and sale of certain land, and on the 8th of January, 1880, the sale was confirmed. The purchaser, having heard that V had no title to the land, brought a suit and obtained a decree cancelling the sale on the 2nd April 1881, and on the 2nd of November 1881 obtained an order for restitution of the purchase money, which was thereupon paid to him by A. On the 2nd March 1883 A applied for execution of the decree by arrest of V :—*Held*, that this application was barred by limitation. I. L. R., 3 Al. 474, followed ; I. L. R., 1 Al. 355, distinguished.—7 Madr. 595.

The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step in aid of execution within the meaning of cl. 4 of art. 179 of sch. ii of the Indian Limitation Act, 1879.—11 Madr. 336.

In a suit for land against several defendants, plaintiff obtained, on 14th June 1884, a decree against the shares of defendants Nos. 3 and 4, the shares of defendants Nos. 5 and 9 being exonerated. The decree-holder appealed against that portion of the decree which exonerated the shares of defendants Nos. 5 and 9, defendants Nos. 3 and 4 being brought on to the record of the appeal as respondents. The appeal having been dismissed, the decree-holder applied on 20th October 1877 for execution against the shares of defendants Nos. 3 and 4 :—*Held*, the application for execution was barred by Limitation Act, 1877, sch. ii, art. 179.—12 Madr. 497.

If it can be gathered from a decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree the requirements of Limitation Act, sched. II, art. 179, cl. 6, are satisfied.—14 Madr. 396.

An application for execution of a decree was made in February, 1868, and proceedings sufficient to bar limitation under Act XIV of 1859, were going on till 30th September, 1871. The next application for execution of the decree, made in October, 1872, was held to be barred under Act IX of 1871, as more than three years had elapsed on that day from the date of the application in February, 1868. *Held* also, following *Gouree Sunker v. Armem Ali* (21 Cal. W.R. 309, Civ. Rul.), that an informal application, made on 30th September, 1871, in the nature of a petition to the Subordinate Judge to give effect to the application of February, 1868, by overruling certain objections of the Collector, and enforcing execution of the decree, was not an application for the execution of a decree such as could bar limitation under Act IX of 1871.—1 Bom. 59.

A decree payable by instalments, with a proviso that, in default of payment of any one instalment, the whole amount of the decree shall become payable at once, is barred, if application for execution be not made within three years of the date on which any instalment fell due, and was not paid. The payment of instalments subsequent to default in payment of first instalment at the date specified does not give the judgment creditor a fresh starting point.—2 Bom. 356.

The "application" spoken of in Art. 160, cl. 4, of Sch. ii. to Act IX of 1871, is merely not such an application as is contemplated by sec. 212 of Act VIII of 1859, but includes an application to keep in force a decree or order. The language of Art. 167, cl. 4, of Sch. ii. to Act IX of 1871 is wide enough to include any application to enforce or keep in force decrees or



orders, and, consequently, an application to enforce or keep in force a decree by the attachment of a portion of the property of the defendant, will keep the decree alive against the residue of his property or his person. An order for attachment of a pension in satisfaction of a decree, obtained on the 10th December, 1863, was made on 16th April, 1869. After the passing of the Pensions Act (XXIII of 1871), the Deputy Collector refused to continue paying the pension to the decree-holder, and returned to the Court the warrant of execution issued under the order of 16th April, 1869; and an order finally disposing of the application for attachment, was made on 14th June 1872. On 19th June, 1872, the decree-holder presented a fresh application, praying that the attachment of the pension might be continued, and a letter be written to the Collector, directing him to continue to pay the pension to the decree-holder, as directed by the order of 16th April, 1869. *Held* that such last-mentioned application came within cl. 4 of Art. 167 of Sch. ii. to Act IX of 1871, and that, consequently, an application, on 24th July, 1874, for execution of the decree of 10th December, 1863, was not barred. *Held* also that the decree might properly be enforced against property of the defendant, mentioned in the application of 1874, other than the property mentioned in the applications of 1869 and 1872.—2 Bom. 294.

A decree payable by instalments provided that in default of payment of two instalments the whole decree should be executed. The decree-holder applied for execution of the whole decree on the ground that default had been made in payment of the third and fourth instalments. The judgment-debtor objected that application was barred by limitation, as he had made default in payment of the first and second instalments, and three years had elapsed from the date of such default. The decree-holder offered to prove that those instalments had been paid out of Court. *Held* that he was entitled to give such proof, in order to defeat the judgment-debtor's plea of limitation notwithstanding such payments had not been certified.—4 Bom. 130, and also 416.

The plaintiff obtained a decree against the defendant in 1872. He first applied for its execution in 1874, and his application was deposited of on the ground that the requisite court-fee had not been paid. His next application was in 1876, and it was disposed of because no property could be found to satisfy the decree. His third application, made on the 10th of March, 1879, was one asking merely that the decree might be kept alive. He now applied for the fourth time on the 26th of November, 1881, and sought execution of the decree. *Held* that the law of limitation, applicable to proceedings in execution, is not the law under which the suit was instituted, but the law in force at the date of the application for execution, in the absence of a legislative provision of the contrary (such as that contained in sec. 1 of Act IX of 1871). The law of limitation, therefore, to be applied to the application of the 10th March, 1879, was Act XV of 1877; and inasmuch as that application did not ask for any step to be taken towards executing the decree, it was not in accordance with Art. 179, Sch. ii. of Act XV of 1877, and did not save the present application from being barred. *Mangal Prasad's case* (L. R., 8 I. A., 123) explained.—7 Bom. 459.

The plaintiff obtained a decree in 1874 and applied for its execution, first on the 4th of August, 1875, then on the 6th of July, 1878, and again on the 23rd of July, 1880. The third application was withdrawn with permission to apply again. On the 30th November, 1882, the plaintiff made his present application :—*Held*, that the present application was not time-barred. The rule laid down in sec. 374, of the Civil Procedure Code does not apply to applications for execution.—10 Bom. 62.

On 15th February, 1872, the plaintiff obtained against the defendant a decree for possession upon his mortgage, and in attempting to take possession was obstructed by Naro, another mortgagee of the defendant, whereupon the plaintiff applied for removal of the obstruction, but his application was rejected on the ground that Naro was in possession as mortgagee and that the plaintiff was not entitled to possession until Naro's mortgage was redeemed. The plaintiff did not apply for execution any further. In 1884 the defendant paid off Naro's mortgage, and on 27th August, 1885, the plaintiff presented an application for execution of his decree of 1872. On reference to the High Court:—*Held*, that the execution of the decree was barred, no application for execution having been made since 1873. The previous application for execution not having been made under sec. 230 of (Act XIV of 1882), the general law of limitation, as laid down in article 179 of Act XV of 1877, governed the case.—11 Bom. 348.

If an application for execution of a decree is duly made so as to satisfy the terms of article 179, paras. 4 and 5, of Schedule II. of Act XV of 1877, but is dismissed, such dismissal does not prevent the application from furnishing a point of time for the beginning of a new term of limitation.—11 Bom. 467.

The application for execution contemplated in clause (4) of article 179 of Schedule II of the Limitation Act (XV of 1877, must be one made in accordance with law, and asking to obtain some relief given by the decree, and to obtain it in the mode that the law permits. A decree provided that the defendant should pay the plaintiff Rs. 156 within one month, and that on receipt of this sum the plaintiff should execute a deed of sale to the defendant. The decree was dated 26th January, 1881. The first application for execution was made on the 24th January, 1884, but dismissed for plaintiff's default. The plaintiff made a second application dated 22nd January, 1887, praying to be put in possession of a certain house which was not awarded by the decree. This application was rejected. On the 23rd June, 1887, the plaintiff made a third application for execution of the decree. *Held*, that this application was barred by limitation, having been made more than three years after the date of the first application. The intermediate application was not an application for execution, nor a step in aid of execution, of the decree, inasmuch as it asked for what the decree did not give. It could not, therefore, keep the decree alive under article 179, Schedule II of the Limitation Act (XV of 1877).—13 Bom. 237.

An application to the Court to order the sale of property which has been attached, is an application to take some steps in aid of execution; and as the Civil Procedure Code does not require a formal application, it is immaterial whether the application be a verbal one or in writing. *Ambica Pershad Singh v. Surdhari Lal* (I. L. R., 10 Cal. 51) followed.—15 Bom. 405.

The plaintiff obtained an *ex parte* decree against the defendant on the 10th March 1886. The defendant applied to have the decree set aside. His application was finally rejected by the appellate Court on 5th March, 1887. The decree-holder presented a *darkhast* for execution of the decree on 24th September, 1889. *Held*, that the *darkhast* was time-barred under article 179, clause 2 of the Limitation Act (XV of 1877). The appeal referred to in that clause is clearly an appeal from the decree or order sought to be executed, and not an appeal from an order of the Court refusing to set it aside. The unsuccessful attempts made by the defendants to set aside the *ex parte* decree could not have the effect of expending the period prescribed by law for execution of the decree.—16 Bom. 123.

Where a redemption decree contained no clause as to the time for payment of the mortgage debt, or foreclosure in default of payment, *held*, that the mortgagor could still, after the expiration of three years from the date of the decree, execute it by paying the mortgage money, having regard to various *darkasts* presented by him from time to time, provided the *darkasts* complied with the conditions of the Statute of Limitation (Act XV of 1877). Dicta to the contrary in *Gan Savant Bal Savant v. Narayan Dhond Savant* (I. L. R., 7 Bom., 467) and *Maloji v. Sagaji* (I. L. R., 13 Bom., 567) disapproved of.—16 Bom. 480.

*Held* that an application under sec. 285 of Act VIII of 1859, being a necessary and decided step towards the execution of the decree, was an application to enforce or keep in force the decree.—1 Al. 525.

*Held* by the Full Bench that the date on which an application for the execution of a decree is presented, and not any date on which such application may be pending, is "the date of applying" within the meaning of this Art. *Held* by the Division Bench that an application by the decree-holder for the stay of execution proceedings is not an application to enforce or keep in force the decree.—1 Al. 580.

An application for the partial execution of a joint decree by one of the decree holders is not an application according to law (1) and consequently has not the effect of keeping the decree in force (2). Where a decree of the Sudder Court awarded costs in the lower Court to certain defendants, separately and to eight sets of defendants, collectively and costs in the Sudder Court to three sets, and the only applications which were made for defendants to recover his costs in the lower Court and a fractional share of the costs in the Sudder Court awarded to his set of defendants, a subsequent application by him and the other defendants for execution of the decree was held to be barred by limitation.—1 Al. 231.

The Munsif gave the plaintiffs in a suit for possession of land and for mesne-profits a decree for possession, but dismissed the claim for mesne-profits. An appeal was preferred to the Judge, who affirmed the decree for possession, and remanded the case to the Munsif, under sec. 351 of Act VIII of 1859, to determine the mesne-profits due to the plaintiffs. The Munsif gave the plaintiffs a decree for certain mesne-profits. Subsequently a special appeal was preferred to the High Court against the Judge's decree. While this was pending, an appeal was preferred to the Judge against the decree of the Munsif's for mesne-profits, and on the 7th June, 1873, the plaintiff again obtained a decree for mesne-profits. Finally, on the 6th March, 1874, the High Court modified the Judge's decree for possession, but did not interfere with the order of remand. *Held*, on the plaintiff's applying for execution of the Judge's decree, dated the 7th June, 1873, that the limitation for the execution of such decree ran, not from the date of such decree, but from the date of the High Court's decree, which was the final decree of the Appellate Court," and the only "final decree."—1 Al. 508.

On the 3rd March, 1875, an application was made by a decree-holder to the Court executing the decree, which did not, as required by sec. 212 of Act V of 1859, state the mode in which the assistance of the Court was required, whether by the arrest and imprisonment of the judgment-debtor or attachment of his property but prayed that the Court would, under sec. 216 of that Act, issue a notice to the judgment-debtor to show cause why the decree should not be executed against him. Under this application notice was issued to the judgment-debtor on the 28th March, 1875. On the 27th April, 1875, the execution case was struck off the file on the

ground that the decree-holder did not desire further proceedings to be taken. *Held* (Per PEARSON & OLDFIELD JJ.) that, the application was one to enforce or keep in force the decree, and further that limitation should be computed from the date the notice to the judgment-debtor was issued. *Franks v. Nunek Mal* (H. C. R., N.-W. P., 1875, p. 97) impugned. *Per SPANKIE, J., contra.*—1 Al. 675.

*Held* that an application to the Court which passed a decree, that it may be sent for execution to another Court, is an application to keep such decree in force within the meaning of the Limitation Act.—2 Al. 284.

A decree for the payment of money by instalments directed that, if the judgment-debtor failed to pay two instalments in succession, the decree-holder should be entitled to enforce payment of the whole amount due under the decree. The decree-holder, alleging that a portion of the ninth instalment was payable, and that the whole of the tenth (the last) instalment was due, applied to enforce payment of the monies due under the decree. *Held, Per* PEARSON, J. that, whether former instalments had been paid or not was immaterial, and the application, being within three years from the dates on which the ninth and tenth instalments became due, was, within time, *Spankie, J.* refused to interfere in second appeal, inasmuch as the lower Appellate Court had found as a fact that there had been no such default in the payment of the former instalments as was contemplated by the decree.—2 Al. 291.

*Held* that the words “appeal” and “Appellate Court” in art. 179 (2), sch. II of Act XV of 1877, include an appeal to Her Majesty in Council. *Held*, therefore, where an appeal had been preferred to Her Majesty in Council from a decree of the High Court dated the 18th August, 1871, and the High Court’s decree was affirmed by an order of Her Majesty in Council dated the 12th August 1876, and an application for execution of the High Court’s decree was made on the 15th July, 1879, that under art. 179 (2), sch. II of Act XV of 1877, the limitation of such application must be computed from the date of the order of Her Majesty in Council.—2 Al. 763.

An application for execution of a decree against one of the several legal representatives of the deceased judgment-debtor takes effect, for the purposes of limitation, against them all.—3 Al. 517.

An application by a decree-holder for the postponement of a sale in execution of the decree on the ground that he had allowed the judgment-debtor time, is not “an application according to law to the proper Court for execution, or to take some step in aid of execution, of the decree,” within the meaning of art. 179, Sch. II, Act XV of 1877, and limitation cannot be computed from the date of such an application.—3 Al. 757.

An oral application, on a sale of immoveable property in the execution of a decree having been adjourned, for the fixing of a fresh date for the sale, is an application to enforce the decree. An application to enforce the decree made within three years from the date of such an oral application will therefore be within time.—3 Al. 139.

An application by a judgment-debtor, stating that the proceedings in execution had been adjusted, and he had paid the decree holder Rs. 10, and would pay him the balance of the decretal amount subsequently, and praying that the execution case might be struck off, is an application to “keep in force the decree,” within the meaning of art. 167, Sch. II of Act IX of 1871, and a “step in aid of execution of the decree,” within the meaning of art. 179, Sch. II of Act XV of 1877.—3 Al. 320.

The holders of a decree by a Civil Court, which directed, *inter alia*, that they should be maintained in possession of a share of a village, by cancelment of the order of the settlement-officer directing the entry of the judgment debtor's name in the revenue registers in respect of such share, applied for execution of such decree, improperly asking the Court executing the decree to order the Collector to amend such entry by the substitution of their names for that of the judgment-debtor in respect of such share, instead of asking it to send such officer a copy of such decree for his information, with a view to such amendment. *Held* that such application, not being one in accordance with law, within the meaning of art. 179, sch. II of Act XV of 1877, was not one which would keep such decree in force.—4 Al. 34.

On the 11th July, 1877, a decree was made against B & J, the defendants in a suit, against which J alone appealed, such appeal not proceeding on a ground common to him and B. The appellate Court affirmed such decree on the 20th November, 1877. On the 23rd September, 1880, the holder of such decree applied for execution against B. *Held* that, so far as B was concerned, limitation should be computed from the date of such decree, and not from the date of the decree of the appellate Court, and such application was therefore barred for limitation.—4 Al. 36.

Application for execution of a decree was made on the 22nd November, 1875, and in pursuance of such application certain property belonging to the judgment-debtor was advertised for sale on the 27th March, 1876. On the latter date the parties to such decree made a joint application in writing to the Court, wherein it was stated that the judgment-debtor had made a certain payment on account of such decree, and the decree-holders had agreed to give him four months' time to pay the balance thereof, and it was prayed that such sale might be postponed and such time might be granted. The Court on the same day made an order on such application postponing such sale. The next application for execution of such decree was made on the 17th January, 1879. The lower Appellate Court *held*, with reference to the question whether such application had been made within the time limited by law, that it had been so made as under Art. 178 (6) Sch. ii. of Act XV of 1877, such time began to run from the date of the expiration of the period of time allowed to the judgment-debtor under the application of 27th March 1876. *Held* that Art. 179 (6) had not any relevancy to the present case; but, inasmuch as the proceedings of the 27th March, 1886, might be considered as properly constituting a 'step in aid of execution,' within the meaning of Art. 179 (4), the application of the 11th January, 1879, was within time.—4 Al. 60.

A decree passed jointly in favour of more persons than one can only be legally executed as a whole for the benefit of all the decree-holders, and not partially to the extent of the interest of each individual decree-holder. *Held*, therefore, where one of two persons, in whose favour a decree for money had been passed jointly, applied on the 27th April, 1880, for execution of a moiety of such decree, and the other of such persons made a similar application on the 30th April, 1880, that such applications, not being made in accordance with law, were not sufficient to keep the decree in force. Also that the illegality of such applications could not be cured by a subsequent amended application for the execution of the decree as a whole, preferred after the period of limitation had expired.—4 Al. 72.

The words, "where there has been an appeal," in cl. 2, art. 179 of Sch. II of Act XV of 1877, do not contemplate and mean only an appeal from the decree of which execution is sought, but include where there has been



a review of the judgment on which such decree is based, and an appeal from the decree passed on such review. *Held*, therefore, where there had been a review of judgment, and an appeal from the decree passed on review, and such decree having been set aside by the Appellate Court, application was made for execution of the original decree, that time began to run, not from the date of that decree, but from the date of the decree of the Appellate Court.—4 Al. 274.

An application by a decree-holder in the course of an investigation into an objection to the attachment of property to have his witnesses summoned is an application within the meaning of Art. 179 (4), Sch. ii. of the Limitation Act XV 1877.—5 Al. 344.

An application by a decree-holder to be paid the proceeds of a sale of property in execution of the decree, is a “step in aid of execution” of the decree, within the meaning of No. 179 (4), Sch. ii. of Act XV of 1877 (Limitation Act).—6 Al. 366.

Where an application for appeal was presented to the High Court, but rejected, owing to the memorandum of appeal being insufficiently stamped, *held* that, under such circumstances there had not been an appeal or a final decree or order of an appellate Court within the meaning of No. 179 (2) of the Limitation Act, so as to give a period from which limitation for execution of the decree appealed from could run.—6 Al. 438.

On the 28th May, 1878, application was made for execution of a decree in pursuance of which certain property was attached and proclaimed for sale. On the day fixed for the sale the Court issued an injunction to stay the same until a suit, which certain persons who claimed the property had instituted, had been decided. On the 4th September, 1882, the suit having been finally decided on the 24th January, 1881, the decree-holder applied for execution. *Held* that the application might properly be considered to be for revival of the former proceedings after removal of the injunction, which Art. 178 of the Limitation Act, 1877, rather than Art. 179, was applicable, and was within the time from the date of accrual of the right apply on the final decision of the suit.—6 Al. 23.

B, the mortgagee of certain property and N. the mortgagor, and T, to whom a part of the mortgaged property had been transferred by sale, for the mortgage-money, and the sale of the mortgaged property. On the 24th September he obtained a decree, which directed N to pay the money, and that it might be realized by the sale of the mortgaged property. T appealed, contending, that as the instrument of mortgage was not registered, it was not receivable as evidence of the mortgage, and therefore the sale of property had been improperly ordered. N did not appeal. The Court of first appeal allowed this contention and set aside the order for the sale of the property. The mortgagee preferred a second appeal, and on the 15th January, 1880, the Court of last appeal modified the decree of the Lower Court, directing that a part of the mortgage-money might be recovered by the sale of the mortgaged property. On the 14th September, 1882, B applied for execution of the decree against N. *Held* that the period of limitation for the application was governed by Art. 179 of the Limitation Act, and such period would run from the final decree of the appellate Court.—6 Al. 14.

A decree for money was passed in 1871 in favour of two persons jointly, In 1883 the decree-holders applied for execution thereof. By previous applications for execution made in 1875, 1877, and 1880 the decree-holders

had sought to recover two thirds of the amount of decree :—*Held* that inasmuch as the previous executions of the decree by some sharers for their shares whether strictly allowable or not, were allowed, and no objections at the time were taken, they were good for the purpose of keeping the decree alive ; and that the judgment-debtor could not now take exception to them as not being applications to enforce the decree within the meaning of the Limitation Act. *Kungul Pershad Dichit v. Grija Kant Lahiri* followed.—7 Al. 282.

The holder of a decree for money dated the 7th June, 1879, applied on the 20th July, 1880, for execution thereof, but it appeared that in certain particulars the decree required correction, and it was therefore ordered, at the request of the pleader that the application should be dismissed and the decree returned to him for amendment. The next application was made by the decree-holder on the 19th February, 1883 :—*Held* that the application of the 20th July, 1880, having been put in and afterwards taken back by the decree-holder, the proceeding became to all intents and purposes as though no application had been made ; that therefore it could have no effect as an application made in accordance with law for execution within the meaning of art. 179 ; that applying the rule contained in sec. 374 of the Civil Procedure Code, in accordance with sec. 647, to the application for execution of the 19th February, 1883, the question of limitation must be determined as if the first application had never been filed ; and that the application now in question was consequently barred by limitation. *Ramanaudan Chetti v. Periatambi Shervai* dissented from.—7 Al. 359.

An application to execute an attached decree is a “step in aid of execution” of the original decree, within the meaning of art. 179, inasmuch as its object is to obtain money in order to pay off the judgment-debtor.—7 Al. 382.

Where a decree-holder died without taking out execution of his decree, and, two days after his death, his pleader made an application for execution on his behalf, this being the first application of the kind :—*Held* that, inasmuch as the authority of a pleader ceases at the moment of his client's death, the application was invalid, and was not such an application or step in aid of execution of the decree as could save a subsequent application for execution by the decree-holder's heirs from being barred by limitation.—7 Al. 504.

An appeal from a decree dated the 8th July, 1879, was rejected by the High Court on the 11th June, 1880, in consequence of the failure of the appellants to pay additional court-fees declared by the Court to be leviable. On the 23rd December, 1882, an application was filed by the decree-holder for execution of the decree :—*Held*, that the order of the 11th June, 1880, rejecting the appeal on the ground of deficient payment of court-fee, was equivalent to a decree, and therefore the application, being made not more than three years from the date of that order, was not barred by limitation.—7 Al. 887.

R, in a suit against S and other persons, obtained a decree on the 24th December, 1878, S being exempted from the decree, and being awarded costs against the plaintiff. In executing his decree, R, on the 16th June, 1880, sought to set off the costs awarded to S against the amount due to himself. On the 6th August, 1880, S preferred objections to this course. On the 19th July, 1883, S applied for execution of his decree for costs :—*Held* that the application was barred by limitation, inasmuch as art. 179 (4) requires that the decree-holder should make a direct and independent



application for execution on his own account, and it was not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case.—7 Al. 893.

Cl. (2), must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal.—8 Al. 573.

An application to execute a decree passed in April, 1880, was made on the 19th February, 1884, and rejected on the 26th March, 1884, as being beyond time. This order was upheld on appeal in March, 1885. While the appeal was pending the decree holder in May, 1884, applied to the Court of first instance to amend the decree under sec. 206 of the Civil Procedure Code, and in December 1874, the application was granted. In April, 1885, an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that art. 178 applied to the case:—*Held*, that No. 179 and not No. 178 was applicable, that the order rejecting the application of the 19th February, 1884, became final on being upheld on appeal, that the amendment could not revive the decree or furnish a fresh starting-point of limitation, and that the application was therefore time-barred. *Mungal Pershad v. Grija Kant Lahiri* and *Ram Kirpal v. Rup Kuari* referred to.—8 Al. 492.

*Held*, following *T. D. Bandyopadhyaya v. B. L. Mukhopadaya* (Tyrrell, J., doubting), that an application made by a decree-holder, the object of which is that the receipt of certain sums of money paid out of Court may be certified, is a “step in aid of execution,” such as will keep the decree alive, within meaning of the Limitation Act (XV of 1877), sch. ii. No. 179. (4). *Gansham v. Mukha* referred to.—9 Al. 9.

Sec. 647 of the Civil Procedure Code makes secs. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali v. Ram Singh* and *Pirjade v. Pirjade* followed. *Tara Chand Megraj v. Kashinath Trimbak* and *Ramanandan Chetti v. Periatambi Shervai* dissented from. A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings. *Held* that, with reference to the second paragraph of sec. 373 read with sec. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, sec. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art. 179 of the Limitation Act.—10 Al. 71.

The expression “applying in accordance with law” in Act XV of 1877 (Limitation Act), Sch. ii, No. 179 (4), means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which, either to the decree-holder’s direct knowledge in fact, or from his presumed knowledge of the law, he must have known the Court was incompetent to do. *Held*, therefore that an application to have the judgment-debtor arrested in execution of decree, which was in contravention of the terms of sec. 341 of the Civil Procedure Code, and an application to bring mortgaged property to sale, which was in contravention of sec. 99 of the Transfer of Property Act IV of 1882), were not applications “in accordance with law”

within the meaning of No. 179 (4) of sch. ii of the Limitation Act.—12 Al. 64.

The expression “step in aid of execution” in Act XV of 1877 (Limitation Act) sch. ii, No. 179 (4) was intended to cover any application made according to law in furtherance of the execution proceedings under a decree. It includes applications made by a decree-holder under sec. 258 of the Civil Procedure Code to enter up part satisfaction of the decree. *Per* Mahmood, J.—Provided that the Payment asserted in the application was actually made.—12 Al. 399.

The granting of an application under sec. 206 of the Civil Procedure Code to bring a decree into conformity with the judgment does not form the starting point of a fresh period of limitation in favour of the decree-holder ; nor is such an application a “step in aid of execution” within the meaning of art. 179, schedule ii, of the Limitation Act (XV of 1877). *Kishen Sahai v. The Collector of Allahabad*, distinguished.—13 Al. 124.

Where a decree for possession of immoveable property was passed not jointly, but severally, as against all the defendants individually, and specifically stated the proportions of which they were severally in possession, as also the costs separately payable by each of them to the plaintiff ; and where two only of the defendants appealed on pleas which did not assail the decree in respect of any right or ground common to the appellants and all or any of the non-appealing defendants, but referred merely to the specific property alleged to be in the appellants’ hands :—*Held* by the Full Bench (Brodhurst and Mahmood, JJ., dissenting) that a first application for execution of the original decree against those defendants who had not appealed from it, and which was made five years after the date of the decree, was barred by limitation, and clause 2 of art. 179, sch. ii of the Limitation Act (XV of 1877), did not apply so as to make time run from the proceedings in the appeal preferred by the other defendants. That clause applies only to those cases in which the parties to the execution proceedings were parties to the appeal, or to the class of cases to which sec. 544 of the Civil Procedure Code applies. *J. P. Wise v. Rajnrain Chuckerbutty* and *Mullick Ahmad Zumma v. Muhammad Syad* approved. *Held* by Brodhurst and Mahmood, JJ., *contra*, that art. 179, clause 2 must be construed as applying without any exceptions to decrees from which an appeal has been lodged by any of the parties to the litigation in the original suit. *Nur-ul-Hasan v. Muhammad Hasan* followed.—13 Al. 1.

The making of an application by the decree-holder for leave to bid at the sale in execution of his decree is “a step in aid of execution” within the meaning of cl. (4), No. 179, sch. ii of the Limitation Act (Act XV of 1877.)—13 Al. 211.

Where a decree for redemption of mortgage stated that the amount due under the mortgage should be paid within four months, but omitted to state what the result would be if the mortgage debt was not so paid,—*Held*, that it was competent to the decree-holder to execute such a decree at any time within the period of limitation prescribed by Art. 179 of the second schedule of Act XV of 1877,—14 Al. 350.

See I. L. R., 14 Cal. 348, noted under art. 175 ; 19 Cal. 132, noted art. 178 ; 7 Cal. 82, noted under secs. 12 and 14 of the Civ. Pro. Code ; 2 Madr. 1, noted under sec. 216 of Civ. Pro. Code ; 5 Madr. 141, noted under sec. 230 of the Civ. Pro. Code ; 14 Madr. 252, noted under sec. 231 of the Civ. Pro. Code ; 4 Al. 83, noted under art. 75 ; 9 Cal. 730, noted under sec. 19.

Description of application.	Period of limitation.	Time from which period begins to run.
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### Third Division : Applications.—(continued.)

<b>180.</b> —To enforce a judgment, decree, or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of Her Majesty in Council.	Twelve years	When a present right to enforce the judgment, decree, or order accrues to some person capable of releasing the right. Provided that, when the judgment, decree, or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments as the case may be.
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#### Notes.

The plaintiff obtained a decree in 1864. The first application for execution was made in September 1869 under sec. 216 of the Civil Procedure Code (Act VIII of 1859); and after notice to the defendant as provided thereby, an order was made under that section for execution to issue. In September, 1880, an application for execution was made under sec. 230 of the Civil Procedure Code of 1877, which repealed Act VIII of 1859. *Held* that the order after notice had the effect of reviving the decree within the meaning of art. 180, sch. ii., Act XV of 1877, and therefore the decree was not barred by the law of limitation. An order for execution under the Code, made after notice to show cause, has, on the original side of the Court, the same effect as an award of execution in pursuance of a writ of *scir facias* had under the procedure of the Supreme Court,—i. e., it creates a revivor of the decree. The clause of sec. 230 of Act X of 1877, which prohibits a subsequent application for execution, only applies where the previous application has been made under that section, and not where such previous application has been made under Act VIII of 1859.—I. L. R., 6 Cal. 504.

Although an order of Her Majesty in Council may confirm a decree of the Court below, that order is the paramount decision in the suit; and any application to enforce it, is in point of law, an application to execute the order, and not the decree which it confirmed. Such an application is governed by art. 180, sch. ii. of Act XV of 1877.—8 Cal. 218.

The plaintiffs obtained a decree of the High Court of Bombay against the defendant on the 22nd February, 1867. The defendant, after the passing of the decree against him, resided in Ahmedabad. In July, plaintiff assigned his decree to L, who in 1876 assigned it to M. From time to time M obtained orders for the execution of the said decree, but was always unable to proceed to execution. The last order for execution made by the High Court was on the 4th February, 1879. In April, 1879, the decree was transmitted to the Court at Ahmedabad for execution, and that Court in Septem-

ber, 1879, issued a warrant of arrest against the defendant against the order for which the defendant appealed. The said order was confirmed by the High Court on 10th February, 1880. In April, 1881, the defendant was in Bombay, and M the decree-holder, obtained a summons calling on defendant to show cause why the decree should not be executed against him. On 3rd May the summons was made absolute. The defendant appealed, and contended that the application for execution was barred by limitation under sec. 230 of the Civil Procedure Code (Act X of 1877) which was to be read with clause 180 of sch. ii. of Limitation Act, XV of 1877. *Held* that the application was not barred. Clause 180 of the second schedule of the Limitation Act, XV of 1877 was intended to be independent of sec. 230 of the Civil Procedure Code, and not to be in any way controlled by it. Sec. 230 does not apply to decrees made by the High Court.—6 Bom. 258.

The Indian Limitation Act XV of 1877, [Schedule II, article 180, applies to a judgment of a Court for the relief of insolvent debtors entered up in the High Court, in accordance with section 86 of the Statute 11 and 12 Vic., cap. 21. Although a Court held under the latter statute determines the substance of the questions relating to the insolvent's estate, the proceedings in execution and the judgment are the High Court's. The judgment is entered up in the ordinary course of the duty cast upon the High Court by the law, not by way of special or extraordinary action, but in the exercise of its ordinary original civil jurisdiction. The latter expression in the charter of 28th December, 1865, being opposed to the "extraordinary" jurisdiction, which the High Court may assume, at its discretion, upon special occasions and by special orders, includes all such jurisdiction as is exercised by the High Court in the ordinary course of law without any step taken to assume it. When an order has been made, under section 86 of the Statute 11 and 12 Vic., cap. 21, that execution be taken out, a present right accrues to the Official Assignee to apply for it; and, therefore, article 180 of Schedule II assigning in reference to judgments of High Courts exercising ordinary original jurisdiction, a starting point of time depending on the accrual of the right to enforce them, is the article applicable.—13 Bom. 520.

# THE NEW CODE OF CIVIL PROCEDURE.

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# CIVIL PROCEDURE CODE.

## ACT No. XIV. OF 1882.

*(As amended up to date.)*

RECEIVED THE ASSENT OF HIS EXCELLENCY THE GOVERNOR-GENERAL  
ON THE 17TH MARCH, 1882.

*An Act to consolidate and amend the laws relating to the Procedure  
of the Courts of Civil Judicature.*

WHEREAS it is expedient to consolidate and amend the  
laws relating to the procedure of the  
Courts of Civil Judicature ; It is hereby  
enacted as follows:—

Preamble.

### PRELIMINARY.

1. This Act may be cited as “ The Code of Civil Pro-  
cedure :” and it shall come into force on  
the first day of June, 1882.

Short title.

Commencement.

This section and section 3 extend to the whole of British  
India. The other sections extend to the  
whole of British India except the Sched-  
uled Districts as defined in Act No. XIV of 1874.

Local extent.

### Notes.

This section applies to Provincial S. C. Courts.

An appeal lies to the High Court from the Sonthal Pergunnahs in all  
civil suits in which the matter in dispute is over R. 1,000 in value.—I. L.  
R., 10 Cal. 761.

On 28th September 1877 (*i. e.*, three days before Act X of 1877 came  
into operation), an application was made for the enforcement of a money-  
decree by attachment (*inter alia*) of a political pension enjoyed by the de-  
fendants. Under Act VII of 1859, sec. 216, a notice was issued on the same  
day to the defendants, calling upon them to show cause why the decree  
should not be executed. The defendants accordingly appeared on the day  
fixed (at which date Act X of 1877 had come into force), and contended that,  
under sec. 266, cl. g. of that Act, the pension was no longer attachable. *Held*,  
that all proceedings, commenced and pending when Act X of 1877 became  
law, were, under Act I of 1868, sec. 6, to be governed by the law therefore  
in force, the general rule of construction contained in that section not being  
affected or varied by Act X of 1877, secs. 1 and 3 ; and that a *bona  
fide* application for enforcement of a decree in a particular way, coupled with  
an order of the Court in furtherance of that object, as much constitutes a  
proceeding in execution commenced and pending as the actual issue of a  
warrant of attachment.—4 Bom.

**2.** In this Act, unless there be something repugnant in the subject or context—  
 Interpretation-clause.

“chapter:” “Chapter” means a chapter of this Code :

“district” means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (herein after called a ‘District Court’),  
 “District:”  
 “District Court:”  
 and includes the local limits of the ordinary original civil jurisdiction of a High Court: every Court of a grade inferior to that of a District Court, and every Court of Small Causes, shall, for the purposes of this Code, be deemed to be subordinate to the High Court and the District Court :

“pleader” means every person entitled to appear and plead for another in Court, and includes an advocate, a vakil, and an attorney of a High Court :  
 “pleader:”

“Government Pleader” includes also any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader :  
 “Government Pleader:”

“Collector” means every officer performing the duties of a Collector of land-revenue :  
 “Collector:”

“decree” means the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal. An order rejecting a plaint, or directing accounts to be taken, or determining any question mentioned or referred to in section 244, but not specified in section 588, is within this definition: an order specified in section 588 is not within this definition :  
 “decree:”

“order” means the formal expression of any decision of a Civil Court which is not a decree as above defined :  
 “order:”

“judgment” means the statement given by the Judge of the grounds of a decree or order :  
 “judgment:”

“Judge” means the presiding officer of a Court :  
 “Judge:”

“judgment-debtor” means any person against whom a decree or order has been made :  
 “judgment-debtor:”

**“decree-holder”** means any person in whose favour a decree or any order capable of execution has been made, and includes any person to whom such decree or order is transferred :

**“decree-holder:”**

**“written”** includes printed and lithographed, and **“writing”** includes print and lithography :

**“written :”**

**“signed”** includes marked, when the person making the mark is unable to write his name ; it also includes stamped with the name of the person referred to :

**“signed :”**

**“foreign Court”** means a Court situate beyond the limits of British India, and not having authority in British India, nor established by the Governor-General in Council :

**“foreign Court :”**

**“foreign judgment”** means the judgment of a foreign Court :\*

**“foreign judgment :”**

**“public officer”** means a person falling under any of the following descriptions (namely) :—

**“public officer:”**

every Judge ;

every covenanted servant of Her Majesty ;

every commissioned officer in the military or naval forces of Her Majesty while serving under Government ;

every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties ;

every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety, or convenience ;

every officer whose duty it is, as such officer, to take, receive, keep, or expend any property on behalf of Government, or to make any survey, assessment, or contract on behalf of

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\* For limitation of suits on foreign judgments, see Act XV of 1877, sch. ii., art. 117, and sec. 3 of this Act,

Government, or to execute any revenue-process or to investigate, or to report on, any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests of Government, and every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty.

And in any part of British India in which this Code operates, "Government" includes the Government of India as well as the Local Government.

"Government .

#### Notes.

" This section applies to Provincial S. C. Courts.

A pleader holding a certificate under sec. 12 of Act XX of 1865 is not thereby entitled to be admitted to practise in the Court of Small Causes at Calcutta.—1 B. L. R., (A. C.) 45; 10 W. R., 82.

When a suit is remitted by order of an Appellate Court for re-hearing or finding on an issue, the proceedings on such order must be regarded as a further proceeding in the trial of the suit, and consequently, under sec. 22 of Reg. XIV of 1816, a vakil cannot change sides, and hold a vakalatnama for the party opposed to the one for whom he appeared at the first hearing.—4 M. H. C. R., App. 43.

The vakil retained by the plaintiff in a suit in which a decree has been given for the plaintiff is competent to plead for his client in answer to a claim advanced (under the first portion of sec. 246 of the Civil Procedure Code, 1859) to property attached in execution of such decree, without the production of a fresh vakalatnama.—5 Bom. H. C. R., (A. C.) 83.

A vakil of the High Court in Calcutta is entitled to practise as a pleader in the Calcutta Court of Small Causes.—2 Ind. Jur., N. S., 133; 7 W. R., 228.

The acceptance of a vakalatnama by a pleader of the High Court should in all cases be unconditional.—14 W. R., 7.

Not merely authorized mukhtars, but other persons generally, are at liberty to appoint pleaders by vakalatnamas.—7 W. R., 481.

The greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of the vakil's authority in the particular matter for which he was employed.—6 M. H. C. R., 127.

A consent by the vakil of a party to a decree being made binding on property other than what the parties to the suit may have an interest in, is a consent to what is beyond the scope of the suit, and can neither be binding on the party, nor acted upon by the Court.—2 M. H. C. R., 423.

When a pleader, in the conduct of a suit, makes admissions on behalf of a client, the client is bound by such admissions.—5 N.-W. P. H. C. R., 2.

Pleaders, unless specially empowered so to do, have no authority to compromise cases conducted by them.—2 N.-W. P. H. C. R., 149.

A vakil has no authority under an ordinary vakalatnama to give up a portion of the claim already decreed, and any such abandonment will not

be binding on his client. When a case is remanded with the specific declaration that the plaintiff shall obtain "possession of the disputed property," the lower Court has no jurisdiction to debar the plaintiff from any portion thereof by reason of a relinquishment made by the vakil.—3 B. L. R., App. 15.

A vakil, by his ordinary employment as vakil, enjoys no authority authorizing him to transfer a decree.—2 N.-W. P. H. C. R., 195.

Where a vakil, upon a mistaken view of the law, goes beyond and contravenes his instructions, his erroneous consent cannot bind his client.—16 W. R., 246.

A vakil in the Courts of the mofussil is not empowered to make admissions on points of law on behalf of his client, although he may make admissions on points of fact.—Jusoda Koonwar v. Gouree Byjnath Pershad, 1 Ind. Jur., N. S., 365; 9 W. R., 375.

A party is bound by the admission of his duly constituted vakil, when the admission is one of a fact which, but for such admission, the opposite party would have had an opportunity of proving.—9 W. R., 485.

A distinct admission of liability made by a vakil who represented the defendant, and whose authority was not questioned, was held to be sufficient to warrant a decree in favour of the plaintiff.—21 W. R., 332.

The admission of a defendant's vakil in Court was held to be legal evidence of the receipt of money, and to do away with the necessity for other proof.—10 W. R., 322.

It is not within the ordinary scope of a pleader's duties to relinquish any portion of his client's case without express authority from the client, who is not bound by such relinquishment, unless it was authorized by himself.—12 W. R., 279.

Ordinarily a vakil who is employed to conduct the case on behalf of his client has no implied authority to compromise it. In the absence of any express provision in the vakalatnama, he can make no compromise which will be binding upon his client, except with his consent.—2 Agra H. C. R., 222.

Where a pleader, authorized only to conduct the defence in the usual way, pledged his client to relinquish his defence if the plaintiff would assert on oath that the defendant was not the owner of the property in dispute, it was held that he had exceeded his power, and that his client was not bound by his act.—3 Agra H. C. R., 309.

Where a vakil has undertaken the conduct of a suit, he is bound to proceed with it, and cannot sue for his fee, in the absence of a special agreement, until the suit is completed, unless where the client has dispensed with his services.—6 M. H. C. R., 265.

The rule under Reg. XIV of 1816, sec. 30, that each of two vakils appointed by a party to a suit shall be entitled to a moiety of the fees payable, applies only to cases where they are appointed by the same vakalatnama.—1 M. H. C. R., 369.

In a suit for a judicial separation and alimony decided under the Indian Divorce Act (IV of 1869), the only basis for the estimation of pleader's fees is ten times the amount of alimony for one year.—7 M.H.C.R., 394.

The fee to be allowed to a pleader upon a petition to the Court to establish the right to have a document registered under Act XX of 1866, sec. 84, was one-fourth of the fee allowable in a regular suit, as was provided by Act I of 1846, sec. 7.—7 Bom. H. C. R., (A. C.) 132.

The provisions of Reg. II of 1827, sec. 52, cls. 1 and 2, and of Act I of 1846, sec. 7, regarding the award of pleaders' costs by way of a percentage, relate only to costs as between party and party, and (inasmuch as sec. 52 of Reg. II of 1827 is, by sec. 6 of Act I of 1846, expressly rendered inoperative for any purpose except for the purposes of sec. 7 of the latter Act) there is not any statutable provision for costs as between pleader and client, so that, in the absence of an agreement between them, the pleader is left to his remedy on a *quantum meruit*.—9 Bom. H. C. R., 33.

An application was made for leave to sue defendant *in forma pauperis*, and he agreed with certain vakils to give them full fees, according to the valuation of the claim, in case they should succeed in having the application rejected. *Held* that this was a valid agreement, and that the vakils, having performed their part, were entitled to recover upon it.—2 C. L. R., 166.

The ordinary rule for assessing the hearing fee according to the market value of the property in suit is not applicable to a suit for partition, and the Court in each such case ought to fix the amount of the fee.—13 C. L. R., 253.

A suit under sec. 15, Act XVI of 1864, was not a summary, but a regular suit, and full fees were awarded for pleaders.—9 W. R., 101.

A, a pleader, was engaged by B, who was acting on behalf of C, to defend certain persons charged with the offences of rioting and of having caused grievous hurt. Two of the accused persons were relatives of C. A agreed with B that, if all the accused were acquitted, his fee was to be Rs. 500; if the two who were the relatives of C were acquitted, then he was to receive Rs. 250; but in the event of none of the accused being acquitted, he was to receive only Rs. 40. Before the trial B paid A Rs. 475; this having come to the knowledge of C, he telegraphed, saying that the fee was exorbitant, and A, upon being remonstrated with, handed over Rs. 250 to a banker to be placed to his (A's) credit. A alleged that, out of Rs. 225 which remained with him, he paid Rs. 140 to B as commission, and that Rs. 25 were paid to his mohurir. *Held* that A was guilty of fraudulent and grossly improper conduct. He was suspended from practising for the period of one year. *Per Pontifex, J.*—If a mukhtar, paid for his services by his employer, were to receive in addition, without the knowledge of his employer, a percentage or commission from the pleader, he would be answerable, not only in the Civil Court, but also in the Criminal Court, to a charge of obtaining money improperly from his employer.—11 B. L. R., 312.

A District Judge has no power to remove a vakil against his will from a Court to which he has once been allotted, except for a criminal offence, misbehaviour, or neglect of duty.—1 Bom. H. C. R., 136.

A Zillah Judge has no authority to oblige a pleader to leave a Court in which he has been practising and to proceed to another.—10 W. R., 332.

Any charge of misconduct against a pleader or mukhtar holding a certificate under Act XX of 1865, other than a recorded conviction of a criminal offence, must be made and substantiated, and a report submitted to the High Court, as provided by sec. 16.—7 W. R., 316.

A Zillah Judge has no power, under Act XX of 1865, to suspend a pleader of the High Court from practising in the Courts of his district on the ground of incompetency. His proper course is to make a representation to the High Court.—14 W. R., 217.

A Zillah Judge has no authority to initiate proceedings against a pleader of the lower grade under sec. 16, Act XX of 1865, which requires that



the inquiry should be made by the Court in which the pleader committed the act of misconduct.—11 W. R., 127.

In a case tried under the provisions of sec. 16, Act XX of 1865, where the subordinate Court is of opinion that the pleader should be acquitted, it is not necessary that there should be any report to the Judge.—13 W. R., 67.

It is not expedient that pleaders should by purchase become the persons entitled to execute decrees in suits in which they have been entitled to execute decrees in suits in which they have been engaged.—2 N.-W. P. H. C. R., 46.

The conduct of a vakil who, having acted in that capacity on behalf of a judgment-debtor in certain proceedings in execution of a decree, subsequently became partner with the decree-holder in the purchase of the property, remarked upon. *Quære*.—Whether, under such circumstances, the purchase by the vakil, or the purchase by the decree-holder in conjunction with him, could not be set aside.—4 B. L. R., (A. C.) 181 : 13 W. R., 209. See also 17 W. R., 480.

The Officiating Advocate-General having claimed pre-audience, the claim was questioned by a senior member of the Bar, but was allowed. *Held* that, down to the transfer of the Government of India to Her Majesty, the Advocate-General of the East India Company was not entitled as such to pre-audience in the Courts without a patent of precedence: that the Attorney-General and Solicitor-General in England enjoy precedence as representing the Sovereign, and not by patent: and that the Advocate-General and Officiating Advocate-General for the time being are entitled to similar pre-audience as the Attorney-General in England.—Bourke's Rep., O. C. 224; A. O. C. 110.

A Collector's Court, although it exercises certain powers under the Civil Procedure Code, is not a Civil Court within the meaning of sec. 15 of Act VI of 1871; nor is it subordinate to a District Court within the meaning of Act X of 1877, sec. 2.—3 C. L. R., 508.

Notwithstanding the provisions of sec. 12 of the Court-fees Act (VII. of 1870), an order rejecting a plaint on the ground of its being insufficiently stamped is appealable as a "decree" within the definition of "decree" in the Civil Procedure Code as amended by Act XII of 1879.—6 C. L. R., 567.

Where an appeal Court made a decree or order directing a commission to issue directed to an Amin to make a partition of certain property into certain specified shares and to allot the shares to the parties to the suit:—*Held*, that such order is a decree.—I. L. R., 12 Cal. 209.

An order under sec. 396 declaring the rights of the parties in a partition suit but leaving their shares to be determined in execution of the decree, is a "decree" within the meaning of sec. 2 of the Code, an appeal therefore lies from such order.—12 Cal. 273.

An order rejecting a memorandum of appeal as barred by limitation is a "decree;" it is therefore appealable, and not open to revision under section 622. *Gujraj Singh v. Bhagwant Singh and Dionatuallah Beg v. Wajid Ali Shah* distinguished.—7 Al. 42.

The plaintiff's claim to redeem certain lands was rejected by a Subordinate Judge on 21st December 1882. On the 1st February 1883, the plaintiff presented an application for review to the Special Judge appointed under the Dekkhan Agriculturists' Relief Act. His application was rejected by that Judge, who was of opinion that the plaintiff's remedy lay in an appeal. The plaintiff was not informed of the result of his application to the

Special Judge until the following May, at which time the Court of the District Judge was closed for vacation. On the 3rd June 1883, he presented an appeal on the opening of the District Court. The District Judge dismissed the appeal as barred by limitation. On appeal to the High Court a preliminary objection being taken that a second appeal would not lie:—*Held*, that the order of the District Judge, having the force of a decree, was appealable.—9 Bom. 452.

Section 442 of the Code refers to a case where the plaint on the face of it appears to have been filed by a minor. Where in a suit the plaintiffs described themselves as adults, and on the objection of the defendants an issue was raised and inquired into on the question of age:—*Held*, that the order passed under the circumstances, although it professed to have been made under sec. 442, must be treated as one rejecting the plaint or dismissing the suit, on the ground that the suit was instituted by persons who were established on the evidence to be minors, and was appealable as a decree. The words, “rejecting the plaint,” in section 2, are not limited to the cases provided for in sections 53 & 54. *Held*, also, that the defendant, not having taken an objection to the suit on the ground of the minority of the plaintiffs, whilst it was pending in appeal to the High Court, were precluded from raising it on remand.—13 Cal. 189.

On an application under section 232 by the purchaser of a decree to be allowed to execute it, two of the judgment-debtors objected that the purchase was *benami* for the other judgment-debtor, and that they had paid off the decree to the original decree-holder. The Munsiff found both objections against them, and allowed the purchaser to execute the decree:—*Held*, that the question was one between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree, and that the decision of that question was a decree under sections 2 and 244 of the Code, and therefore appealable, and a second appeal lay therefrom to the High Court.—12 Cal. 610.

An appeal was preferred against a decree of an Original Court dismissing a suit, and the Appellate Court sent the case back for the purpose of certain evidence being taken, and certified to it. Pending that being done the parties applied to the Appellate Court to refer the case to arbitration, and that Court referred that application to the Original Court for disposal, although the case was still pending in its own file for disposal. Subsequently another application was made to the Original Court to refer the case to arbitration, and on the 10th May the record was sent to the arbitrator with directions to submit his award within seven days. On the 12th September, as the award had not been sent in, the Original Court passed an order, recalling the record, and subsequently the award of the arbitrator, dated the 12th September, was filed. The Original Court thereupon forwarded the record to the Appellate Court for its decision. Objections were taken to the award, but overruled, and the Appellate Court passed an order directing the case to be sent back to the Original Court, with orders to pass a formal decree in accordance with the award of the arbitrator:—*Held*, that a second appeal lay against the last mentioned order, inasmuch as it amounted to a decree under the provisions of section 2.—12 Cal. 173.

An order refusing leave to institute a suit under sec. 18 of Act XX of 1863 is not a “decree” within the meaning of sec. 2 of the Civil Procedure Code, and is not appealable.—18 Cal. 382.

The ancestors of B mortgaged their share in a certain mehal to A.

Subsequently B became entitled to this share in the mehal, and A obtained a decree on his mortgage, in execution of which the right, title and interest of B was sold and purchased by C. Subsequently to this latter decree and sale, B obtained a decree against D for possession of certain lands which were proved to belong to this mehal. E then obtained a decree against B, in execution of which the right, title and interest of B in this same mehal was sold and purchased by F; C and F transferred their respective rights to E. E thereupon, as purchaser of the right, title and interest of B from F, applied to execute the decree obtained by B against D. This application was rejected by the Subordinate Judge, but on appeal to the District Judge was allowed. B thereupon applied to the High Court to have this order set aside:—*Held*, that the order should be set aside, inasmuch as no appeal lay from the order of the Subordinate Judge, the order not being a decree within the meaning of secs. 2 & 244 (cls., *a*, *b* and *c*).—11 Cal. 150.

The proceedings contemplated by sec. 396 are proceedings in a suit before decree, and in order to enable the Court in that suit to determine exactly the terms of that decree. Where those proceedings, however, were left to be taken in execution of the decree, the High Court, treating it as an error in point of form, and without deciding whether or not an objection if it had been taken would have been fatal to the proceedings, dealt with the case in the same way as was done in *Gyan Chunder Sen v. Doorga Churn Sen*, I. L. R., 7 Cal. 318, regarding the further proceedings taken after decree declaring the rights of the several parties as proceedings to obtain a decree on further consideration. Where in a partition suit an order was made in the course of such proceedings by which the position of some of the parties to the suit was determined but no declaration was made of the exact rights of each of the parties:—*Held*, it was a mere interlocutory order and no appeal would lie from it. *Seemle*, such an order is not a decree within the terms of sec. 2. *Bholanath Dass v. Sonamoni Dasi*, I. L. R., 12 Cal. 273, distinguished.—12 Cal. 275.

*Held* that an order rejecting an application for permission to sue as a pauper, and striking the case off the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with the defendants, was a "decree" within the meaning of sec. 2 of the Civil Procedure Code, and appealable as such.—9 Al. 129.

The defendant in a redemption-suit, against whom a decree had been passed, appealed to the High Court, which on his application granted the usual stay of execution pending the appeal, upon security being given by him. The Subordinate Judge, feeling doubt as to whether the actual value of the property or the value stated in the plaint should be regarded in fixing the security, referred the case to the High Court, under sec. 617 of the Civil Procedure Code (Act XIV) of 1882. *Held* that no reference would lie under sec. 617 of the Civil Procedure Code. The question as to the amount of the security was a question relating to execution as contemplated by sec. 244 of the Code, and, therefore, an order determining that question would be appealable under sec. 2 of the Code.—12 Bom. 30.

An order by a District Judge, under sec. 545 of the Civil Procedure Code (Act XIV of 1882), refusing to stay execution, is a decree as defined in sec. 2, and is therefore appealable.—12 Bom. 279.

The Court of first instance, being of opinion that the plaint bore an insufficient court fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal the lower Appellate Court held that the court-fee was

sufficient, and remanded the case for trial on the merits. *Held* that sec. 158 of the Civil Procedure Code was not applicable to the case; that the first Court's disposal of the suit must be treated as being under sec. 54, and was therefore a decree within the meaning of sec. 2, and appealable as such; and that such appeal was not prohibited by sec. 12 of the Court-fees Act. *Ajoodha Pershad v. Gunga Parshad* (I. L. R., 6 Cal. 249; 6 C. L. R., 567) and *Annamalai Chetti v. Cloete* (I. L. R., 4 Madr. 204) referred to.—11 Al. 91.

For the purpose of determining the proper appellate Court in a Civil suit what is to be looked to is the value of the original suit that is to say, the "amount or value of the subject matter of the suit." Such "amount or value of the subject matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appear that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint. An order of a District Judge returning a memorandum of appeal to be presented in the proper Court on the ground that the value of the suit is beyond the pecuniary limits of his jurisdiction is not a decree within the meaning of sec. 2 of the Civil Procedure Code.—13 Al. 320.

One B. D. was made a party to an application for execution of a decree as one of the representatives of a deceased judgment-debtor. It had been decided in a previous suit that B. D. was not related to the judgment-debtor in such a manner that he could become its legal representative, and in this proceeding also he objected that he was not such representative, and his objection was allowed, and the order allowing it remained unappealed and became final. The Court, however, while allowing the objection, did not give the objector his costs. *Held* that the objector did not, by being improperly brought into the execution proceedings, lose his right of appeal, and further, that he could under the circumstances appeal on the question of costs alone.—13 Al. 290.

The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court" in Chota Nagpur under secs. 2 and 344 of the Civil Procedure Code. A Deputy Commissioner therefore invested by the Local Government with powers under sec. 360 of the Code has no jurisdiction, apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under sec. 344 to have his judgment-debtor declared an insolvent. *In re Waller* (I. L. R., 6 Madr. 430) and *Purbhudas Velji v. Chugan Raichand* (I. L. R., 8 Bom. 196) followed. The question of jurisdiction not having been raised in the lower Court, the order was set aside without costs.—16 Cal. 13.

An order merely determining a point of law arising incidentally or otherwise in the course of a proceeding for determining the rights of parties seeking relief is not a decree within the meaning of sec. 2 of the Civil Procedure Code and is not appealable. Where the judgment-creditor after satisfaction entered upon a compromise, applied for execution, on the ground of the compromise having been obtained from him by fraud, and the Court below, being of opinion that the remedy of the judgment-creditor was by a proceeding in execution, and not by a regular suit, ordered the case to be tried on its merits, *held*, that no appeal lay from such an order.—18 Cal. 469.

The definition of "decree" in sec. 2 of the Civil Procedure Code means that where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record, it is a "decree." *Held* by the Full Bench

that an order passed under sec. 381 of the Civil Procedure Code, dismissing a suit for failure by the plaintiff to furnish security for costs as ordered, was the decree in the suit, and appealable as such, and consequently was not open to revision by the High Court, under sec. 622 of the Code.—8 Al. 108.

A decree against a married woman provided that the amount due under it should be payable out of the separate estate of the judgment-debtor. The judgment-debtor was entitled to a life-interest in certain trust-funds under a settlement of which the Official Trustee was the trustee. The decree-holder proceeded to execute his decree against this life-interest by notice to the Official Trustee under sec. 272 of the Code of Civil Procedure, but there were no funds in the hands of the Official Trustee which would have been attachable under sec. 268. The decree-holder now applied that the life-interest might be sold. *Held* that the interest of the judgment-debtor was not validly attached. *Semble*.—The Official Trustee is a public officer within the meaning of sec. 2 of the Civil Procedure Code.—12 Madr. 250.

An order under sec. 556 of Act X of 1877, dismissing an appeal for the appellant's default, is not a "decree" within the meaning of sec. 2, and is not appealable.—3 Al. 382.

The term "judicial proceeding," as used in Act X of 1877, sec. 2, must be understood to mean a judicial proceeding of the same nature as a suit, or such proceedings as are referred to in secs. 333, 522, 526, and 531. The definition given in the Code of Criminal Procedure, Act X of 1872, is not applicable.—2 Bom. 553.

Where an order, requiring the decree-holder to give security within three days, is made under sec. 546 by the Judge of the Court in which the decree was passed, and in which the execution is pending, such order is appealable as a decree under the provisions of sec. 2, and sec. 244, cl. (c).—8 Cal. 477.

*Held* by the FULL BENCH (PRINSEP, J., doubting):—That an order in a suit for partition, which declares the specific rights of the parties and the property to be partitioned, decides that the suit must be decreed, as after such an order the suit could not be dismissed by the Court by which it was made, and is therefore an order which adjudicates upon the rights claimed and the defence set up in the suit, and which, as far as the Court expressing it is concerned, decides the suit within the definition of a decree in sec. 2 of the Civil Procedure Code, and is therefore appealable as a decree.—19 Cal. 463.

An order made by a Civil Court under sec. 84 of the Bengal Tenancy Act is not appealable, not being a decree within the meaning of section 2 of the Code of Civil Procedure, and no appeal being allowed by section 588 of the Code or by any special provision of the Bengal Tenancy Act. *Goghun Mollah v. Rameshur Narain Mahta* referred to and followed.—19 Cal. 485.

A Decree of a Small Cause Court can be executed by it at any place within the local limits of the District Court to which it is subordinate, as defined by Act X of 1877, sec. 2, without having recourse to the procedure under sec. 648, which applies only to cases in which a decree passed in one district has to be executed in another district.—4 Cal. 823.

The expression "person referred to" in section 2 of Act X of 1877 means person referred to in the subsequent sections of the Code, as being required to sign or verify certain documents, and it is not a condition precedent to such person being able to use a stamp that he should be unable to write his name.—3 Al. 575.



A Collector, when acting under sec. 204 of Act XIX of 1873 as the agent of the Court of Wards in respect of the estate of a disqualified person, is a public officer within the meaning of secs. 2 and 424 of Act X of 1877, and consequently, when sued for acts done in that capacity, is entitled to the notice of suit required by the latter section.—3 Al. 20.

In a suit for a share of the cost of a party wall built by the plaintiffs, who, and also the defendant, were adjoining owners of plots of land under the Government for building; portion of the agreement being that all disputes as to the cost and maintenance of party walls to be settled by the Government Surveyor, whose decision was to be final—the Judge, *Scott, J.*, on 11th December 1882, decreed that the defendant was liable to pay half whatever sum the Government Surveyor might certify to be due for the cost, and that the defendant was entitled to set off in the calculation of what was due from him, the cost of any work or materials which the Government Surveyor might find had been contributed by him: and the case was thereupon adjourned for the certificate of the Government Surveyor. The Government Surveyor subsequently gave his certificate as to the cost of the unused portion of the said wall, but stated that on the evidence before him he was unable to decide as to the ownership of the foundations, &c., of the wall. The case came on again before *Scott, J.*, who decided to take evidence on the points left undetermined by the Government Surveyor. Witnesses were accordingly examined, and on 11th December 1883 the Court disallowed the defendant's claim of set-off, and gave judgment for the plaintiff for half the sum certified by the Government Surveyor as the cost of the disputed part of the wall. The defendants appealed. *Held* that the decree of the 11th December 1882 was not a decree or an "order directing accounts to be taken" within the meaning of sec. 2 of the Civil Procedure Code (Act XIV of 1882), and that the defendants, although they had not filed an appeal against it within the period allowed by the Limitation Act, were entitled to appeal against it when appealing against the decree of 11th December 1883.—9 Bom. 183.

A. in 1839 obtained a decree against B, a *sardar*, in the Court of the Agent for Sardars. The decree was executed in the Agent's Court until B's death in 1868. B's status as a *sardar* under the exclusive jurisdiction of the Agent did not descend to his sons, and the decree was transferred to the Court of the First Class Subordinate Judge at Ahmednagar for execution. Various objections were taken to the execution of the decree by that Court, but none on the ground that the Agent's decree could not be executed by a mere transfer to an ordinary Civil Court. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of A's representatives against the estate of B's sons. In 1885, one of A's representatives assigned his interest under the decree to C and D. Thereupon the transferees, C and D, applied to the First Class Subordinate Judge at Ahmednagar to have their names substituted in the place of the transferor in the execution proceedings. The Subordinate Judge rejected this application, on the ground that he could not recognise the transfer of the decree either under sec. 372 or sec. 232 of the Civil Procedure Code (Act XIV of 1882). He also found that execution had been going on for several years contrary to the ruling in *Khusaldas v. Sakham Ramchandra* (10 Bom. H. C. R., 212.) which laid down that the Agent's decree could not be executed by a mere transfer to an ordinary Court, the remedy in such cases being by a suit on the decree. On this ground also, he refused to recognise the transfer of the decree. *Held*, reversing the order of the lower Court, that the assignment of the decree-holder's rights

to execution in this case was one approved by the law as contained in section 232 of the Code of Civil Procedure (Act XIV of 1882). The transferee of a decree gains by the transfer the rights of the transferor. *Held* also that though the execution-proceedings in this case had been for many years irregularly conducted by a mere transfer of the Agent's decree to an ordinary Civil Court, still as the Court which carried on the execution had jurisdiction to grant the same relief if a suit had been brought upon the decree, the irregularity, having been acquiesced in, did not vitiate the former proceedings in execution. Where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way the party who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards challenge the legality of the proceedings due to his own invitation or negligence. But if there is no jurisdiction over the subject-matter, the acquiescence of the parties concerned cannot create it. Where a decree is one of continuous operation, taking effect as each year furnishes proceeds for its satisfaction, it must be executed each year according to the law of procedure then in force.—11 Bom. 153.

A decree-holder, within the meaning of the Civil Procedure Code, is the person whose name appears on the record as the person in whose favour the decree was made, or some person whom the Court has, by order, recognized as the decree-holder from the original plaintiff or his representatives. Sec. 235 of the Civil Procedure Code puts on the party applying for execution the obligation of stating any adjustment between the parties after decree; that is, any matter not done through the Court, as well as any agreement through the Court.—2 Madr. 216.

*Per SPANKIE, J.*—An order refusing an application to file a private award in Court is appealable as a decree. *Jokhun Rai v. Bucho Rai* (N. W. P. H. C. R., 1888, p. 353) and *Hussaini Bibi v. Mohsin Khan* (I. L. R., 1 Al. 156) impugned and distinguished: *Vishnu Bhan Joshi v. Ravji Bhan Joshi* (I. L. R., 3 Bom. 18) distinguished. *Per STUART, C. J.*—An order refusing an application to file a private award in Court on grounds not mentioned in secs. 520 and 521 is a decree, and appealable as such.—3 Al. 427.

An Appellate Court rejected the application of the legal representative of a deceased sole plaintiff-appellant to enter his name in the place of such appellant on the record, on the ground that such application had not been made within the time limited by law, and passed an order that the suit should abate. *Held* that the order of the Appellate Court, passed under the first paragraph of sec. 366 of Act X of 1877, not being appealable under cl. 18, sec. 588, of that Act, nor being a decree within the terms of sec. 2, from which a second appeal would lie, was not appealable.—3 Al. 814.

An order under sec. 549 of the Civil Procedure Code, rejecting an appeal because security has not been furnished, as directed under that section, is a "decree" within the meaning of sec. 2, from which an appeal will lie. The discretion conferred on an Appellate Court by sec. 549 to demand security for costs must be properly exercised; and such discretion is not so exercised when the order requiring such security is made without notice to the appellant to show cause why the order should not be made. No order affecting a party should be made without notice to him calling upon to show cause why the order should not be made.—5 Al. 380.

The sharers of a joint undivided estate agreed in writing that such estate should be partitioned and the accounts thereof settled by arbitration and named one of such sharers as arbitrator, and agreed that he should



settle all the accounts, show the surplus at each sharer's credit, and prepare lots, after partition of the lands and houses comprehended in such estate, and have them drawn within one year from the completion of the partition. Subsequently, one of such sharers applied, under sec. 523 of Act X of 1877, to have such agreement filed in Court. The other sharers not objecting to this course, such agreement was filed accordingly, and the case was referred to such arbitrator. The arbitrator made an award, whereby he partitioned such estate into lots assigning some only of such lots by name, and wherein he stated that he had not been able to settle the accounts owing to the default of the parties, and that, considering that the partition should take effect without any delay, he did not ask for further time. He further stated that "all the parties state that they will adjust the accounts after renewing the agreement," and that he requested that the unassigned lots might be drawn in Court. The Court made an order confirming the award, and, it being objected that the settlement of the accounts should not be postponed, but that they should be settled as agreed, directed that the arbitrator should settle the accounts, and gave him a year's time for that purpose, and some of the parties, not being willing to draw the unassigned lots, directed the distribution of such lots "in reference to the age and number" of the sharers. *Held* that such order was a "decree" within the meaning of secs. 2 & 522 of Act X of 1877: that the arbitrator should himself have drawn such lots, or he should have made the parties draw them; but, inasmuch as it would not have strained the agreement to have had such lots drawn in Court, and no objection had been taken to the arbitrator not having himself drawn them, it was not incumbent on the Court to have remitted the award in order that the arbitrator might have drawn them: that the Court, however, should not have distributed such lots in the manner it had done, but should have drawn a lot for each person, and in acting as it had done, it had acted contrary to the award, and for that reason its decree could not be maintained: and that, in confirming the award before the accounts had been settled, and an award made in respect thereof, the Court had acted erroneously, inasmuch as the award had left undetermined a very important matter, *viz.*, the settlement of the accounts, and the Court should, under sec. 520 of Act X of 1877, have remitted the award for the reconsideration of the arbitrator, and as it had power to remit it upon such terms as it thought fit, the Court could have allowed one year, if necessary, for the settlement of the accounts; and on this account, and also because the Court had made an order postponing the settlement of the accounts, and thereby made an order contrary to and in excess of the award, its decree must be reversed.—3 Al. 286.

Where it was shown that a judgment-creditor was himself the purchaser at an execution-sale, and the amount for which he so purchased the property of his judgment-debtor was set-off against the amount due to him under his decree, and where, on the application of the judgment-debtor, the Court passed an order setting aside the sale on the ground of fraud practised by the judgment-creditor on the judgment-debtor in connection with the sale in consequence of which fraud the property had been sold at an under-value, *held* that, inasmuch as the order involved the decision of a question between the parties to the suit relating to the execution, discharge, or satisfaction of the decree (the decree having been satisfied as far as the purchase-money bid by the decree-holder went), the order cancelling that *pro tanto* satisfaction, though not appealable under the provisions of sec. 588, cl. 16, was appealable as a decree under the provisions of the Code of Civil Procedure (Act XIV of 1882,) secs. 2 & 244, cl. (c.)—10 Cal. 410.

An application under sec. 93 of the Bengal Tenancy Act, 1885, is not a suit between a landlord and tenant within the meaning of sec. 143. and no appeal lies from an order rejecting such an application.—14 Cal. 312.

*Per* BAYLEY, WEST & LATHAM, JJ.—None but Barristers and Attorneys have a legal right to practise in the Bombay Court of Small Causes. Neither secs. 2 and 36 of the Code of Civil Procedure (Act No. XIV of 1882), nor secs. 38 and 76 of the Presidency Small Cause Courts Act (No. XV of 1882), give the pleaders of the Bombay High Court that right. The provisions of section 47 of Regulation II of 1827, authorizing persons holding *sanads* from the High Court to practise in the Mofussil Courts, are still in force. *Per* BAYLEY, WEST, PINHEY & LATHAM, JJ.—Sec. 2 of the Code of Civil Procedure, 1882, does not give every pleader a title to appear and plead; it only enacts that “pleader” means every person entitled to appear and plead for another in Court, and includes an advocate, a *vakil*, and an attorney of a High Court. Consequently, if pleaders or *vakils*, who are the same class of practitioners, are not entitled by law to appear or plead for another in Court, the definition of “pleader” gives them no new right or *status*.

The “words in sec. 36 of the Code of Civil Procedure, (Act XIV of 1882), “by a pleader duly appointed to act on his behalf,” do not simply mean a person duly appointed by the party in the suit, but a pleader duly appointed according to law regarding pleaders in force in the particular Court. *Per* PINHEY, SCOTT and LATHAM, JJ. (WEST, J., *dissentiente*).—The High Court has the power of making rules for the admission of pleaders to practise in the Bombay Court of Small Causes; and the Bombay Court of Small Causes under sec. 9 of the Presidency Small Causes Court Act XV. of 1882 also has the power of making similar rules with the sanction of the High Court—8 Bom. 105.

On the day fixed for the hearing of an appeal in the lower appellate Court the appellant appeared by a duly appointed pleader. The pleader applied to the Court for an adjournment, on the ground that he had not time to fully prepare himself in the case. The Court refused to grant any adjournment, and dismissed the appeal for default. *Held*, that the order of dismissal was bad. The mere fact that the appellant’s pleader was not prepared to proceed with the case would not enable the Court to deal with the case as if there was no appearance at all for the appellant, and to dismiss the appeal for default. *Per* BIRDWOOD, J.—An order dismissing an appeal for default is one falling within the definition of a “decree” contained in sec. 2 of the Code of Civil Procedure (Act XIV of 1882), and is, therefore, appealable.—16 Bom. 23.

An order under sec. 373 of the Civil Procedure Code, permitting the withdrawal of a suit, with liberty to bring a fresh one, not being made appealable by sec. 588, or being a “decree” within the meaning of sec. 2, is not appealable. When the plaintiff in a suit applies for permission to withdraw it with liberty to bring a fresh one, such permission should not be granted without the defendant being served with notice to show cause why such permission should not be granted. L. claiming as heir to H, a deceased Hindu, sued K, his widow, and G, a minor, represented by his mother and guardian, B, to have the adoption by K of G set aside, and for certain other reliefs. The matters in difference in the suit were referred to arbitration, and an award was made in favour of the defendants. The plaintiff preferred objections to the award. Before these were disposed of, K died. The Court of first instance subsequently allowed the objections, and set aside the award. The minor defendant then applied to the High Court for revision of the order setting aside the award. This application was rejected on the ground

that the order might be impugned on appeal from the decree in the suit. The plaintiff subsequently applied for permission to withdraw the suit, with liberty to bring a fresh one, on the ground that, K having died, he was entitled to possession of immoveable property left by H. This permission was granted. The minor defendant applied to the High Court for revision. *Held* that it might have been a very good ground for allowing the plaintiff to withdraw the suit that K, the adoptive mother of the minor defendant, had died *pendente lite*, had no arbitration proceedings taken place in the course of the suit; but when the parties had referred their differences to arbitration, and an award had been made in favour of the defendant, and had been set aside, and an application for revision of the order setting it aside had been refused, on the ground that the matter could be made the subject of appeal from the final decree in the suit, permission to withdraw the suit and being a fresh one should not have been granted. The minor defendant might be seriously prejudiced by such a course, and the suit had not abated against him by the death of K, while on the other hand a decree in the suit, if in his favour, would decide the litigation, and, if in favour of the plaintiff, would not prevent his bringing a suit for possession on the separate cause of action which had arisen. *Stahlschmidt v. Walford* (L. R., 4 Q. B. D. 217) referred to. The High Court refused to allow the plaint in the suit to be amended by the addition of a claim for possession of the property left by H.—6 Al. 211.

See L. L. R., 2 Bom. 641, noted under sec. 5; 3 Bom. 161, noted under sec. 3; 14 Madr. 99, noted under sec. 256; 9 Al. 617, noted under sec. 635; 12 Bom. 279, noted under sec. 545; 13 Al. 569, noted under sec. 293; 14 Al. 210, noted under sec. 295; 12 Al. 61 and 14 Al. 420, noted under sec. 87 of the Transfer of Property Act.

**3.** The enactments specified in the first schedule hereto annexed are hereby repealed to the extent mentioned in the third column thereof. But all notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, and forms framed under any such enactment, shall, so far as they are consistent with this Code, be deemed to be respectively published, made, appointed, filed, prescribed, and framed hereunder.

And when, in any Act, Regulation, or notification passed or issued prior to the day on which this Code comes into force, reference is made to Act No. VIII of 1859, Act No. XXIII of 1861, or the "Code of Civil Procedure," or to Act No. X of 1877, or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof.

Save as provided by Section 99A, nothing herein contained shall affect any proceedings prior to decree in any suit instituted or appeal presented before the first day of June

Saving of procedure in suits instituted before 1st June, 1882.

References in previous Acts.

Enactments repealed.

1882, or any proceedings after decree that may have been commenced and were still pending at that date.

Every appeal pending on the twenty-ninth day of July 1879, which would have lain if this Code had been in force on the date of its presentation, shall be heard and determined as if this Code had been in force on such date; and every order passed before the same day, purporting to transfer a case to a Collector under Act No. X of 1877, section 320, and every notification published before the same day, purporting to be issued under Act No. X of 1877, section 360, shall be deemed to have been respectively passed and issued in accordance with law.

#### Notes.

A right of second appeal, where it existed prior to Act X of 1877, now exists in the case of any proceedings in execution which were commenced prior to, and were still pending on, the 1st October 1877.—3 C. L. R., 437.

On the 16th June 1877, certain property was sold in execution of decree, and on the 29th June 1877, the judgment-debtor, the owner of the property, applied to the Court to set aside the sale, and the sale was set aside by the Subordinate Judge on the 24th January 1878. The decree-holder, who was the purchaser of the property, appealed to the Court of the District Judge, who reversed the order of the Subordinate Judge. *Held* that the Judge had no jurisdiction to do so, as the proceedings must be taken to be governed by Act VIII of 1859, and not by Act X of 1877. *Runjit Singh v. Mehurban Koer* (2 C. L. R., 391) cited and followed.—3 C. L. R., 208.

Proceedings in execution of a decree in a suit begun under the old procedure were regulated by Act VII of 1855.—Bourke's Rep., O. C. 59.

Where a decree for sale of certain property was obtained under Act VIII of 1859, and the property was sold, but an order was passed after the new Code of Procedure, Act X of 1877, had come into force, setting aside such sale, *held* that an appeal would lie from such an order under Act X of 1877.—I. L. R., 5 Cal. 259; 4 C. L. R., 23.

The effect of Act I of 1868, sec. 6, and Act X of 1877, sec. 3, taken together, is that the Chapter of the new Code of Civil Procedure which deals with execution of decree is prospective, and does not affect proceedings already commenced.—In the matter of the petition of Ratansi Kalianji and six others, I. L. R., 2 Bom. 148 (F. B.). See also I. L. R., 3 Cal. 662 (F. B.); and I. L. R., 4 Cal. 825. But see I. L. R., 2 Al. 74.

The word "decree" in Act X of 1877, sec. 3, means an order final in its nature, and does not include an interlocutory order, such as an order of reference to take accounts, although such order may, in general, be properly termed a "decree"; and therefore a suit which has been referred by the Court to the Commissioner to take accounts is still in a stage "prior to decree" within the meaning of sec. 3.—3 Bom. 161.

The effect of the proviso to sec. 3 of Act X of 1877 (taken in connection with the definition of the word "decree" in sec. 2) is that, in all suits pending when that Act came into force, the practice and procedure to be followed down to the final result of such suits (*i. e.*, when nothing remains

to be done but to execute the decree or to appeal from it) are the same as previously existed, but that, in all subsequent proceedings in execution of the decree or in appeal from it, the practice and procedure provided by Act X of 1877 are to be observed.—3 Bom. 161.

Where a suit had been instituted under Act VIII of 1859, but decided at a time when Act X of 1877 had come into operation, and an appeal is presented against such decision, sec. 3 of the latter Act distinctly indicates that such an appeal is to be governed by the law of procedure in force at the date of the presentation of the appeal. Where, therefore, an appeal, presented when Act X of 1877 was in force, has been dismissed under sec. 556 of that Act, the appellant may apply for its re-admission under sec. 558; and if such re-admission is refused, he is entitled to an appeal under sec. 558.—4 Cal. 825; 3 C. L. R., 593.

In all suits instituted before Act X of 1877 came into force, in which an appeal lay to the High Court under Act VIII of 1859, an appeal still lies, notwithstanding the repeal of that Act by Act X of 1877. *Per* GARTH, C. J.—A suit is a “judicial proceeding,” and the words “any proceedings” in Act I of 1868, sec. 6, include all proceedings in any suit from the date of its institution to its final disposal, and therefore include proceedings in appeal. The word “procedure” in Act X of 1877, sec. 3, has not the same meaning as the word “proceedings” in the above-mentioned section. The proceedings in a suit instituted before Act X of 1877 came into force, including a special appeal if the old Code allowed one, go on to the end of the suit, notwithstanding the repeal of the Code. The “procedure” (*i. e.*, the machinery by which those proceedings are conducted) is, after decree, to be that provided by the new Code.—*Per* JACKSON, J.—The word “decree,” as defined in Act X of 1877, does not include “orders,” either original or appellate, upon matters arising in the course of a suit or in execution of a decree. The power of the High Court to hear appeals from the Civil Courts in the interior is regulated by Act VI of 1871. Act I of 1868, sec. 6, covers proceedings taken in execution of decree which have been commenced before Act X of 1877 came into force. *Per* MARKBY, MITTER, and AINSLIE, JJ.—Cl. 16 of the Letters Patent of 1865 empowers the High Court to hear appeals in all cases in which an appeal lay under Act VIII of 1859.—*Runjit Singh v. Maherban Koer*, I. L. R., 3 Cal. 652 (F. B.). See also I. L. R., 2 Bom. 148 (F. B.); I. L. R., 1 Al. 668 (F. B.); I. L. R., 4 Cal. 825.

Where, an appeal having been filed, the respondent objected that no appeal lay, and by agreement of the parties the case was set down for the argument of this preliminary point, *held* that the appellant had the right to begin. Clause 3 of section 3 of the Civil Procedure Code Act (XIV of 1832) provides that nothing in that Code shall apply to any proceedings after decree that had been commenced and were still pending on the 1st June, 1882. In case of any question connected with proceedings commenced prior to that date the applicability of the Code of 1882 depends on whether the new proceeding subsequent to that date, out of which the question has immediately arisen, is so intimately connected with the proceedings prior to that date as to be regarded as part of them. A decree was passed in 1870, by which the suit was referred to the Commissioner to take accounts. On the 21st June, 1882, the Commissioner, in the course of taking the said accounts, issued a warrant ordering the defendants to show cause why they should not give inspection of certain books. *Held* that the question as to inspection was so intimately connected with the

taking of the accounts that it should be regarded as part of the same proceedings, and as these had commenced and were still pending on the 1st June, 1882, the question whether the order refusing inspection was appealable or not, was (under sec. 3 of Act XIV of 1882) to be determined by the Civil Procedure Code (Act VIII of 1859), and not by the Code of 1882. Sec. 11 of Act XXIII of 1861 must be read as an amendment to the Civil Procedure Code (Act VIII of 1859). That section is, in terms, confined to questions arising in the execution of decrees, which expression, as used in the said Code, means the enforcement of the decree on the application of one or other of the parties to it. *Held* that an order of a Judge confirming the report of the Commissioner for taking accounts, by which he refused to require the defendants to give inspection of certain books, was not an order within the contemplation of that section, and was, therefore, not appealable.—8 Bom. 287.

Having regard to sec. 3 of Act XIV of 1882, it is clear that the word “Code” in Sch. II., art 171B of Act XV of 1877, applies to the present Code of Civil Procedure (Act XIV of 1882); and that, therefore, the word “defendant” in sec. 368 of the Code, when read with sec. 582, must be held to include “respondent.”—11 Cal. 694.

*Held* by the Full Bench (MAHMOOD, J.,—dissenting) that art. 171B of the second schedule of the Limitation Act does not apply to the death of a respondent, whether plaintiff or defendant in the original suit; and that art. 178 applies to an application made by a plaintiff-appellant to bring upon the record the representative of a deceased defendant-respondent. *Narain Das v. Lajja Ram* (I. L. R., 7 Al. 693) and *Balkrishna Gopal v. Bal Joshi Sadashiv Joshi* (I. L. R., 10 Bom. 663) referred to. *Baldeo v. Bismillah Begam* (I. L. R., 9 Al. 118) and *Rameshar Singh v. Bisheshar Singh* (I. L. R., 7 Al. 734) overruled. *Held* by MAHMOOD, J., *contra*, that the word “defendant” in art. 171B includes a defendant-respondent, and, reading art. 171B with cl. 2 of sec. 3 in conjunction with secs. 368 and 582 of the Civil Procedure Code, includes also a plaintiff respondent; and that an application made by a plaintiff-appellant more than sixty days after the defendant-respondent’s death to have the representative of the deceased made a respondent is barred by limitation, and the appeal is liable to abatement. *Soshi Bhusan Chand v. Grish Chunder Taluqdar* (I. L. R., 11 Cal. 694) referred to.—I. L. R., 10 Al. 264.

The judgment of the majority of the Full Bench in *Narain Das v. Lajja Ram* (I. L. R., 7 Al. 693) only decided that art. 171B, sch. ii., of the Limitation Act of 1877, did not apply to an application by a defendant-appellant to have the representative of a deceased plaintiff-respondent made a respondent. Art. 178 applies to such applications. So *held* by the Full Bench, MAHMOOD, J., dissenting. *Held* by MAHMOOD, J., that by reason of sec. 3 (read with secs. 368 and 582) of the Civil Procedure Code, the word “defendant” in art. 171B of the Limitation Act necessarily includes a plaintiff-respondent. *Soshi Bhusan Chand v. Grish Chunder Taluqdar* (I. L. R., 11 Cal. 694) referred to.—I. L. R., 10 Al. 260.

See I. L. R., 4 Bom. 163 and 10 Cal. 761, noted under sec. 1.

Saving of certain Acts affecting Central Provinces, Burma, Panjab, and

4. Save as provided in the second paragraph of section 3, nothing herein contained shall be deemed to affect the following enactments (namely):—

The Central Provinces Courts Act, 1865 :



The Burma Courts Act, 1875 :

The Panjab Courts Act, 1877 :\*

The Oudh Civil Courts Act, 1879 :

or any law heretofore or hereafter passed under the Indian Councils Act, 1861,† by a Governor or a Lieutenant-Governor in Council, prescribing a special procedure for suits between landholders and their tenants or agents :

or any law heretofore or hereafter passed under the Indian Councils Act, 1861,\* by a Governor or a Lieutenant-Governor in Council, providing for the partition of immoveable property.

And where, under any of the said Acts, concurrent civil jurisdiction is given to the Commissioner and the Deputy Commissioner, the Local Government may declare which of such officers shall, for the purposes of this Code, be deemed to be the District Court.

#### Notes.

Whether a decree for rent, under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction," under 24 and 25 Vic., c. 104, sec. 15—I. L. R., 9 Cal. 295 ; 12 C. L. R., 361 : L. R., 9 I. A. 174.

The provisions of the Civil Procedure Code relating to awards are not applicable to suits under the N. W. P. Rent Act, 1881, the matters in dispute in which have been referred to arbitration, as sec. 96A of that Act specifically imports into it the procedure of the N. W. P. Land Revenue Act with regard to arbitrations.—I. L. R., 6 Al. 170.

A sale of the tenant's interest in certain land having taken place under secs. 39 and 40 of the Rent Recovery Act, the Deputy Collector refused to issue a sale-certificate to the purchaser on the ground that the sale had been irregularly conducted. *Held* that under sec. 35 of the Rent Recovery Act the purchaser was entitled to a sale-certificate. *Held* further that the High Court had no power to review the proceedings of the Deputy Collector under sec. 622 of the Code of Civil Procedure.—9 Madr. 332.

An appeal from the Court of the Recorder of Rangoon to the High Court is an appeal under the Civil Procedure Code, and must be made within time prescribed by art. 156, sch. ii., of the Limitation Act.—13 Cal. 221.

**4A.** (1) Where any Revenue Courts are governed by the provisions of the Code of Civil Procedure in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the Official Gazette, declare that any portions of

Power to modify the Code in its application to Revenue Courts.

able to them is silent, the Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the Official Gazette, declare that any portions of

\* See Act XVIII of 1884.

† 24 and 25 Vic., c. 67.



those provisions shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government, with the sanction aforesaid, may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits relating to the rent, revenue, or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits as being suits of a civil nature of which its cognizance is not barred by any enactment for the time being in force.\*

5. The chapters and sections of this Code specified in the second schedule hereto annexed extend (so far as they are applicable) to Courts of Small Causes constituted under Act No. IX of 1887,† and to all other Courts (other than the Courts of Small Causes in the towns of Calcutta, Madras, and Bombay) exercising the jurisdiction of a Court of Small Causes.‡ The other chapters and sections of this Code do not extend to such Courts.

#### Notes.

This section applies to Provincial Small Cause Courts.

Under sec. 360 of the Code of Civil Procedure, the Local Government cannot invest a Mufassal Small Cause Court with the insolvency jurisdiction conferred on District Courts by Ch. XX of the said Code, inasmuch as, by reason of sec. 5, Ch. XX does not extend to such Courts of Small Causes.—I. L. R., 9 Madr. 112.

The effect of Act X of 1877, sec. 5, coupled with sch. 2, is to render the whole of Chap. XX (relating to insolvent debtors) inapplicable to a Mufassal Small Cause Court, notwithstanding the words "any Court other than a District Court" and "any Court situate within his district," which occur in that section. Consequently the Government Resolution of 3rd April 1878, investing the Judge of the Small Cause Court at Ahmedabad with power under the said chapter, to adjudicate in insolvency matter, is *ultra vires* and invalid.—2 Bom. 641.

Saving of jurisdiction and procedure—

6. Nothing in this Code affects the jurisdiction or procedure—

*Act XIII of 1889.]*

(b) of officers appointed to try small suits in Bombay.

(b) [*Repealed by Act VIII of 1887, Sec. 2, and Schedule.*]

\* This section has been inserted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 3.

† See the Provincial Small Cause Courts Act (IX of 1887), sec. 2.

‡ As to portions of this Code extending to these Courts, see Act XV of 1882, sec. 23.

of Village Munsifs  
and Village Panchayats in  
Madras.

(c) of Village Munsifs or Village  
Panchayats under the provisions of  
Madras Code; or

(d) of Recorder of Ran-  
goon sitting as Insolvent  
Court.

(d) of the Recorder of Rangoon,  
sitting as an Insolvent Court in Rangoon  
"or Maulmain."\*

or shall operate to give any Court jurisdiction over suits  
of which the amount or value of the subject-matter exceeds  
the pecuniary limits (if any) of its ordinary jurisdiction.

**Note.**

The Deputy Commissioner of Akyab, sitting as District Judge, has  
power to entertain applications under Act X of 1877, Chap. XX. Sec. 6 (d)  
of that Act interposes no obstacle in the way of his dealing with such ap-  
plications, nor does the exercise of such power in any way "affect the  
jurisdiction of the Recorder of Rangoon" sitting as an Insolvent Court in  
Akyab within the meaning of that sec.—I. L. R., 4 Cal. 94.

**7. With respect to.**

(a) the jurisdiction exercised by certain jagirdars and  
other authorities invested with powers  
under the provisions of Bombay Regu-  
lation XIII of 1830 and Act No. XV of 1840 in the cases  
therein mentioned; and

(b) cases of the nature defined in the enactments specified  
in the third schedule hereto annexed;

the procedure in such cases, and in the appeals to the  
Civil Courts allowed therein, shall be according to the rules  
laid down in this Code, except where those rules are incon-  
sistent with any specific provisions contained in the enact-  
ments mentioned or referred to in this section.

**Note.**—See I. L. R., 8 Cal. 483, noted under sec. 43.

Save as provided in Sections 3, 25, 86, 223, 225,  
386, and Chapter XXXIX, "and by the  
Presidency Small Cause Courts Act,  
1882,"† this Code shall not extend to any suit or proceeding  
in any Court of Small Causes established in the towns of  
Calcutta, Madras, and Bombay.

"But the Local Government may, by notification publi-  
shed in the official Gazette, extend to any such Court this  
Code, or any part thereof, except so far as relates to appeals  
and reviews of judgment."‡

\* See Act No. XII of 1891. (Repealed and Amending Act.)

† The words quoted have been inserted by Act XV of 1882, sec. 3.

‡ See the Repealing and Amending Act (No. XII of 1891.)

**Notes.**

Whilst the pecuniary jurisdiction of the Small Cause Court was limited to Rs. 1,000, the plaintiffs brought a suit for that amount for damages for breach of a certain contract after abandoning the excess and in that suit they elected a non-suit under sec. 53, Act IX of 1850. *Held*, in a suit brought in respect of the same damages for the full amount due to them, that the plaintiffs were not precluded, by their having abandoned the excess in the former suit, from recovering the full amount sued for.—I. L. R., 9 Cal. 473.

The Madras Court of Small Causes has no jurisdiction in insolvency. The second paragraph of sec. 8 of the Code of Civil Procedure, 1882, which authorized the Local Government, by notification published in the official Gazette, to extend to the Presidency Small Cause Court certain portions of the said Code, is repealed by the Presidency Small Cause Court Act (sec. 2 of Act XV of 1882), and consequently the notification of the Governor in Council of Fort St. George, dated 25th February 1879, conferring on the Madras Court of Small Causes jurisdiction in insolvency, being repugnant to sec. 8 of the Code of Civil Procedure, 1882, as amended, if otherwise valid, ceased to have effect when Act XV of 1882 came into force.—6 Madr. 430.

Division of Code.

**9.** This Code is divided into ten Parts as follows:—

The first Part: Suits in General.

The second Part: Incidental Proceedings.

The third Part: Suits in particular Cases.

The fourth Part: Provisional Remedies.

The fifth Part: Special Proceedings.

The sixth Part: Appeals.

The seventh Part: Reference to and Revision by the High Court.

The eighth Part: Review of Judgment.

The ninth Part: Special Rules relating to the Chartered High Courts.

The tenth Part: Certain Miscellaneous Matters.

## PART I. OF SUITS IN GENERAL.

### CHAPTER I.

#### OF THE JURISDICTION OF THE COURT AND RES-JUDICATA.

**10.** No person shall, by reason of his descent or place of birth, be, in any civil proceeding, exempted from the jurisdiction of any of the Courts.

No person exempt from jurisdiction by reason of descent or place of birth.

**Note.**—This section applies to Provincial Small Cause Court

**11.** The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is barred by any enactment for the time being in force.

Courts to try all civil suits unless specially barred.

*Explanation.*—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

**Notes.**

The plaintiff, who was a *Smarta* Brahman, but had married a widow (whose first marriage had not been consummated), alleged that he had made a vow to present an offering in a certain temple, and that the defendants, who were the committee of the temple, had obstructed and prevented him from entering the inner shrine (where orthodox Brahmans usually make their offerings), asserting that he was disqualified to enter by reason of his having married a widow contrary to Hindu *sastras*; and he sued for damages for the above obstruction and imputation, for a declaration that he was entitled to enter the shrine as a Brahman, and for an injunction restraining the defendants from interfering with his exercise of this right:—*Held*, (1) that the right claimed was of a civil nature and within the cognizance of the Civil Courts; (2) that the question to be determined was not a question of the plaintiff's legal *status* since a Brahman widow is at liberty to re-marry under Act XV of 1856, but it was a question of caste *status* in respect of a caste institution; (3) that in order to determine the above question, the Courts must inquire (a) what was the usage of the temple as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission and (b) whether according to such usage or presumable intention of the foundation those who secede from the caste custom as to re-marriage of women are outside the class of beneficiaries as regards the right of admission into the inner shrine as above.—I. L. R., 13 Madr. 293.

Act IX of 1861 does not debar a District Munsif's Court from entertaining a suit by a Hindu father to recover possession of his minor son alleged to be illegally detained by the defendant.—9 Madr. 31.

A tenant having received a notice of attachment under sec. 39 of the Rent Recovery Act sued in a District Munsif's Court to have the notice cancelled, no specific damage being alleged. *Held* that the suit did not lie.—10 Madr. 368.

A obtained a decree against B, in execution of which he was put in possession of certain land by proclamation, the land being in the possession of tenants. A subsequently sued B and the tenants to recover possession of the same land. B pleaded that the decree obtained by A was the result of a collusion between himself and A in fraud of B's creditors. *Held* that it was not open to B to raise this plea.—10 Madr. 17.

Plaintiffs sued for an injunction to prevent defendant from interfering with their right to present to certain persons at a certain festival in a certain temple a crown and water. The lower courts found that plaintiffs possessed the right claimed, and granted the injunction. *Held*, that the suit

was cognizable by a civil court under sec. 11 of the Code of Civil Procedure, and that the injunction was properly granted.—11 Madr. 450.

Certain Moplahs, described as “the *Moktessor and Jamats*” of a mosque, sued certain other Muhammadans, described as “members of the Puslar caste,” alleging that the custom was for the defendants to attend the plaintiffs’ mosque on Friday at the reading of the kutbah, and that the defendants had recently built another mosque a short distance off, and had “for two months been attempting to read the kutbah there.” It was further alleged in the plaint that such reading of the kutbah was “quite contrary to the Muhammadan religion “and that the defendants nevertheless proposed to have the kutbah read, “whereby the kutbah or adoration conducted in our mosque will, according to religion, be fruitless.” The prayer of the plaint was for an injunction, restraining the defendants from reading the kutbah in their mosque:—*Held*, that the plaint disclosed no cause of action.—15 Madr. 355.

A suit will lie to recover a subscription promised, the subscriber knowing that, on the faith of his and other subscriptions, an obligation is to be incurred to a contractor for the purpose of erecting a building to be paid for out of the moneys subscribed.—14 Cal. 64.

A suit for the establishment of a right to the hereditary title of musicians to a *satra* will lie under sec. 11 of the Code of Civil Procedure, notwithstanding that the right sought to be established is one which brings in no profit to those claiming it.—15 Cal. 159.

The ordinary Civil Courts have jurisdiction to try a suit for dissolution of partnership, their jurisdiction to try such suits not being ousted by sec. 265 of the Contract Act, 1872.—7 Al. 227.

The plaintiff and the defendant belonged to the caste of Visnagra Brahmans, which in 1841 divided into two sections, known as the big and little sections. While this division continued, *viz.*, in the year 1868, certain lands purchased by the small section in the names of the plaintiff, the defendant, and three other persons. In 1873 the members of the small section, with the exception of the defendant, reunited with the other members of the caste. The lands, however, remained in the possession of the defendant. The plaintiff, on behalf of the caste, brought this suit to recover the lands from the defendant. Both the lower Courts held that the case was not cognizable by the Civil Courts, as it involved a caste-question. On appeal by the plaintiff, the High Court reversed the decrees of the Courts below, and sent back the case for retrial. The lands in question had been admittedly purchased out of their own funds and for their own purposes by the members of the caste who had seceded; and the question, as to whom those lands now belonged, being one between the caste and one of the seceding members who had purchased them, could not be a caste-question, unless the small seceding section itself could be regarded (and it was not so contended) as a separate and distinct caste. Under these circumstances it was for the Civil Court alone to determine who was entitled to the property, although it might be incidentally necessary for that purpose to enquire into the usage and practice (if any) of caste sections, situated as the seceding section of this caste had been, with respect to the property in question. If the lands had been originally the property of the caste, the question would have been between the caste and a section of it, and would have been a caste-question, and not cognizable by the Civil Court.—12 Bom. 225.

An administration suit filed in 1870 against executors on behalf of

three infant plaintiffs was referred to the Commissioner to take accounts of the administration of the estate by the defendants. In August, 1876, and before the taking of accounts was concluded the plaintiff's guardian withdrew certain surcharges and objections which had been filed to the defendant's accounts and compromised the suit. The Commissioner then made his report, which with the consent of all parties to the suit was confirmed by the Court on the 13th January, 1885. One of the plaintiffs attained his majority in December, 1887, and on the 15th March, 1888, obtained a rule calling on the defendants to show cause why the proceedings in the Commissioner's office subsequent to August, 1876, should not be set aside, and why he should not be at liberty to proceed with the accounts filed in the Commissioner's office. He alleged that the enquiry before the Commissioner had not been conducted in the interest of himself and the other infant plaintiffs; that their guardian had been induced to withdraw objections and surcharges by the threats and coercion of the defendants, and that the compromise had not been sanctioned by the Court. He contended that the proceedings before the Commissioner had been a sham. *Held*, that the rule should be discharged. The decree was regular in itself and on the face of it correct, and it could only be set aside by a regular suit. *Per FARRAN, J.* :—The only modes of setting aside a decree prescribed by the Indian Code of Civil Procedure (XIV of 1882), are by review under section 623 and by suit under section 11.—15 Bom. 594.

Sec. 18 as much as sec. 25 of the Bombay Hereditary Offices' Act (III of 1874) excludes by direct implication any right on the part of the Civil Courts to declare that persons are eligible to serve as hereditary officers under the Act. The plaintiffs sued, as *vatandar mahars* of certain villages, to establish their right to receive the *aya* attached to their office, as against defendants, who were the *vatandar mangs* of the same villages, and who claimed the right to receive the *aya* equally with the plaintiffs. *Held* that the suit was not cognizable by a Civil Court.—13 Bom. 83.

The effect and intention of the proviso to sec. 148 of the N.-W. P. Rent Act (XII of 1881) is to preserve the jurisdiction of the Civil Courts under sec. 42 of the Specific Relief Act (I of 1877), while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as sec. 148 contemplates. Neither that section nor the proviso affects the jurisdiction of a Civil Court to entertain a suit by some of a body of co-sharers in a joint and undivided mahal for a declaration of their title to receive a proportionate share of the rent payable by the tenants. Having regard to sec. 11 of the Civil Procedure Code, a suit for the recovery of certain sums of money as the plaintiffs' share of rent alleged by them to have been wrongfully received by the defendants, their co-sharers, and in which the plaintiffs' right to receive any portion of the rent claimed is denied by the defendants, is not barred from the cognizance of the Civil Courts by sec. 93 (h) of the N.-W. P. Rent Act. The provision does not contemplate suits in which such claims of title are so made and resisted. But a suit by some of the co-sharers in a joint and undivided mahal for such declaration and such recovery of a proportionate share of rent as above referred to, is barred by the provisions of sec. 106 of the N.-W. P. Rent Act, in the absence of proof of local custom or special contract authorising such suits.—11 Al. 224.

Reading together secs. 111, 112, and 113 of the N.-W. P. Land Revenue Act (XIX of 1873), as they must be read, the objection contemplated in each of them is an objection to be made by the person upon whom the notice required by sec. 111 is to be served, i. e., a person who is a co-sharer



in possession, and who has not joined in the application for partition. So far as secs. 111, 112, 113, 114, and 115 are concerned, a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right, either in an original suit in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of an objection raising such a question under sec. 113, or an appeal in those cases in which the Assistant Collector or Collector does decide upon such questions raised by an objection made under sec. 112. The remaining sections relating to partition do not provide for or bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may arise in partition-proceedings or on the partition after the time specified in the notice published under sec. 111. Sec. 132 is not to be read as making the Commissioner the Court of appeal from the Assistant Collector or the Collector upon such questions, nor does sec. 241 (*f*) bar the jurisdiction of the Civil Court to adjudicate upon them. Where, therefore, after the day specified in the notice published by the Assistant-Collector under sec. 111, and after an amin had made an apportionment of lands among the co-sharers of the mahal, the original applicants for partition raised for the first time an objection involving a question of title or proprietary right, and this objection was disallowed by the Assistant Collector and the partition made, and confirmed by the Collector under sec. 131, *held* that the objection was not one within the meaning of sec. 113, that the remedy of the objectors was not an appeal from the Collector's decision under sec. 132, and that a suit by them in the Civil Court to establish their title to the land allotted to other co-sharers was not barred by sec. 241 (*f*), and, with reference to sec. 11 of the Civil Procedure Code, was maintainable. *Habibullah v. Kunji Mal* (I. L. R., 7 Al. 447) distinguished. *Sundar v. Khuman Singh* (I. L. R., 1 Al. 613) referred to.—9 Al. 429.

*All suits of a civil nature.*—Thus, the Courts have entertained the following suits: suit to declare the plaintiff's right to be restored to his caste, 7 Suth. Civ. R. 299: suit to declare that an alleged Hindu marriage is invalid, 6 Ben. 243: suits between Hindus for divorce or for restitution of conjugal rights, *ibid.* 252; 4 N.-W. P. 109: suit for breaking a curd-pot in a temple on a certain day, 9 Bom. H. C. 413: and many others. But they have refused to entertain the following declaratory suits: suit for a declaration that the plaintiff is a member of a Hindu society from which he has been excluded, such exclusion neither depriving him of caste, nor affecting any right of property, 3 Ben. App. Civ. 91: suit for a declaration that the plaintiff is entitled to be summoned to all marriages, and to receive a present of *pan* from the members of a particular community, S. D. A. 1854, p. 1850: or to offerings made by *jajmans* to family-priests, S. D. A. 1852, p. 398; 1 Hay 365; 5 Suth. Civ. R. 225: or to a mere dignity unconnected with any emoluments, 2 Bom. 476; 6 Bom. 119: and the following suits for damages: for loss of honours and voluntary offerings at a temple, 5 Madr. 313: for intrusion on an office to which no fees were of right appurtenant, 2 Bom. 470; 7 Madr. 91: for not offering food to an idol, 6 Bom. 122: against a magistrate acting judicially and with jurisdiction, though carelessly and irregularly, 7 Ben. 449: and the following suits for specific performance of alleged obligations: to compel a Hindu widow to adopt a son, 19 Suth. 127; 7 Cal. 288; 7 Moo. I. A. 2062: to compel hereditary priests of a temple to put certain ornaments on the God's image on certain days, 5 Bom. 83: to compel Hindus against their will to invite other Hindus to their houses or their entertainments, 6 Suth. Civ. R. 325. So the Courts have rejected a suit by one purohit against another purohit



for interfering with an alleged exclusive right of performing ceremonies at a certain place, Marshall 161, and see the case in 3 Moo. I. A. 198; and suits against barbers to compel them to shave the plaintiffs (Sadr. Decisions, 1854, p. 465), or to pare their nails (1 Suth. Civ. R. 352, col. 1). For other cases in which a suit was held not of a civil nature, see 7 Madr. 91, and *supra*, p. 391. A suit is not maintainable to establish a right to a mere dignity unconnected with any fees, profits, or emoluments, 6 Bom. 121, following 2 Bom. 476 and a decision of the Privy Council in 3 Moo. I. A. 198. A suit by a temple-servant for damages for omitting to make a daily offering of rice and cake to the idol will not lie, unless indeed he sues as representing the idol, 6 Bom. 122.—Stokes's Anglo-Indian Codes, Vol. II. (Adjective Law), p. 471.

*Held* that a suit by a landholder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy-tenants was cognizable by the Civil and not by the Revenue Court.—I. L. R., 8 Al. 446.

The sale of mortgaged property was decreed by a Subordinate Judge. Before the sale another suit, instituted in the same Court for the purpose of having other property substituted in lieu of part of that mortgaged, was transferred to the Court of the District Judge, who decreed, upon consent, that the substituted property should be sold, and that, for the purpose of this sale, this suit should be taken as supplemental to the former one. On the petition of the mortgagee for execution of the decrees, in both suits, in the District Court, it was objected that execution could not proceed therein, on the ground that the decree for sale was that of the Subordinate Court:—*Held*, that the decree (which affected the whole property mortgaged) was that of the District Court, which accordingly had jurisdiction to execute it. To have enabled the Subordinate Court so to do, an order by the District Court would have been necessary.—11 Cal. 244.

By an agreement between S and M, members of the same Hindu family, it was arranged that certain immoveable property dedicated to charitable uses by the family should be managed by M, subject to the supervision of S, and that M should render accounts to S and observe certain other conditions. S sued M in the Court of the District Munsif and prayed for a decree for the removal of M as manager and for the appointing of himself as manager of the property. M objected that the Court had no jurisdiction, because the property exceeded in value the pecuniary limits of the jurisdiction of the District Munsif's Court as fixed by sec. 12 of the Madras Civil Courts Act, 1873:—*Held*, that S was not entitled to sue for the removal of M without paying for his ejectment from the property, and that, as the property exceeded in value Rs. 2,500, the District Munsiff had no jurisdiction.—8 Madr. 516.

The plaintiff sued three defendants on a bond alleged to have been executed by them to the plaintiff. Two of the defendants did not appear, or make any defence, to the suit. The second defendant only appeared, and objected to the jurisdiction of the Court; but his objection was over-ruled, and a decree was made against all three defendants. On appeal the lower Appellate Court reversed the decree, holding that the Court of first instance had no jurisdiction. The plaintiff preferred a second appeal and contended that the first and third defendants had consented to the jurisdiction of the Court, and that the decree was binding as against them:—*Held*, affirming the decision of the lower Appellate Court on the question of jurisdiction, that the conduct of the defendants, even if it could be held to

have amounted to consent or acquiescence, did not give the lower Court any jurisdiction.

On finding that the Court of first instance had no jurisdiction, the lower Appellate Court ought to have ordered the plaint to be returned. It not having done so, the High Court on second appeal ordered the plaint to be returned, in order that it might be presented to the proper Court.—9 Bom. 266.

A bond having been executed, whereby it was stipulated that a debt should be paid by instalment subject to the condition that if any one instalment were not paid within a certain time after it become due, the whole amount remaining due should become payable at once, the creditor evaded the debtor's attempts to pay the instalments as they became due, and the debtor brought a suit to compel the creditor to accept an instalment due:—*Held*, that such a suit would not lie.—9 Madr. 55.

The plaintiffs and the defendants as members of a family of Ganvkars claimed to be entitled to certain *mans* consisting of the right to be the first to worship the deity on certain occasions and to receive gifts of rice, cocoanut and *vida* and venison made by the priest on certain religious ceremonies and other occasions. The plaintiff being obstructed by the defendants in the enjoyment of the *mans*, sought to obtain a perpetual injunction against the defendants. The Court of first instance dismissed the plaintiff's claim as being one for mere dignities unaccompanied with emoluments, and, as such, not cognizable by a Civil Court. The plaintiff thereupon appealed, and the lower Appellate Court reversed the lower Court's decree, and granted a perpetual injunction against the defendants, prohibiting them from interference with the plaintiff's enjoyment. On appeal by the defendants to the High Court:—*Held*, restoring the decree of the Court of first instance, that the plaintiff's suit was not maintainable. The *mans* were mere dignities to which no profits or emoluments were attached. The trifling gifts, made by the priest, of rice, a cocoanut and *vida* on the occasion of worshipping the deity and of a piece of venison on other occasions could not be regarded as emoluments, being merely symbols of recognition and marks of respect of and to the holders of the *mans*.—10 Bom. 233.

A suit for recovery of a debt will lie in a Civil Court against a soldier in Her Majesty's service up to judgment under proviso to section 144 of the Army Act however small may be the amount of the debt. The question, whether the defendant is a soldier or not, arises only when the plaintiff seeks to execute his decree.—10 Bom. 218.

Neither under section 12 of Act VIII of 1859, nor in any other way, has the High Court in its appellate capacity power to give jurisdiction to a District Court to inquire into facts, as upon a remand, in a suit decided in the Court of another district, and relating to lands in the latter. Of two mortgages, between the same parties, the first comprised four villages, of which three were in district A, and a fourth property was in district B. The second mortgage comprised, in addition to the above, three other villages in district B. Suits brought in both districts by the assignee of the mortgagee against the mortgagor were thus framed, *viz.*, in the suit in district A for possession upon foreclosure of both mortgages, and for a declaration of the plaintiff's right as purchaser of one of the properties; and in the suit in district B, for payment of the debt on the second mortgage. Both suits were dismissed. The High Court, hearing appeals in both suits together, affirmed the dismissal of the suit in district B, and remanded the other to the Court

of first instance in district A, to have the proportionate value of the properties determined, with a view to the apportionment of the liabilities of the parties by way of contribution. As the defendant who succeeded in both suits in the District Courts raised no question of jurisdiction, each of them might be taken to have had the consent of parties to its hearing the whole suit before it. But no such consent could be deemed to have been given to the order of the High Court made as above stated on contested appeals. This order was, accordingly, unauthorized. Although wide powers of amendment, of framing new issues, and of modifying decrees are conferred upon the High Court by provisions in the Code, of which the plain meaning is not to be narrowed by judicial construction, these powers were exceeded in the change of the suits by the order in question into a suit of a description differing totally from that of either of them, as originally decreed ; and this without the consent of the parties.—12 Cal. 225.

A suit claiming a right to the regular offerings made out of the funds of a temple which are of a substantial value as emoluments is a suit of a civil nature within the meaning of the explanation to sec. 11 of the Code of Civil Procedure. *Krishnama v. Krishnasami*, I. L. R., 2 Mad., 62, referred to ; *Narayan Vithe Parab v. Krishnaji Sadashiv*, I. L. R., 10 Bom., 233, distinguished. The plaintiffs based their claim to a goat sacrificed on the 4th day of each month on an alleged custom by which each of five families took certain goats in each month, and sued to establish their right without making the other families parties. *Held*, that to make any declaration in a suit to which they were not parties would be in effect to partition joint property, and to define the share of each without all the shares being before the Court. *Prahlad Singh v. Luchmunbutty*, 12 W. R., 256.—17 Cal. 906.

No suit is maintainable to set aside a sale under the provisions of section 174 of the Bengal Tenancy Act. The right under the section to have a sale set aside is not an abstract right which can be enforced by suit against any particular person, but is a right to call upon a Judge to set aside a sale, and on his refusal to proceed in revision.—18 Cal. 481.

In execution of a decree certain land belonging to the judgment-debtor was sold ; subsequently the auction-purchaser, who had not got possession, re-sold the land to a third party and gave him the certificate. The latter then applied to the Court to be put into possession, but having failed in those proceedings, owing to some irregularity in the description of the boundaries of the property, he instituted a regular suit against the judgment-debtor to obtain possession. On a plea that such suit would not lie as the plaintiff could have got possession in the miscellaneous proceedings :—*Held* that having regard to the provisions of art. 138 of sch. ii of Act XV of 1877 and of sec. 11 of Act XIV of 1882, such suit was maintainable.—9 Cal. 602.

Suits as to religious rites or ceremonies, which involve no question of the right to property or to an office, are not suits of a civil nature, nor are they intended to be brought within the jurisdiction of the Civil Courts. A suit, therefore, by the plaintiffs, as members of a committee of management of a Hindu temple, to compel the hereditary priests of the temple to take out certain ornaments from the treasury of the managing committee, and to obtain a declaration that the said ornaments, after they had been so taken out of the treasury, were in the custody of the priests, and that they were responsible for their safe custody, was held unsustainable. Sec. 11 of the Civil Procedure Code, Act X of 1877, introduces no new law, but merely declares the law as it has always been administered.—5 Bom. 80.

Although it is not the duty of a Civil Court to pronounce on the truth of religious tenets, nor to regulate religious ceremony, yet, in protecting persons in the enjoyment of a certain status or property, it may incidentally become the duty of the Civil Court to determine what are the accepted tenets of the followers of a creed, and what is the usage they have accepted as established for the regulation of their rights *inter se*. A claim to the exclusive right to perform certain portions of the religious worship in a Hindu temple, and to restrain a rival sect from joining in such worship otherwise than as ordinary worshippers can be enforced by the decree of a Civil Court. A claim to damages for the loss of honours and voluntary offerings which would have been made by worshippers at a temple to the holders of a religious office therein had the latter not been disturbed by the defendants in the performance of the duties of such office, is not enforceable by law.—5 *Madr.* 313.

**12.** Except where a suit has been stayed under Section

Pending suits.

20, the Court shall not try any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India, having jurisdiction to grant such relief, or in any Court beyond the limits of British India established by the Governor-General in Council and having like jurisdiction, or before Her Majesty in Council.

*Explanation.*—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

**Notes.**

This section applies to Provincial Small Cause Courts.

The judgment of a foreign Court, obtained on a decree of a Court in British India, is no bar to the execution of the original decree.—I. L. R., 7 Cal. 82.

Pending the final hearing in appeal of a suit for confirmation of possession of certain land, and for the recovery of the produce of such land alleged to have been carried away by the defendants, the plaintiffs brought a suit again asking for confirmation of possession, but also for the recovery of the produce which had arisen since the institution of the other suit. *Held* that the second suit, so far as it sought for the recovery of the produce was not barred by the previous suit.—8 C. L. R., 113.

The pendency of litigation regarding rent, *malikana*, or other demand for one year, does not, under sec. 12 of the Civil Procedure Code, bar a suit between the same parties in which the same demand is made for a subsequent year, inasmuch as the reliefs claimed in the two cases are different. Secs. 12 and 13 of the Code compared. On the 17th August 1885, a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291, and 1292 *faslis*. On the 5th October 1885, the Munsif dismissed the suit. On the 10th March 1886, the Subordinate Judge on appeal reversed the Munsif's decree, and decreed the suit. On the 21st June 1886 the defendant appealed to the High Court, which, on the 4th July 1887

reversed the Subordinate Judge's decree, and restored that of the Munsif, on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 fasli, which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November 1886, the lower Courts decreed this suit, holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, operated as *res judicata*, and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May 1887, the defendant appealed to the High Court, and on the 16th May 1888, (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July 1887), the appeal came on for hearing. *Held* that the trial of the present suit by either of the lower Courts was not barred by sec. 12 of the Civil Procedure Code by reason of the fact that, at the time of such trial in August and November 1886, the previous litigation between the parties was pending in second appeal before the High Court.—I. L. R., 11 Al. 148.

**13.** No Court shall try any suit or issue in which the matter directly and substantially in issue *Res-judicata.* has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

*Explanation I.*—The matter above referred to must, in the former suit, have been alleged by one party, and either denied or admitted, expressly or impliedly, by the other.

*Explanation II.*—Any matter which might, and ought to, have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

*Explanation III.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

*Explanation IV.*—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party, or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

*Explanation V.*—Where persons litigate *bona fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of

this section, be deemed to claim under the persons so litigating.

*Explanation VI.*—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.

#### Notes.

This section applies to Provincial Small Cause Courts.

A, claimed certain property as the adopted son of B, and it was decided in that suit that A had failed to prove that he was the adopted son of B. *Held* that this decision was no legal bar to A's proving in another suit that he was the adopted son of B, in which A sought to obtain a different property upon a different cause of action, though the parties to the suit were the same.—1 B. L. R. (A. C.) 68; 10 W. R. 100.

A sued B and C in the Civil Court to recover possession of certain lands of which he alleged that they had dispossessed him, under a decree obtained by them in a suit in which he had previously sued B in the Civil Court, before Act X of 1859 had been passed, for rent, in which suit C had been added as a party, and had proved his title to the lands against A. *Held* that A's suit must fail, on the ground that it involved a material issue of fact which had already been determined by a Court of concurrent jurisdiction in the former suit, which was between the same parties, and which issue disposed of the present suit.—1 B. L. R., (A. C.) 30; 10 W. R. 75.

Where a plaint prayed for possession and wasilat, and a decree was given for possession without mention of the wasilat, and on application for review it was urged, though not in the written grounds of application, that the question of wasilat, ought to have been disposed of, but no decision was given as to it either by the High Court, or by the Court of first instance, to which application was afterwards made, *held* that the fact that a prayer for wasilat was contained in the plaint in the suit in which only a decree for possession was given was not a bar to a subsequent suit for mesne-profits within sec. 2, Act VIII of 1859.—2 B. L. R., (S. N.) 16; 10 W. R., 486.

A, on the 1st February 1868, entered into a contract with B to supply him with straw for twelve months, the supplies to be sent as ordered daily. On the 12th March B brought an action in the Small Cause Court against A for damages sustained by the plaintiff by reason of A's having failed to supply straw as agreed upon. The Judge decided the questions in issue (namely, of the *factum* of the contract, and the authority of the person who executed it in A's behalf) in favour of B, and gave him a decree. On the 21st April, a second suit was brought by B against A on the same contract. The claim was for damages sustained by the plaintiff by reason of A's having failed to supply straw as agreed from the 20th February to the 17th April. That suit was dismissed, the Judge holding that the matter was *res adjudicata*, as he considered that the contract was an entire one, and that B had shown, by suing on it for general damages, that he treated it as such, and had elected to rescind it. On the 9th May a rule *nisi* was granted for a new trial, and on the 16th May the rule was made absolute. On the 12th June, at the new trial, a decree was made in favour of B for so much of the damages claimed as had been sustained subsequently to the date of the



decree of the 25th March. In an action brought by B on the same contract for damages sustained between the 17th April and the 16th June, by reason of A having failed to supply straw according to the terms of the same contract, A denied that there had been any such contract, and further pleaded that the matter of the contract, if there had been one, had already been adjudicated upon. On a reference from the Small Cause Court, *held* that the finding of the Judge upon the contract in the action brought on the 12th March was conclusive between the parties, and that A's plea of *res adjudicata* was not well founded.—2 B. L. R., (O. C.) 48.

The defendant had obtained an order under sec. 25, Act X of 1859, to eject the plaintiff, who now sued in the Civil Court for recovery of possession. *Held* that sec. 2, Act VIII of 1859, did not bar the suit.—2 B. L. R., App., 36 ; 11 W. R., 145.

In a previous suit the plaintiff sought to obtain a kabuliyat from the defendant in respect of land held by him, alleging the quantity to be 8 bighas and 17 cottahs. It was therein determined that the defendant held only 7 bighas and no more. In the present suit brought to eject the defendant from 1 bigha 17 cottahs of land, *held* that it was not maintainable, as it was for the determination of a question decided in the former suit.—3 B. L. R., App., 34.

A landlord sued his tenants and his tenant's surety in the Collector's Court for arrears of rent, the surety being merely treated as a nominal party, and the decree being given against the tenants. He afterwards sued the surety in the Civil Court on the bond given by him, and in the lower Court obtained a decree, not only for the arrears of rent, but also for the costs in the (Act X.) suit. *Held*, on special appeal, that the suit was, as regards the arrears of rent, not barred by sec. 2, Act VIII of 1859, but that the costs in the Collector's Court could not be recovered.—3 B. L. R., App. 37 ; 11 W. R., 407.

In a suit for declaration of title to land from which a raiyat had been ejected at the suit of his zamindar by the order of a Collector under sec. 23, Act X of 1859, and wherein the genuineness of the patta upon which the suit was brought was at issue, the order of the Collector could not be pleaded in bar.—3 B. L. R., App., 139 ; 12 W. R., 284.

Two purchasers of holdings in the defendants zamindari at a sale for arrears of revenue applied to the Collector to have the transfer registered in the zamindar's sharista under Act X of 1859, sec. 27. Their application was refused, and then they brought a suit in the Civil Court to set aside the Collector's order, and register their names. *Held* that proceedings authorized to be taken in the Collector's Court under sec. 27, Act X of 1859, were not proceedings in a suit ; and consequently that such proceedings were no bar to a suit in the Civil Court under sec. 2, Act VIII of 1859.—4 B. L. R., (F. B.) 43 ; 12 W. R., (F. B.,) 30.

In execution of a decree, the right, title, and interest of A in a certain property were sold and purchased by B. In execution of another decree, the right, title, and interest of A and C in the same property were sold and purchased by D. In a suit by A the sale to B was set aside, but on appeal the decision of the Court of first instance was, upon consent of the parties, set aside, and the sale allowed to stand good. D sued for possession of the share of A and C in the property purchased by him, and obtained a decree for possession of the share of C only. D now sued to set aside the sale to B and for possession of the share of A. *Held* that the suit was not barred by sec. 2, Act VIII of 1859.—5 B. L. R., 220 ; 13 W. R., 343.



A Mahomedan died, leaving among others a widow and a sister entitled to shares in his estate. The widow got possession of the whole. The sister died, and after her death her husband, on behalf of himself and grandson, sued the widow to obtain the shares to which the deceased sister was entitled, and obtained a decree for payment of the same, after satisfaction of the widow's lien for dower, in certain proportions to himself and grandson. The husband's interest in the decree was subsequently confiscated by Government for having taken part with the enemy in the Mutiny. He subsequently died leaving his grandson. The widow died during the Mutiny, and her brother was put into possession of the property by the Government as her heir. The grandson now sued the widow's brother to recover his own and his grandfather's share, alleging that the lien for dower had been satisfied. *Held*, the suit was not barred by Act VIII of 1859, sec. 2.—5 B. L. R., 570; 14 W. R., P. C., 5.

A daughter succeeded to a share of her father's estate, and transferred it in full property by a formal instrument or ikrarnama, dated March 1849, to her grand-daughter, expressly naming her and treating her as her heiress—the transfer being in the nature of a release, reserving maintenance and other advantages to the donor. Upon the application of the grand-daughter before the Collector for the mutation of names according to the terms of the ikrarnama, the reversioners (collateral heirs of the father) affected to contest the unauthorised nature of the alienation, but dropped their opposition. In 1857 the diaras, or alluvial lands attached to the estate, were perpetually settled with the grand-daughter. The alienor quarrelled with her grand-daughter, and in 1857 brought a suit against her to set aside the ikrarnama, upon the ground of the non-performance of a condition subsequent. The plaintiff succeeded in the first Court, but the judgment was reversed (October 1858) on appeal to the Zillah Judge. Pending the appeal the plaintiff died (February 1858), and the reversioners applied to be, and were, admitted as her heirs to conduct the appeal. The grand-daughter remained in possession from the date of transfer until 1866, when she died. In April 1867 the present suit was brought by the surviving reversioner, who claimed to be entitled to recover possession of the property by right of inheritance from the alienor's father. He was one of the reversioners who had been admitted to conduct the appeal in the former suit upon the death of the alienor. *Held* (on special appeal and review), there had been no adverse possession; the instrument enured as a transfer of the donor's life-interest only; the judgment in the former suit brought to set it aside did not bind or affect the reversioners, who in that suit merely represented the interest of their predecessors, the life-tenant.—5 B. L. R., 585; 13 W. R., 52.

A, a Hindu of Gya, died, leaving a sister, B, and C, the son of a deceased sister. On A's death B took possession of the property left by A. In a suit by C against B for recovery of possession thereof as heir to his maternal uncle, the Court of first instance held that B should retain possession of the property during her lifetime without power of waste, and that on her death C, should be entitled to the possession thereof. This was reversed by the High Court on appeal, who held that the decree should have been simply a decree of dismissal of the plaintiff's suit. B died, leaving an adopted son, D. C sued D for recovery of possession of the property, the subject-matter of the former suit, on the ground that D was not the adopted son of B, and that C, who came within the class of bandhus, was entitled to succeed to the property left by A and B, there being no nearer heir in existence. *Held* that sec. 2, Act VIII of 1859, did not bar the suit.—5 B. L. R., 663; 14 W. R., 73.

Previous to the institution of the present suit, one of the shareholders of a piece of land brought a suit against the Chairman of the Municipality for recovery of possession of his share. The other shareholders were made by *pro forma* defendants in the suit. This suit was dismissed as barred by the law of limitation. After the dismissal of the suit, the plaintiff brought the present suit for recovery of his share of the land, on the allegation that his tenant had relinquished the land within three months, in consequence of his having been dispossessed by the Municipal Commissioners. *Held* that the suit was not barred by sec. 2, Act VIII of 1859.—5 B. L. R., App. 50; 13 W. R., 461.

When a suit has been remanded by the Appellate Court, and then dismissed by the Court of first instance for non-appearance of the parties, the plaintiff is not debarred thereby from bringing another suit upon the same cause of action against the same defendant.—5 B. L. R., App. 64; 14 W. R., 81.

The doctrine laid down in the *Duchess of Kingstons'* case 2 Smith's, L. C., 6th Ed., 679, as to estoppel by judgment, is applicable to cases tried under Act VIII of 1859, the second section of which is consistent with that rule. But the Judicial Committee, reversing the decision of the Court below, considered that the doctrine had no application in the present case, the judgment relied on not being the judgment of a Court of concurrent jurisdiction directly upon the point upon the same matter; and, after an examination of the whole evidence, restored the judgment of the first Court.—7 B. L. R., 673; 15 W. R., P. C., 30.

S died in 1865, leaving two sons, N and G. M took possession of the property of S under a will alleged by her to have been executed by S. In 1867 G brought his suit, as one of the heirs of S, to set aside the will, and made his brother N a co-defendant. The Principal Sudder Ameen dismissed the suit, finding on the evidence that the will was genuine. In 1869 N brought this suit for his share as heir of S against M. The first Court found that the will was a forgery, and gave the plaintiff a decree. On appeal, the Judge held that N's claim was barred by the decision in the former suit brought by his brother, and reversed the decision of the first Court. *Held*, on special appeal, that it was not barred by the finding of the Court in G's suit as N was no party to that suit, and he could not in any manner have availed himself of a decree in that suit to enforce a claim to his share.—7 B. L. R., App. 38; 15 W. R., 309.

D and B executed a bond, by which they mortgaged certain lands as security for a loan taken by them from the plaintiffs. A suit was brought and a decree was obtained by the plaintiffs against D and B, under which they recovered a portion of the amount due on the bond. The plaintiffs now sued S and others, on the ground that they were joint proprietors of the land mortgaged, that the loan was taken by D and B, as managers, for the use of all the parties interested and for carrying on their joint business and trade, and that therefore they were all jointly liable. *Held* that the suit could not be maintained. *Ramnath Roy Chowdry v. Chunder Sekhur Mohapattur* (4 W. R., 50) dissented from.—10 B. L. R., 200; 18 W. R., 458.

The plaintiffs, as talukdars, brought a suit against their tenant M for recovery of rent at enhanced rates of land held by him, as to two cottahs of which he denied that they were part of his holding, but alleged that they were part of the lakhiraj holding of one H, and H intervened in that suit, and claimed the two cottahs as lakhiraj. The result of that suit was that the rent was assessed on the land admitted by M to be in his possession,

excluding the two cottahs. The plaintiffs then brought a suit against H for a declaration that these two cottahs were their māl lands, and obtained a decree simply declaring their māl rights over the land in dispute. In a suit brought by the plaintiffs against H after serving him with notice to quit, for recovery of khas possession of the two cottahs with mesue-profits and praying that he might be ordered to remove a mud house erected by him on the land, the defence was that as the plaintiffs had already claimed khas possession and obtained a decree simply declaring their right to receive rent, the suit was barred, and that as H had been twenty years in possession, and had erected a house without any opposition from the plaintiffs, they had no right now to sue for khas possession. *Held* that the suit was not barred by sec. 2, Act VIII of 1859, and the plaintiffs were entitled to a decree for khas possession.—10 B. L. R., App., 5 ; 18 W. R., 19.

B had instituted a suit in the Court of the Munsif of the 24-Pergunnahs against A on account of an alleged trespass to a certain drain, which B then alleged to be his property ; that suit was dismissed on the ground that B had not proved his title to the drain in question. In a suit arising out of an alleged trespass to the same drain brought by A against B, in which A stated it was his property, the judgment of the Munsif in the former suit was tendered in evidence on behalf of the plaintiff, and it was contended it was an estoppel. The Court admitted it in evidence, but doubted whether it would be an estoppel.—10 B. L. R., App., 31.

Where a party, failing to obtain judgment for the possession of land claimed by her in her first suit as *taufir*, brought a fresh suit claiming the land as property belonging to her taluq according to the true boundary line, *held*, affirming the decision of the High Court, that her suit was barred by sec. 2 of Act VIII of 1859.—11 B. L. R., (P. C.) 158 ; 18 W. R., 163. 2 B. L. R., A. C., 102. 10 W. R., 426 ; 13 W. R., 209.

A, a raiyat, brought a suit in the Court of the Deputy Collector against B, his zemindar, for recovery of possession of a piece of land, on the ground that he was the holder of a mirasi patta, and that he had been illegally ejected by B. The Deputy Collector held that the mirasi patta was genuine, and that B had illegally ejected A. He passed a decree in favour of A, in execution of which A obtained possession of the land in dispute. In a suit brought by B against the heirs of A in the Civil Court for recovery of possession of the said piece of land, on the ground that the mirasi patta was a spurious document, and that no mirasi patta had been granted to A, *held* (JACKSON, J., doubting) that the decision of the Deputy Collector was not conclusive between the parties.—11 B. L. R., (F. B.,) 434 ; 19 W. R., 322 ; 20 W. R., 105 ; 20 W. R., 455 ; 11 B. L. R., 437, note ; 13 W. R., 417.

Where, in a suit for enhancement of rent, the plaintiff failed to prove notice of enhancement, but the Court enquired into and gave a declaratory decree as to his right to enhance, such decree is decisive of the right in a subsequent suit for enhancement of the rent of the same tenure founded on a valid notice.—12 B. L. R., (P. C.,) 53 ; 19 W. R., 175.

C, a Hindu subject to the Mitakshara law, adopted S, and afterwards B, and made a will, whereby, after providing for his widow, the family worship, &c., he made a division of his real and personal property between his two adopted sons. Provision was also made for forfeiture by either of the sons in case they disputed the will, in which event the whole estate was to go to the other son. This will was registered and filed in the Collector's Court. S was subsequently disowned by C, and declared to have forfeited his right to anything under the will. In 1859 S brought a suit against C, B, and certain persons who claimed portions of the property under deeds

executed by C, to cancel those deeds, to cancel the will, to set aside the adoption of B, and for maintenance. In this suit he alleged that C had no power to make any of the devises of real estate contained in the will, inasmuch as the whole estate, consisting of property inherited by C and property acquired by him from the income of such inherited property, was ancestral. The only issue raised in that suit referring to the will was whether it was assented to by S. The first Court found that it had been so assented to ; that the adoption of B was valid ; and that S's conduct justified C in disinheriting him : the suit was accordingly dismissed. S appealed to the High Court, and in his grounds of appeal raised the same contention as before, *viz.*, that the whole of the real property was ancestral, and therefore C had no power to dispose of it without his consent. The High Court, in 1863, varied the decree of the first Court, and held that the will must be set aside so far as it affected the right of S in the ancestral property, but that the ancestral property only included that inherited, and not that acquired by C with the income of the inherited property. In a suit brought by S after the death of B and C, against B's widow and the parties to the former suit, or their representatives, to obtain possession of the whole estate of C on the ground that both the inherited property and the property acquired from the income thereof were ancestral, *held* (reversing the decision of the High Court) that, although the issue as to the assent of S to the will clearly embraced only a portion of the controversy between the parties, the Court had jurisdiction, and indeed was bound, to decide whether or not the will was operative as to all or to any, and what portion, of the property, and that its decision on that point was binding on the parties. According to the general law relating to *res judicata*, where a question has been necessarily decided in effect, though not in express terms, between parties to a suit, they cannot raise the same question as between themselves in any other suit in any other form. Sec. 2, Act VIII of 1859, does not prevent the operation of this general law. The words "cause of action" in that section must be construed in reference to the substance rather than the form of the action.—12 B. L. R., (P. C.) 304 ; 20 W. R., 377 ; L. R., I. A., Sup. Vol. 212, reversing the decision of the High Court in *Sudanund Mohapattur v. Soorjomonee Dabee*, 8 W. R., 455 ; and on review 11 W. R., 436.

A brought a suit in the Court of S against B for certain land as being an accretion to an estate in the District of S. B claimed it as being part of his estate in the District of G, to which district he alleged the land had, in a former decision, been found to belong. The Court of S held that the land was an accretion to A's estate in the district of S. In a subsequent suit brought by B in the Court of G against A for the land to which the subject of the former suit had been found to be an accretion, *held* that the holding in the former suit necessarily decided that the land claimed by B was in the district of S, and therefore that the Court of G, under Act VIII of 1859, sec. 14, had no jurisdiction.—12 B. L. R., (P. C.) 391 ; 18 W. R., 182.

A deed of gift, valid and operative between the parties thereto, cannot be avoided because in another suit between different parties it has been held to be fraudulent as against creditors. *Quære*.—Whether a donor can avoid his own deed on the ground of his own fraud.—12 B. L. R., (P. C.) 433.

L and R, the holders of a patni estate, granted in 1856 a dar-patni lease to S at an annual rent, the lease stipulating that S should have full power of sale and gift, but should not sub-let without the patnidar's consent. The lease contained no stipulation for the registration of any

vendee or donee. In 1860 S sold the dar-patni lease to K, the deed of sale, which was duly registered, providing for mutation of names in the patnidar's books. No such mutation was ever effected by K, who was never recognised as their tenant by L, and R, the rent of the dar-patni being paid in the name of S. In 1864, the rent due from the patnidars being in arrear, the zemindar proceeded to sell the patni under Reg. VIII of 1819. Thereupon K, in order to protect his under-tenure, deposited in the Collectorate, on 17th November 1864, a sum of money, on which the sale was stayed. K, being then in arrear in the payment of his dar-patni rent, claimed to set off the amount deposited in the Collectorate against the rent due to L and R. This L and R refused to allow, and they brought a suit in the Collector's Court against S and his sureties to recover the arrears of rent. In that suit K intervened, claiming the benefit of the set-off, to which, however, the High Court, on 26th June 1866, on appeal, held that he was not entitled, the deposit being merely a voluntary payment by K. On 30th October 1867 K brought a regular suit against S and L and R to recover the amount of the deposit, and obtained a decree; but the decision was reversed on appeal, and the suit dismissed for want of jurisdiction. On 6th June 1869 K filed his plaint in the proper Court. *Held* that he was entitled to recover the amount deposited by him in the Collectorate, and that the suit was not barred as being *res judicata* by the decision of 26th June 1866.—13 B. L. R., (P. C.) 146; 20 W. R., 380.

By a bond, dated 10th February 1857, a certain village was mortgaged by one G to the appellants and their father as security for a loan; the bond providing that, "if I fail to pay the money as stipulated, I and my heirs shall, without objection, cause the settlement of the said village to be made with you." The interest of G in the village was described as that of a Malguzar, and his proprietary right therein was declared by the revenue-authorities shortly after the execution of the mortgage; but his payments of revenue being in arrear, the Board of Revenue granted a lease of the village for ten years to the appellants' father. The mortgagees in a suit on the bond obtained the following decree on 3rd November 1860: "As the defendant acknowledges the plaintiff's claim, it is ordered that a decree be given to the plaintiff's for principal and interest and costs against the defendant and the mortgaged property." In proceedings in the Civil Court taken under this decree, the mortgagees asked for possession of the village, and obtained, on 17th July 1862, an order, in pursuance of which they were put in possession, an appeal by G being rejected. G took various steps to recover possession of the mortgaged property, or a declaration of his proprietary interest therein, but failed in his endeavours; an application for a grant of the proprietary right in the village, and an appeal from an order cancelling his patta, being rejected by the revenue-authorities, on 8th December 1864, and 27th July 1865, respectively; and on 12th August 1867 G conveyed the village by deed of sale to the respondents. In a suit brought by them to redeem the mortgage and obtain possession of the property, *held*, the suit was not barred by the order of the Civil Court of 17th July 1862, nor had the orders of the revenue-officers of 8th December 1864 and 27th July 1865 effected such a transfer of any right which G might have had to the appellants as to render the sale to the respondents invalid.—13 B. L. R., (P. C.) 205.

The dismissal of a suit for multifariousness is not a hearing and determination of the suit within the meaning of sec. 2, Act VIII of 1859.—13 B. L. R., App., 37; 21 W. R. 105; 2 C. L. R., 10.

A proceeding under sec. 53 of Act XX of 1866 was a suit of a civil



nature within the meaning of sec. 1, Act VIII of 1859, independently of any peculiarities in the special procedure to be adopted. Therefore, where a creditor had resorted to the summary procedure provided by sec. 53, and had recovered a portion of his claim in execution of the decree so obtained, a regular suit subsequently brought to enforce his remedies on the bond, giving the defendant credit for the amount already recovered, was barred by sec. 2, Act VIII of 1859.—14 B. L. R., (F. B.) 408 ; 23 W. R., 187 ; 23 W. R., 344. 8 B. L. R., App., 92. 17 W. R., 154.

As a general rule of Hindu law, property given for the maintenance of religious worship, and of charities connected with it, is inalienable. It is competent, however, for the sebait in charge of property dedicated to the worship of an idol, in his capacity of sebait and as manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks, and other like objects. The power to incur such debts is to be measured by the existing necessity for incurring them ; the authority of the sebait being in this respect analogous to that of a manager for an infant heir. It being competent for a sebait to borrow money for necessary purposes, it follows that judgments obtained against a former sebait in respect of debts so incurred are binding upon succeeding sebaites, who form a continuing representation of the debutter property. But, before applying the principle of *res judicata* to such judgments, the Court should be satisfied that the judgments relied upon are untainted by fraud or collusion, and that the necessary and proper issues have been raised, tried, and decided in the suits which led to them. Execution of such judgments should be decreed only against the rents and profits of the debutter property.—14 B. L. R., 450 ; 23 W. R., 253 ; L. R. 2 I. A., 145.

*Held* (JACKSON, J., dissenting) that a judgment by a Collector, in a suit under Act X of 1859, declaring the plaintiff entitled to assess rent upon land alleged by the defendant to be lakhiraj, is not conclusive in a subsequent suit between the same parties for arrears of rent under Bengal Act VIII of 1869. *Per* JACKSON, J.—A decision in a previous and similar suit upon an issue raised substantially in the same manner by parties in a Revenue Court is binding upon them as evidence in a subsequent suit, which, but for the passing of Bengal Act VIII of 1869, would also have been brought in a Revenue Court.—15 B. L. R., (F. B.) 238 ; 24 W. R., 154.

In a suit for rent under Act X of 1859, the Collector had no jurisdiction to decide a question of mokurari title otherwise than so far as it might be incidental to the determination of the amount of rent, if any, due ; and his decision on such a question was therefore not binding in a subsequent suit to establish the mokurari right.—15 B. L. R., 242 ; 19 W. R., 217 ; 4 W. R., 2 ; 3 Agra H. C. R., 311.

The decision of the Collector in a suit for rent of certain land is conclusive in a subsequent suit between the same parties in a Civil Court for a declaration that the land is liable to pay rent.—15 B. L. R., 248, note ; 22 W. R., 362.

The decision of the Civil Court in a suit for rent under Bengal Act VIII of 1869 was binding in a suit between the same parties for a declaration that the land, the rent of which was the subject of the former suit, is lakhiraj.—15 B. L. R., 251, note ; 21 W. R., 207.

In a foreclosure suit in which A was plaintiff and B, C and D, were defendants, *held* that a verdict on the point in issue in an ejectment suit

in which C and D were plaintiffs and A was defendant was a bar to the suit.—1 M. H. C. R., 245 ; 13 W. R., 64.

A suit between two brothers, A and B, respecting ancestral property, was compromised, and the particulars of the compromise embodied in a razinama presented in Court by both parties. A having died, his widow and B presented in Court another razinama embodying the particulars of an arrangement respecting the property in which she had become interested as widow, and which was comprised in the former razinama ; and of this second razinama they subsequently put in an amended copy. *Held* that a claim arising out of such arrangement could not, within the meaning of Act VIII of 1859, sec. 2, be considered to have been a cause of action heard and determined in the former suit.—1 M. H. C. R., 240.

To give effect to the plea of *res judicata*, the Court must be satisfied that the ground of legal right on which the plaintiff sues was a point raised and opened for decision in the former suit, and what it was finally dealt with by the judgment and decree therein.—2 M. H. C. R., 131. Affirmed in Raghoonadda Periya Oodya Taver v. Kattama Nauchear, 10 W. R., P. C., 1. 11 Moore's I. A. 50.

A case decided by a Collector under Reg. V of 1822, from whose decision no appeal was made, was held to be *res judicata*, and could not be re-opened before a Small Cause Court Judge.—2 M. H. C. R., 475. But see 2 M. H. C. R., 22.

Where A sued B for monies alleged to be due under certain documents, and B pleaded that the demands had been included in a settlement of accounts embodied in a document which he set forth in his answer, and the suit was dismissed on the ground that, being included in the settlement, the demands no longer existed as causes of action, *held* that A's representative was not stopped from disputing the document in a subsequent action brought by him against the representatives of B. The conclusive effect of *res judicata* defined. The law of British India, as administered in the mofussil, recognizes no distinction between specialities and other documents. *Eastmure v. Laws* (5 Bing. N. C. 444) concurred in.—1 M. H. C. R., 312.

The rule which makes a judgment conclusive against parties, and those who claim under them, is subject to certain exceptions, which are the offspring of positive law, and the reason for the exception may be generally stated to be that the nature of the proceedings by which there is a fictitious, though not unjust, extension of parties, renders it proper to use the judgment against those not formally parties. The rule as to judgments *in rem*, in some peculiar cases, results from the nature of the proceedings, and before attempting to apply the rule in this country, consideration should be given to the question whether there are Courts so proceeding as to warrant the application of the doctrine of decrees *in rem*. Mr. Smith's definition of judgment *in rem* discussed and dissented from, and the authorities in English and Roman law on the subject examined and commented upon.—2 M. H. C. R., 276.

A case decided by a Collector under Reg. V of 1822, from whose decision no appeal was made, is *res judicata*, but cannot be re-opened before a Small Cause Court Judge. *Adimulan Pillai v. Kovil Chinna Pillai* (2 M. H. C. R., 22) observed upon and doubted.—2 M. H. C. R., 475.

To conclude a plaintiff by a plea of *res judicata*, it is not sufficient to show that there was a former suit between the same parties for the same matter upon the same cause of action : it is necessary also to show that



there was a decision finally granting or withholding the relief sought.—3 M. H. C. R., 84.

In a suit to recover, with mesne profits and other incidents, a jera-yati village alleged by the plaintiff to form part of the zemindari, and to be wrongfully held by defendant by virtue of the execution of a decree of the late Commissioner of the Northern Circars passed in 1844, the defendant pleaded that he held on a permanent lease subject to a fixed quit-rent, that he and his ancestors had held on that tenure since and previously to the permanent settlement, and that the quit-rent had been received from him by the plaintiff. The agent dismissed the suit, on the ground that the matter had become *res judicata* against the plaintiff by a former decree in 1807. *Held* that the matter of the present claim was not <sup>es 71</sup> ~~g~~, because the question of the existence and validity of the alleg-  
<sup>g</sup>, on which the defendant relied, was not determined in the former decree.—3 M. H. C. R., 120.

In 1856 the plaintiff, the zemindar of Tarla (who had attained his majority in 1853), instituted suits for the recovery of the two villages claimed in the present suit on the ground that the villages were jerayati, and had been temporarily alienated, and he claimed a right of resumption. It was decided that the villages had formed a mokasa jaghir from a date prior to that of the permanent settlement, and that, as they did not constitute a portion of the assets of the zemindari at the date of the settlement, there was no right of resumption. Pending those suits, an order was issued by Government which plaintiff construed as a transfer to him of the Government right in the villages, and he founded the present suit upon the lapse of the mokasa to Government, and the order transferring the right to him. *Held* that the present suit was not *res judicata*.—3 M. H. C. R., 207.

In a suit brought to set aside the adoption of the first defendant, to declare plaintiff's title to certain lands and for possession, the first defendant pleaded that the question of his adoption was *res judicata* in a former suit. In that suit, between the present plaintiff's son as plaintiff and his father (the present plaintiff) as the first defendant, and the present first defendant, the alleged adopted son as second defendant, the latter was found to be the adopted son of the undivided brother of the present plaintiff. *Held* that the first defendant's adoption was not *res judicata*. Ayyavu Muppanor v. Niladatchi Ammal (1 M. H. C. R. 45) and Udaiya Taver v. Katama Nachiyar (2 M. H. C. R. 131) distinguished.—3 M. H. C. R., 217.

The force of *res judicata* attaches, not only to the bare condemnation or discharge of a defendant, but to all the objective grounds distinctly found by the Judge as the basis of his decision. The proposition that everything acquired by a woman during converture is the property of her husband has no foundation in Hindu law.—3 M. H. C. R., 272.

Plaintiff, claiming as grandson of one S M, the only undivided brother of S, sought to recover half of the village sold by S to first defendant's father in 1855; the village having been (as alleged) family property, and sold without the consent of plaintiff's father, who succeeded his father, S M, and not for family purposes. In a former suit (No. 3 of 1855), brought by the plaintiff's father against S and R, the father of the present first defendant, and the present second defendant, the paternal nephew of the first defendant, for possession of the whole of the family property belonging to him and S as coparceners, and to rescind the sale to R, the plaintiff stated, amongst other things, that S was imbecile; and that the sale-deed was obtained by taking a fraudulent advantage of his imbecility, and that it was invalid as

being made without plaintiff's consent. The Court decided that S was "both physically and mentally qualified to manage, and legally competent to deal with the estate, supposing it to be undivided, to the extent of his own share," and dismissed the suit. In 1862 the plaintiff again sued the present defendant for the whole of the village on the same ground of imbecility and fraud. The Civil Court decided that the suit was barred by the decree in the first suit, and on appeal the decree was affirmed. *Held* that the present cause of action—namely, the plaintiff's right as coparcener to a moiety of the property, and the invalidity of the instrument of sale to pass to that right to the defendant—was not *res judicata*.—3 M. H. C. R., 320.

The plaintiffs, mirasidars of a village, held on pungavaly tenure, sued their co-mirasidars, the owners of the remaining shares, and others, occupants of land in the village, for a partition of the common lands of the village and an allotment to the plaintiffs of specific parts thereof proportionate to the shares which they represented. In a former suit, to which all the present mirasidars were parties, either actually or as previous to those through whom they claim, it was decided that no right existed in any individual shareholder of the village to have allowed to him a distinct portion of the common lands in proportion to his share or shares. *Held* that the former decree declaring the impartibility of the common land of the village was conclusive in the present suit between the present shareholders upon the same question of right.—4 M. H. C. R., 285.

Plaintiff sued to establish his right to receive certain honours in a temple as appertaining to his office of officiating priest of the temple, and to recover damages for the invasion of his right. In a former suit between the predecessor and the plaintiff and the first defendant, the claim to sit at the right side of the idol at festivals was admitted, but the right to receive a cake on the same occasion was disallowed. *Held* that the claim of the plaintiff, so far as it sought to establish the plaintiff's right, was *res judicata*.—4 M. H. C. R., 349.

The plaintiff sued to recover two villages from the defendants, claiming title from C, the purchaser. The first defendant alleged that her husband, not C, was the purchaser. This question was determined in a former suit, in which the present first defendant was plaintiff and the present plaintiff defendant, in favour of the present plaintiff, by the Civil Judge, and the decision was confirmed on appeal by the Sudder Court. An appeal to Her Majesty in Council was dismissed for want of prosecution. *Held* that the matter in issue was *res judicata*. *Quære*.—Whether the former judgment could be deemed conclusive whilst an appeal was pending.—5 M. H. C. R., 176.

Suit brought by plaintiff against the first three defendants as his tenants on kanam, and the fourth, the representative of a rival jenmi, to obtain a declaration of title as jenmi. Plaintiff had previously sued the first three defendants to establish the relation of jenmi and kanamkar, and to recover the land. He failed, and then brought the present suit. *Held* that this was a case of the employment of the devise of a suit for a declaration of title in order to get back land by a crooked, and not legal, process, after failure to recover by proper legal means, the intention being to cut off the defendants (the tenants) from the plea of *res judicata*. The Court, which had a discretion as to whether such a suit should be permitted, ought at once to have said that it should not. Where there are no interests to be protected, there is no foundation for a suit for a declaratory decree.—6 M. H. C. R., 117.

Plaintiff sued to recover a zemindari from his step-brother, alleging that the zemindari was hereditary property belonging to the family, the

succession thereto being governed by the law of primogeniture ; that his father died in 1859, leaving the plaintiff, defendant, and another, his sons, the former by the first wife, and the latter two by the second wife ; and that the defendant (respondent) unlawfully enjoyed the estate, while plaintiff, as the eldest son, had a legal claim thereto. In defence it was pleaded that the claim was *res judicata* by the decree in a suit which was brought by plaintiff to obtain a declaration of his status as the son of his father's pattaba stri, of royal wife, in which suit the plaintiff's father was first defendant, and defendant's mother was second defendant, and wherein they both denied that plaintiff was son of the pattaba stri and affirmed that second defendant was first defendant's first wife, and that her sons were preferential heirs to the zemindari. Among the points recorded was for "plaintiff to prove his status and right as alleged," and that issue was set down for defendants to rebut. The Judge dis-believed that plaintiff was the son of his father's first wife, and added, "Plaintiff further pleads that he is the eldest son, a position not denied, but one which cannot confer on him the status he now claims." The Judge decided that plaintiff had failed to prove that his mother was the pattaba stri, and that he was heir to the exclusion of second defendants' sons. On appeal to the Sudder Adawlat the decree below was confirmed, and the Court made the following observation : "It has been attempted at the hearing of the appeal to maintain the plaintiff's right to succeed as being the eldest son. This, however, was not the position taken in the Court below, where the succession was allowed to depend on another circumstance—namely, the mother being the pattaba stri ; and the Court, therefore, held the argument to be an inadmissible one." *Held*, on appeal, that the present suit was barred by *res judicata*, a different *causa* to the former not having been adduced. To the judgment in Chinnaya Mudali v. Venkatachella Pillai (3 M. H. C. R., 326-34), after the words in page 334, "in favour of the defendant all the objective grounds of the decision which have led to the dismissal of the suit," the following ought to be added : "and without the establishment of which the suit could not have been logically or legally dismissed."—7 M. H. C. R., 160.

In a former suit the present defendant sued as owner by right of inheritance to recover the property of her deceased husband, and the present plaintiff resisted that the suit on the ground of her preferable right to inherit. Having failed in that suit, plaintiff brought the present suit to recover half the property on the basis of a family-agreement made between her and the present defendant's deceased husband. This agreement was designedly suppressed at the period of the former suit. *Held* that the suit should be dismissed ; that plaintiff in the present suit insisted upon a valid family compact varying the ordinary rules of inheritance, having, however, previously appealed to that general rule, and designedly kept back the compact upon which she now sought to insist ; that there could be no stronger case of an absolute waiver of that contract, and of conduct rendering it wholly inequitable to permit her now to insist upon it. *Semble*, where a defendant has been sued by a plaintiff upon his right of ownership, plaintiff's recovery negatives all grounds of defence to that action then existent, and within the plaintiff's knowledge.—7 M. H. C. R., 263.

Leave to institute a suit relating to property out of the jurisdiction, as well as to property within such jurisdiction, was refused by one Judge on the 30th June 1874. The same application, in the same suit, between the same parties, relating to the same property, and founded on the same cause of action, was made before another Judge on the 15th December

1874, and the leave prayed for was granted. *Held* that the order should not have been made, and that it should be discharged.—8 M. H. C. R., 21.

In an action to recover fees claimed for services as an hereditary family and village priest, it appeared that a deceased brother of the plaintiff had recovered judgment against one of the defendants and others in an action for similar fees. *Held* that the former judgment was not conclusive in favour of the plaintiff, nor as against a brother of one of the original defendants.—1 Bom. H. C. R., 141.

The decision of an Appellate Court, on a preliminary issue of fact, which was not at the time appealed against, and which on a subsequent special appeal was not altered or noticed by the Special Appellate Court, is conclusive between the parties, and the issue determined cannot be reopened on a second special appeal.—1 Bom. H. C. R., 173.

It having been decided in a former suit, wherein the present plaintiff and appellant was defendant and the present defendant was plaintiff, that the latter could not claim from the former a share or certain property set apart for the maintenance of a samsthan, *held* that, after that decision, it was not competent to the present defendant to collect the rents of the property. He was accordingly ordered to make them over to the present plaintiff.—2 Bom. H. C. R., 77.

K sued to establish his title to a house purchased by him from D D's guardians during minority, alleging that the greater part of the purchase-money was employed in paying off a mortgage-claim upon the house; that after he had obtained possession under his deed one D S, the holder of a decree against D D's guardians, attached the house; and that he brought the suit to raise the attachment, in which having failed he paid into Court the amount of D S's claim. *Held* that K was not estopped from bringing this suit against D D by the decree in his former suit to raise the attachment, which declared that the deed of sale now relied upon was fraudulent and void as against D S.—2 Bom. H. C. R., 369.

A judgment *inter partes* between A and B cannot be considered to conclude A in a suit between A and C, and is not admissible in the second suit as evidence of the truth of the facts adjudicated in the former one.—2 Bom. H. C. R., 385.

*Held* that a former judgment by a Court of competent jurisdiction upon the same cause of action was conclusive between the same parties in a subsequent suit brought in another Court, notwithstanding the pendency of an appeal against it; but that the judge passing a decree in the subsequent suit might, upon application made to him, and security being given, stay the execution of it until the appeal in the former suit was decided, and might, if the decree in the former suit was reversed, entertain an application for the review of his own decision in the subsequent suit.—4 Bom. H. C. R., (A. C.) 81.

A B instituted a suit against V B to recover possession of one-half of a field. S N and B N, on their application, were made plaintiffs in that suit, but no alteration in the amount either of stamp or claim was made in the plaint. The Principal Sudder Ameen awarded to A B one-fourth of the field, and to S N and B N conjointly he awarded one-fourth, but as to the remaining one-half he passed no decree, as it had not been claimed in the plaint. S N and B N thereupon filed a fresh suit to recover possession of their remaining one-fourth of the field, and the Principal Sudder Ameen passed a decree in their favour. This decree was confirmed by the Joint Judge. *Held* that the decrees of the lower Courts were erroneous, and that

the claim of the plaintiffs was barred by the provisions of sec. 2 of the Civil Procedure Code, but leave was granted to them to apply to the Court below for a review of the decree passed in the former suit.—5 Bom. H. C. R., (A. C.) 173.

The plaintiff sued to raise an attachment placed upon a certain house, but failed in the lower Court, and the decision of the lower Court was confirmed upon appeal. The house was then sold. The plaintiff sued the purchaser to recover possession of it. *Held* that he was not estopped from suing by the decision in the former suit refusing to raise the attachment, and that such decision could not be given in evidence in the latter suit.—5 Bom. H. C. R., (A. C.) 199.

When a suit is brought to recover possession of immoveable property, and the decree does not provide for the mesne-profits that accrued during the suit, a separate suit may be maintained for them. Where, however, it can be shown that the omission in the decree to provide for mesne-profits was the deliberate act of the Court, the defendant may set that up as a defence in the separate suit.—6 Bom. H. C. R., (A. C.) 109.

As a purchaser at an auction-sale held by a Court only acquires the right, title, and interest of the judgment-debtor in the property sold, a plea of limitation that would be good against the judgment-debtor is good also against the purchaser. When a person fails to establish a prescriptive title in a suit in which he is plaintiff, it does not follow that the defendant is entitled to recover the subject of such suit in an action brought by him.—6 Bom. H. C. R., (A. C.) 220.

A suit was brought against T and an *ex parte* decree obtained against him. An application by T to have the decree set aside was dismissed. The defendant afterwards applied to have the attachment and all the proceedings set aside and declared null and void. *Quære*.—Whether the former refusal to set it aside would be a bar to prevent the setting aside by the Court.—7 Bom. H. C. R., (O. C.) 150.

A decree passed in a suit in a Small Cause Court in which a question of title is incidentally dealt with is not a bar to a suit for a general declaration of title.—8 Bom. H. C. R., (A. C.) 23.

The plaintiff sued to recover certain land, on the ground that he had been forcibly dispossessed of it by the defendant. As the plaintiff did not prove the alleged dispossession his claim was rejected, but the Court suggested that he might recover in a fresh suit, treating the defendant as a trustee, and offering to make certain payments to him. The plaintiff then filed a fresh suit, framing it in the manner indicated by the Court. *Held* that the latter suit, being based on a different cause of action from the former, was not barred, and that the question at issue between the parties was not *res judicata*.—8 Bom. H. C. R., (A. C.) 89.

In 1864 the original plaintiff, L, as heir of F, brought a suit against J (the guardian of F), A, B, and C, to recover a piece of land. The suit was rejected as it was proved that (though the plaintiff was the heir of F) F's guardian had mortgaged the land for necessary purposes to C, the two defendants A and B being merely tenants of C. The plaintiff then sued C for redemption of the Mortgaged premises, *Held* that the second suit was not barred under sec. 2 of the Code of Civil Procedure. *Held*, also, that the fact of the document under which C held the land being described in the Court's judgment in the earlier suit as an instrument of sale, was not conclusive in the second suit as to the real nature of the instrument.—9 Bom. H. C. R., 65.



S, the mortgagee of a talukdari village, obtained a decree upon his mortgage against his mortgagor, the talukdar of the village, under which S attached the village. The Collector of the district in which the attached village was situated thereupon came in under sec. 246 of the Civil Procedure Code, 1859, and sought to raise the attachment, but, as he failed to appear when the matter came on for adjudication, his application was dismissed. The village was then sold under the decree and was purchased by S, the mortgagee. Upon S seeking to obtain possession of the village, he was resisted by the Collector, whereupon S (after proceedings ineffectually taken by him under sec. 269 of the Code) filed a suit against the Collector praying to be put in possession of the village. *Held* by the Appellate Court (affirming the decision of *Tucker, J.*) that the right of S to be put in possession of the village was, as between him and the Collector, *res judicata* by reason of the dismissal of the Collector's application under sec. 246 of the Code (to set aside which dismissal the Collector had not filed a suit within the year allowed for that purpose), and that S ought therefore to have been at once put in possession of the village without further proof of his title.—9 Bom. H. C. R., 205.

A mortgagee is not affected by the order of a Mamlatdar made under Bombay Act V of 1864 on the application of the mortgagor for possession subsequent to the date of the mortgage.—9 Bom. H. C. R., 275.

If the plaintiff's cause of action might and ought properly to have been made a ground of defence in a former suit, brought against him by the defendant, his suit is barred by sec. 2 of Act VIII of 1859. The father of A and B having died, A alleging that his father's assets amounted in value to Rs. 12,000, and admitting that he (A) had received Rs. 1,000, part thereof in 1866, sued B whom he alleged to be in possession of the rest of the property, for Rs. 5,000, as the residue of A's share, and obtained a decree for a half share in immoveable property of their father of the value of about Rs. 700, and no more. In 1871 B sued A for a moiety of the Rs. 1,000, which A, in his suit in 1866, had admitted to be in his possession. *Held* that such a suit could not be maintained, as the claim on which it was founded must be deemed a *res judicata* in A's suit in 1866.—10 Bom. H. C. R., 293

Failure in a suit of simple ejectment does not bar a subsequent suit for redemption, notwithstanding that the defendant had asserted the existence of his mortgage in the former suit.—11 Bom. H. C. R., 224.

The fact that a person failed to establish a prescriptive title in a suit in which he was plaintiff does not debar him from defending his right of possession against another plaintiff suing him for the property.—6 Bom. H. C. R., (A. C.) 220.

So long as a decree subsists unreversed and unvaried, the parties thereto and those claiming under them are bound by it, and no effect can be given to any prior agreement regarding the same matter on the ground that the terms of the decree differ from those of the prior agreement, notwithstanding that the parties had requested the Court which passed the decree to draw it up according to the terms of the agreement.—8 Bom. H. C. R., (A. C.) 241.

Two applications before a Collector, the one by defendants, asking an amendment of the Collectorate record by expunging therefrom plaintiff's names, as being out of possession, and which, after evidence taken, was ordered to be done, and the other by plaintiffs, praying a partition under Act XIX of 1863, which was refused, on the ground that they had not establish-

ed their possession, were held not to be such an adjudication of rights as to be a bar to a suit by the plaintiffs for establishment of right to and possession of the land referred to in such application.—2 N. W. P. H. C. R., 64.

G executed a deed of gift of his whole property in favour of J. J sued for possession and obtained a decree. On the death of G, his heir sued to set aside the deed of gift, alleging that, notwithstanding the decree, J did not obtain possession till after the death of G, and that the deed of gift was, under the Imames law, invalid. *Held* that this might have been a good defence on the part of G to the suit brought against him by J, but that after the decision of that suit, it was not open to G to dispute the title of J, nor was it now open for his heir to do so.—5 N.-W. P. H. C. R., 118.

The plaintiff sued to enhance the rent of the defendant's holding. In a former suit between the parties which the defendant had brought to determine the plaintiff's right to enhance, it was held that the plaintiff was not entitled to enhance. *Held* that the decision in the former case was rightly admitted as conclusive evidence in the present case as to the plaintiff's right to enhance.—5 N.-W. P. H. C. R., 163.

Where a person became security for the due payment of rent by a third party, and on default of such payment the creditor sued both the principal debtor and the surety in the Revenue Courts for the amount owing, and such suit as against the surety was an appeal thrown out by the High Court on the ground that the Revenue Courts had no jurisdiction to entertain it, and the creditor then sued the surety in the Civil Courts, *held* that the proceedings instituted in the Revenue Courts were no bar to the entertainment of this suit.—6 N.-W. P. H. C. R., 77.

B sued on a bond to recover its amount and to enforce a mortgage lien. He obtained only a money-decree on the 26th August 1871. D, who also held a decree against the same debtor, caused a portion of the property which had been included in the plaintiffs' mortgage to be brought to sale. B instituted a second suit on the 21st January 1873, to enforce the lien. *Held* (in accordance with the opinions of Turner, Oldfield, and BROADHURST, JJ., STUART, C. J., and PEARSON, J., dissenting) that the suit was unmaintainable.—7 N.-W. P. H. C. R., 17.

Where a Court, without jurisdiction, decreed a claim by a landholder for arrears of enhanced rent, and the tenant subsequently sued to remove an attachment based on the decree, it was held that the decree could not be regarded as binding on the parties, and the second suit should have been tried and disposed of on its merits.—7 N.-W. P. H. C. R., 99.

R obtained, on the 7th January 1862, a decree declaring a deed of sale in his favour, dated the 7th January 1854, to be a genuine, authentic, and valid instrument. The question whether the sale was changed into a conditional sale or mortgage by an agreement entered into by him with the vendors on the same day that the deed of sale was executed, could not be raised by any of the parties to that suit or their representatives in a suit brought by R to obtain proprietary possession of the subject of the sale, in virtue of the deed and the decree.—7. N. W. P. H. C. R., 149.

M brought a suit to obtain her share of the entire property of A, her deceased father. It was pleaded, with respect to a certain portion of the property, that A had made it over by parol gift to his minor son. The case came before the High Court on special appeal, when it was contended on behalf of M, the appellant, that the gift was not proved, and that some portion of the property was "mush'a" (undivided), and the gift in regard to it invalid. The High Court refused to allow the last plea, which had not been



taken in the Court of first instance, to be taken in appeal, the point raised being one of fact; and as the gift had been established by evidence, dismissed the appeal. F, the purchaser of the rights and interest in A's estate of W, a defendant in the suit, brought a suit against his vendor, M, and the guardian of the minor, to obtain possession of the property conveyed by the sale in which property affected by the gift was included, and claimed the setting aside of the gift because a portion of the property conveyed by it was undivided. *Held* that his suit was not barred by sec. 2 of Act VIII of 1859.—77 N.-W. P. H. C. R., 251.

N sued M and K, claiming proprietary possession, under the Mahamedan law, of a share in certain property by right of heirship to her deceased husband. She had previously sued the same persons to recover a portion of the same property under a will of her husband, and obtained a decree which was reversed on the ground of the will being invalid. *Held* (in accordance with the opinion of the Full Bench) that the second suit was not barred by sec. 2, Act VIII of 1859.—7 N.-W. P. H. C. R., 60.

*Held* that an entry in the *wajib-ul-urz* is only good for what it may be worth as evidence, and cannot be held to be like a judgment or to require to be set aside by a regular suit subject to a limitation calculated from the date of the instrument.—1 Agra H. C. R., 233.

The dismissal of a suit in which the plaintiff had claimed a proprietary title in certain land, *held* not to bar a subsequent suit in which he prayed for a declaration that, as planter of the trees and constructor of a tank in a garden forming a portion of the land, he was entitled to retain possession of the garden and tank.—2 Agra H. C. R., 32.

*Held* that a former suit which decided the question of relinquishment of the land by defendant, a ryot, did not bar a subsequent suit, which was brought on the allegation that the land being sir land, the defendant, the occupant, had no right of occupancy, and should consequently be ejected.—2 Agra H. C. R., 93.

*Held* that a decree of the Revenue Court, in a suit for possession brought by one lessee against the zemindar, was no bar to a suit in the Civil Court brought by another lessee to obtain possession against both the zemindar and the first lessee.—2 Agra H. C. R., 127.

*Held* that the plaintiff having failed in a regular suit in 1853 to establish his right to rent, a subsequent suit for rent was not admissible, unless since that date rent was paid or his title recognized in some way.—2 Agra H. C. R., 221.

The purchaser of the conditional vendor's interest pending the suit to impeach the conditional sale must be bound by the decree on that suit.—2 Agra H. C. R., 301.

Where a widow was treated as an equal sharer in her husband's estate with her sons, and in conjunction with one son applied for partition as a sharer, and objections taken to the partition were overruled and no appeal made to the Civil Court, *held* that a suit to declare the widow only entitled to maintenance was not maintainable.—3 Agra H. C. R., 137.

Where D sued for redemption, and obtained a conditional decree, and subsequently the plaintiff sued D to establish his right to the mortgaged property and obtained a decree, *held* that a suit by the plaintiff for redemption was not barred by sec. 2, Act VIII of 1859.—3 Agra H. C. R., 144.

A former judgment, in which a certain document has been held to be genuine between a third person as plaintiff and the present plaintiff and pre-

sent principal defendant as defendants, was held to be conclusive in this suit on the point of authenticity of the document, though not a *res judicata* under sec. 2, Act VIII of 1859, in other respects.—1 Hay's Rep., 430.

In a suit for wasilat brought after a decree awarding possession to the plaintiff, the defendant cannot set up the title of a third person.—Marsh. Rep., 105; 1 Hay's Rep., 181.

Where a suit against several defendants for a joint jumma is dismissed on the ground that the jumma is several and not joint, the plaintiff is not precluded by Act VIII of 1859, sec. 2, from afterwards suing each of them severally for the separate jumma.—Marsh. Rep., 418; 2 Hay's Rep., 528.

A mortgagee can resort to all his remedies on the mortgage at the same time, and is not estopped in an action on the covenant to pay the mortgage-money by the fact of his having obtained a decree for sale.—1 Ind. Jurist, (N. S.) 370.

A brought a suit against B in the Collector's Court for rent. In answer, B set up a bond, by the terms of which A, in consideration of a loan of Rs. 10,000, stipulated that B should apply a certain portion of the annual rent to the reduction of the loan, and the payment of the interest thereon. A alleged that the bond was false. The Collector, in an issue directed by the High Court, decided that it was genuine, and this decision was affirmed on appeal. B afterwards sued A in the Civil Court upon the bond. *Held per* PEACOCK, C. J., and PHEAR, J. (CAMPBELL, J., *dissentiente*), that the Collector's decision as to the genuineness of the bond did not operate as an estoppel. The two Courts were not Courts of concurrent jurisdiction. *Per* PEACOCK, C. J.—*Quære*—Is a judgment of a Court of concurrent jurisdiction between the same parties on the same point conclusive between the parties in another Court in the country?—2 Ind. Jurist, (N. S.) 264; 8 W. R., 175.

A case struck off on the ground of discrepancy between the plaint and the plaintiff's deposition cannot operate as a *res judicata*.—W. R., 1864, 163.

A decision in a former case, in which a mere question as to the use of the water in a water-course arose, cannot operate as *res judicata* in a subsequent case, in which the subject-matter is whether the defendants have the right of throwing up an embankment and obstructing the water-way.—W. R., 1864, 167.

In such a suit a Collector had no jurisdiction to try whether a title under a grant made prior to the 1st December 1790 was valid or not.—W. R., (F. B.) 70.

A suit by a zemindar to assess or resume land alleged to be invalid lakhiraj, under sec. 28 of Act X of 1859, had to be brought in the Revenue Courts.—1 W. R., 31.

The dismissal of a suit for rent is no bar to suit for title and possession with mesne-profits.—1 W. R., 99.

A decree of a Civil Court in a suit concerning the title is not of itself in all cases a bar to a suit against a tenant for rent by the person against whom such decree has been obtained. When the decree clearly adjudicates against the plaintiff's right, and the Collector sees that it relates to the property in question and is in force, the Collector should give effect to the decree as a bar to the plaintiff's suit for rent, notwithstanding that the plain-

tiff may have an actual receipt of rent prior to the institution of the suit.—1 W. R., 331.

A finding in one suit to which A was a party is no bar against A in another suit, unless it is shown that the issue in question in the latter was raised in the former suit, and was a material issue in it.—2 W. R., 79; 2 Agra H. C. R., 192; 16 W. R., 85.

The dismissal of a suit for rent in the Revenue Court for want of jurisdiction (the plaintiff not having proved that he was *de facto* landlord in possession) was held not to bar a suit in the Civil Court for declaration of right to the same rent.—2 W. R., Act X 1859, 103; 3 W. R., 176.

A decree of a Revenue Court awarding arrears of rent for a certain year under a kabuliyat against a raiyat does not bar the jurisdiction of the Civil Courts in a suit brought by him for a declaration of his title as laknirajdar in the same land.—3 W. R., 227.

A Civil Court is not bound by a Magistrate's view of the genuineness of a document.—5 W. R., 26; 5 W. R., Cr., 50; Marsh. Rep., 43; 1 Hay's Rep., 75.

The conviction in a criminal case is not conclusive evidence in a civil suit for damages in respect to the same act.—5 W. R., 27.

The Tipperah Rajah's Court was a Court of competent jurisdiction within the meaning of sec. 2, Act VIII of 1859. A decision given there bars a fresh suit in respect of the same matter in a British Court.—6 W. R., Civ. Ref., 31.

Where a Deputy Collector declined jurisdiction in a suit for ejectment under sec. 28, Act X of 1859, and the appeal against this decision to the Judge was dismissed, *held* that that decision was no bar to a suit for ouster in the Civil Court, either in the way of *res judicata* or otherwise.—7 W. R., 97.

A possessory suit under cl. 6 of sec. 23 of the Rent Act, 1859, by a raiyat against his zemindar, did not bar a suit for confirmation of title by the intervenor in that suit.—7 W. R., 469.

The decision of a Collector on a question of possession and of the right to receive the rent, does not bar an action in the Civil Courts to try the title of the parties.—8 W. R., 68.

A decree made in favour of a plaintiff in a suit is binding upon the defendants collectively and severally, notwithstanding any of them was made a defendant only *ikhteatun*, i. e., by way of precaution.—8 W. R., 366.

A Collector's judgment as to the genuineness of a patta could not be pleaded as an estoppel in the Civil Court in an action for ejectment on account of trespass.—8 W. R., 487.

A fresh suit will not lie to determine an issue left untried by the Judge. The plaintiff's remedy, where such is the case, should be by special appeal to the High Court.—9 W. R., 524.

When a Court of competent jurisdiction in deciding upon a particular subject-matter thinks it necessary to go into collateral facts for the purposes of its decision, its opinion on those facts is not conclusively binding in a subsequent suit which relates to a different subject-matter.—9 W. R., 592.

A suit for a kabuliyat in which the rate of rent is the subject-matter, and the question of the right of occupancy is not the main point, is not an estoppel to a suit for repossession, under cl. 6, sec. 23, Act X of 1859.—9 W. R., 595.

The Court of the Rajah of Independent Tipperah was not a competent Court within the meaning of sec. 2, Act VIII of 1859.—10 W. R., 337.

Where a suit had been struck off the file on default under the old law, Reg. XXVI of 1814 ("kharij" being the word used), it was held that there was no "decision" such as is contemplated by sec. 148 of the Civil Procedure Code, 1859.—11 W. R., 250.

A plaintiff's failure in a former suit to establish his claim with reference to a different property from which he was dispossessed on a different date cannot render a subsequent suit inadmissible under the provisions of sec. 2, Act VIII of 1859, even though the title set forth in both the suits is identical.—11 W. R., 382.

A litigant is bound to disclose all his titles at once. He cannot be allowed to keep back one, and then, years after, to bring a fresh suit on the ground that he had still a right in reserve.—12 W. R., 55; 15 W. R., 168.

A previous decision against one member of a family suing to recover his own share of certain property is no bar, under sec. 2, Act VIII. of 1859, to a suit by the receiver in the name of the whole family to recover the whole property.—12 W. R., 117.

An affirmation in general terms of the right of a plaintiff in a suit which was based in some measure, upon certain documents, is not such a decision between the parties as precludes the defendant from raising a question as to the genuineness of these documents in a subsequent suit between the same parties.—12 W. R., 525.

A previous suit against the same defendant on a bond having been dismissed on the ground that plaintiff had failed to prove the execution of the bond, defendant sued to recover the identical sum as a balance due on a khatta account. *Held* that the second suit was not brought on a cause of action previously tried and determined between the parties, and was cognizable by the Court of Small Causes.—13 W. R., 97.

Where a plaintiff's claim to have a property declared ijmalee had been dismissed in a former suit, his suit for a partition of the same property was held to be barred against a defendant who had been a party to that suit, as well as against defendants who were not in possession.—14 W. R., 195.

Where a party claiming certain land by right of pre-emption failed to set up her rights in a suit in which the purchaser of that land sued her for possession and obtained a decree, it was held that she was not entitled to bring a fresh suit to enforce the same rights.—14 W. R., 272.

In a suit to recover possession on the ground of illegal ejectment, a Collector has no jurisdiction to inquire into any matter having reference to the rights of the parties so as to bar a subsequent suit for them.—14 W. R., 301.

Where, for the purposes of a rent-suit, a Revenue Court found that a kabuliyat propounded by the plaintiff was a genuine document, such finding was no bar to a Civil Court trying the question of right between the parties, and for that purpose trying the validity and genuineness of the kabuliyat.—15 W. R., 32.

In a special appeal the general affirmation of a judgment can only refer to the points raised by the appellant, the rejection of the appeal not necessarily affirming the other findings of fact or law incidentally arrived at by the Lower Appellate Court.—15 W. R.,

A plaintiff's cause of action is a very different thing from his title; the one being something done contrary to his interest, which obliges him to seek the aid of a Court of justice, the other being the proof that that something affords him a valid ground for relief.—15 W. R., 168.

*Held* (MITTER, J., *dubitante*) that a suit claiming property on a title by inheritance was barred by secs. 2 and 7, Code of Civil Procedure, 1859, where plaintiff's claim on a title derived by gift had already been adjudicated upon.—15 W. R., 168.

The cause of action between two parties cannot be said to be *res adjudicata* if the first case was disposed of on an appeal on a purely technical point, even though the suit was decided on its merits in the Court of first instance.—15 W. R., 208.

The plea of set off is one form of bringing a suit, the defendant becoming in regard thereto a plaintiff, and he cannot therefore be allowed to set up a claim for which a suit had been previously brought by him and dismissed.—15 W. R., 252.

A decree in a suit for a kabuliyat at an enhanced rate was no bar, under sec. 2, Act VIII of 1859, to a suit for a declaration of the rights of the present plaintiff to hold the land in lieu of maintenance on payment of a quit-rent, which could not be tried by a Collector.—15 W. R., 424.

A suit for possession as the heir of S is not barred by sec. 2, Act VIII of 1859, because plaintiff's former claim to the same property as the heir of S's father was dismissed.—16 W. R., 264.

A suit is not barred as *res judicata* because, in a former case between the same parties, and in the same cause of action, the plaintiff, after the evidence had been recorded, but before final judgment was passed, obtained the Court's permission to withdraw the suit with reservation of leave to bring another.—16 W. R., 276.

Plaintiff, after failing in a former suit to establish her right to certain land as belonging to her patni taluk, was not allowed to fall back on a different title and bring a separate suit claiming the same land as belonging to her mirasi, the cause of action in both cases being really the same.—17 W. R., 351.

A suit dismissed as being prematurely brought is not a *res judicata* in a subsequent suit brought at the proper time.—17 W. R., 360.

Sec. 2, Act VIII of 1859, was held not to apply to a case where the present plaintiff's name was ordered by the High Court to be expunged from the list of defendants in a former suit, but, notwithstanding that order, her name by some mistake still appeared some two years afterwards in the decretal order, the onus being on the present defendant to show how that happened, and that the former suit was decided in her presence.—18 W. R., 29.

On a question of fact the decision of one Court cannot bind another in a suit between other parties.—18 W. R., 469.

The dismissal of a suit because it is considered that all the proper parties have not been joined in it, though a decision of the suit, is not a decision on the merits within the meaning of Act VIII of 1859, sec. 2.—21 W. R., 272.

A suit for ejectment, on the ground that the defendant had entered the plaintiff's land wrongfully and forcibly, having been dismissed by the Court, which found that the defendant was not a trespasser but a tenant, held that a subsequent suit by the same plaintiff, on the allegation that the

defendant was a trespasser, though lately a tenant, was not prohibited by sec. 2, Act VIII of 1859. The suit, however, was dismissed on other grounds.—22 W. R., 115.

*Held*, with reference to Act VIII of 1859, sec. 2, that where the cause of action is the same in substance in both suits, and where the former suit was so constituted that the parties to the present suit were in direct contest with each other, and had full opportunity of asserting their rights, the decision in the former suit is *res adjudicata*—e. g., decrees passed in suits for patni-rent in which the jumma payable is put in issue are decisive as to the amount of such jumma.—22 W. R., 282.

A suit for a declaration of the plaintiff's right to a chur, which they claimed as an accretion to mouzah L, was held to be barred under Act VIII of 1859, sec. 2, by a judgment in a former suit, in which they had claimed the same land as an accretion to mouzah R, because, whether by accretion to the one estate or to the other, the question in both suits was that of title by accretion. A complainant is bound to bring forward in his suit all the grounds of origin of his right. A difference in the origin of the right is not a matter which makes a different cause of action.—22 W. R., 464.

Where a suit for a share of ancestral property was decreed, but the decree was modified on appeal as regards certain immoveables so far as to be made declaratory of plaintiff's right to a specified share without any specific declaration of value, and plaintiff subsequently brought a second suit for the value of the moveables, *held* that the second suit was not barred by Act VIII of 1859, sec. 2.—24 W. R., 23.

A suit to recover possession of land, on the ground of purchase from the admitted owners, is not barred by Act VIII of 1859, sec. 2, simply because plaintiff's claim as against the same defendant was dismissed in a former suit in which he (defendant) appeared as an intervenor.—24 W. R., 248.

A plaintiff is bound to raise every title on which he can succeed and to obtain a decision upon every part of his case, and if it is found that any part of the case which he made has been neglected by the Court which tried the suit, he is not at liberty to bring a fresh suit in respect of such part.—24 W. R., 304.

If one of the defendants in a suit for possession puts in a written statement disclaiming all interest in the property in suit, and a decree is made by reason and on the faith of such disclaimer, the decree is valid against him, and he is absolutely concluded by it so long as fraud is not proved.—25 W. R., 128.

The old Privy Council and Full Bench Rulings, that a Revenue Court's decision on title in a rent suit under Act X of 1859 is not conclusive, went upon a Collector's incompetency to determine a question of title, but do not now apply to the decision of a competent Civil Court hearing a rent suit under the Rent Act, 1869.—25 W. R., 189.

Where a suit for right of way was once thrown out on the specific ground that, according to plaintiff's own statement, the road in suit was a public one, and that the Court had no jurisdiction, *held* that, as the real cause of action—namely, the obstruction of the road—was not decided in the first trial, sec. 2 of the Code of Civil Procedure did not bar a second suit for the removal of the obstruction.—25 W. R., 208.

Where, in a suit for some land, a Judge had considered it necessary to find out the boundary between two villages, and had given a decision in favour of one of the parties, who in a second suit of the same kind, but



with reference to some other land, brought in the former decision to show that the land in dispute in the second suit must be his if the finding as to the village boundary in the former suit was correct, *held* that the finding as to the village boundary in the former suit was conclusive only as to the land in dispute in the former case, but did not make the former decision conclusive as to the boundary line itself.—25 W. R., 393.

Where a joint decree, passed against several defendants, has been satisfied out of the property of one of them, and then a subsequent suit for contribution has been brought by the latter against her co-defendants in the former suit, there is nothing to prevent the defendants from showing that, as between themselves and the plaintiff, the latter alone was liable to satisfy the decree in the former suit, and that consequently they are not liable to contribute.—2 C. L. R., 406.

Plaintiff alleged a purchase of land from A and B, of which he afterwards granted them a patta, and retained them in possession, and he put in evidence a consent-decree obtained against B for arrears of rent. *Held*, in a suit brought to recover possession on the ground of the tenancy having expired, that the decree worked no estoppel against B by virtue of sec. 115 of the Evidence Act, and did not relieve the plaintiff from the necessity of proving his case completely.—1 C. L. R., 528.

When a plaintiff sues for possession and determination of right to a certain property, and to set aside an execution sale of a portion of the property on the ground of irregularity, and his suit is dismissed on the merits, a subsequent suit for possession of the property sold, on the ground that the sale was void *ab initio*, is barred as *res judicata*. *Wooma Tara Debia v. Unnopoorna Dasse* (11 B. L. R., 158) and *Periya Odaya Taver v. Katama Natchiar* (11 Moore's I. A., 50) cited and followed.—3 C. L. R., 253.

In a suit between A and B a question of title was raised and decided in B's favour in the Court of first instance, but on appeal the Judge refused to go into it, saying that B might bring a fresh suit. *Held* that a subsequent suit by B raising the same question was not barred as *res judicata*. *Watson v. Collector of Rajshahye* (3 B. L. R., P. C., 48; 12 W. R., P. C., 43) cited and distinguished.—3 C. L. R., 447.

A, alleging himself the owner of a certain garden, brought a suit for damages against B and C for forcibly carrying off fruit grown in such garden. In the suit, the question whether A was exclusively in possession of the garden was incidentally raised and decided against A. Thereupon A, who in the meantime had been ousted from possession, brought a subsequent suit, in which B and C together with others were co-defendants, in which he claimed an undivided share in the same garden. *Held* that under the circumstances the doctrine of *res judicata* did not apply, and that such suit was maintainable.—3 C. L. R., 540.

In a suit for rent and for ejectment, the defendant pleaded that his tenure was transferable and *istimrari*, and consequently protected by the Rent Law. In a former suit for arrears of previous years, in which the defendant pleaded that his tenure was *istimrari*, the plaintiff obtained a decree for ejectment on non-payment of rent within fifteen days. In that case the defendant saved his tenure by payment within the time stated. *Held* that inasmuch as the defendant might in the former suit, in which the nature of the tenure was put in issue, have urged that his tenure was both transferable and *istimrari*, he could not in the present suit be allowed to alter his defence, and rely upon the tenure being transferable. *Woomatara Debia v. Unnapoorna Dasse* (11 B. L. R., 158) cited and followed.—4 C. L. R., 51.



In order to constitute the bar of *res judicata*, it is not sufficient merely that an issue on the same point should have been raised in the former suit, although that issue may have been incidentally decided; but it must appear that the matter referred to was alleged by one party, and either denied or admitted expressly or impliedly by the other.—5 C. L. R., 251.

In 1814 litigation commenced between a zemindar and his tenants by reason of his having dispossessed them of lands held under a jote tenure, and a decree having been obtained by the tenants the zemindar assessed the jote lands at a certain rent. Subsequently this rent fell into arrear, and under a decree the jote lands were in 1836 sold in satisfaction of the arrears to J., who was put in possession in 1839. Another suit, which was pending between the tenants and their mortgagee, in which a question arose whether these jote lands were included in the mortgage, was decided in favour of the mortgagee in 1841. J, the then jote tenant, was no party to that suit, and continued in possession of his jote lands. Disputes arose, and by an order of the Sudder Court in 1845 the jote lands were directed to be put in possession of the mortgagee. In 1856 a suit was brought by J's representative to set aside that order and to recover possession of the jote lands. The Privy Council held that, as J, the jote tenant, was not a party to the suit under which the decree was made in 1841, the decree was not binding upon him or those deriving title through him, and remanded the case in order that the issue whether the land was parcel of the jote or not might be tried. *Held* that this order of remand was conclusive that the question of the title of the representatives of J to the jote lands could not be re-opened.—6 C. L. R., (P. C.) 121.

Certain lands having been divided under a butwara between A and B, who together took one portion, and C, who took the remainder, A in 1847 mortgaged his share to B under a usufructuary mortgage. In 1851 a dispute arose as to the boundaries under the butwara, and ended in C surrendering  $51\frac{1}{2}$  bighas, which B was allowed to take possession of under an *ikrarnamah* executed by A to secure the costs incurred by B in the dispute. In 1874 A sued to recover possession of a moiety of the lands held jointly by him with B, and in 1875 obtained a decree for possession and *wasilat*, no specific mention of the  $51\frac{1}{2}$  bighas being made in the decree. In execution of the decree, *wasilat* in respect of a moiety of the  $51\frac{1}{2}$  bighas was allowed, an objection by the defendant to such *wasilat* being charged having been overruled. In 1878 B sued to recover possession of the moiety of the  $51\frac{1}{2}$  bighas, which had been taken by A under his decree. *Held* that, in rejecting the objection raised by B, and allowing *wasilat* in respect of the  $51\frac{1}{2}$  bighas, the Court had interpreted the decree passed, and declared that under it possession of a moiety of the 51 bighas had been decreed and given to A, and that the suit instituted in 1878 was therefore barred. *Held*, also, that this matter having been decided under sec. 11, Act XXIII of 1861, between the parties in execution of a decree, could not be made the subject of a suit.—6 C. L. R., 215.

In 1852, T acquired a plot of land, X, under a Government grant. In 1851 N, claiming to be the owner of the adjoining plot Y, granted a lease of it to R; but in 1853 another lease of the same plot was granted by an agent of N to G. In 1859 G sued T to recover possession of lot X as being part of plot Y, and obtained a decree, against which T appealed to the Privy Council. Pending the appeal R sued G for possession of plot Y, and obtained a decree against G. Meanwhile, R having failed to pay rent, plot Y was put up for sale, and purchased by the present respondent. In 1872, the respondent, who was unable to get possession of his purchase,

obtained leave to be admitted a party respondent in the appeal to the Privy Council, and filed a case averring that the interests of the original respondents had ceased, and that he was, pending the appeal, precluded from enforcing his rights. The Privy Council held that the plaintiff G had not proved that plot Y included plot X, but they stated that they did not adjudicate upon any question of title between the respondents on that appeal, or N or any other person's interest in plot Y. The present respondent subsequently sued T's representative for possession of plot X as being parcel of plot Y. *Held*, reversing the judgment of the High Court, that the respondent's claim was *res judicata* by reason of the previous judgment of the Privy Council.—7 C. L. R., (P. C.) 308.

The father of the appellant obtained a decree against G's widow and his reversionary heirs, who had intervened in the suit for possession of property mortgaged by the widow. In the schedule annexed to the plaint the mortgaged property was described as "mouzah B, usli with dakhili,"—that is, mouzah B K and Mouzah M B,—but in the body of the plaint it was described simply as "mouzah B." On the death of plaintiff in that suit, the reversionary heirs of G sued the appellant for an adjudication of their right to 16 annas of mouzah M B, and it was found that mouzahs B K and M B were not usli with dakhili, but distinct mouzahs, and that the mortgage-deed did not include mouzah M B. *Held*, affirming the judgment of the High Court, that in the first suit the Court was called on to adjudicate upon the property as described in the body of the plaint, and not as described in the schedule annexed thereto, and that the question in the latter suit was therefore not *res judicata*.—7 C. L. R., (P. C.) 404.

Pending the final hearing in appeal of a suit for confirmation of possession of certain land, and for the recovery of the produce of such land alleged to have been carried away by the defendants, the plaintiff brought a suit, again asking for confirmation of possession, but also for the recovery of the produce which had arisen since the institution of the other suit. *Held*, the second suit, so far as it sought for the recovery of the produce, was not barred by the previous suit.—8 C. L. R., 113.

In a suit for possession of a plot of land situate in B, the plot was claimed by the plaintiff as appertaining to mouzah M, and by the defendant as appertaining to mouzah S, and each party set up a patta from the same lessor, the zemindar, in proof of his title. It was held that while the land known as B appertained to mouzah M, the patta of the defendant was prior in date to that of the plaintiff, and that the defendant therefore had the superior title. A second suit for another plot of land situate in B was subsequently instituted by the same plaintiff, and the same title put forward. *Held* that the matter in dispute was *res judicata* by the former suit.—9 C. L. R., 216.

Certain property, having been mortgaged, was sold in execution of a decree against the mortgagor, and the decree-holder became the purchaser. The mortgagee subsequently sued upon his mortgage, making the purchaser a defendant, but pending the suit the latter died, and the suit was not revived against his representatives. A decree was, in 1876, obtained, and in execution of that decree the property in question was purchased by the plaintiff, who now sued to recover possession of the same from the representatives of the purchaser at the former execution sale. *Held* that the matter was not *res judicata* by reason of the mortgage suit, inasmuch as that suit having been under Act VIII of 1859, the abatement had not the effect which such an abatement under Act X of 1877 would have had, viz., being a bar to a fresh suit in the same cause of action.—10 C. L. R., 229.

An ejectment suit by B's tenant against the defendant having been dismissed, a second ejectment suit was subsequently, after B's death, brought in respect of the same land against the defendant by the successor in title of B. *Held* that, inasmuch as a lessor cannot be considered as claiming under his own lessee, the principle of *res judicata* did not apply,—11 C. L. R., 122.

A suit for rent, in which the sole defendant denied the plaintiff's title, alleging that B and A were his landlords, having been dismissed on the ground that the plaintiff had failed to prove his title, another suit was brought by the plaintiff against A, B, and C for possession. *Held* that the suit was barred under sec. 13 of the Civil Procedure Code, 1882.—12 C. L. R., 38.

In a suit against the Maharajah of Hill Tipperah, which is an independent Sovereign State, for maintenance, it appeared that, in a former suit tried in British India in respect of the same claim, the Court had ordered the amount of the maintenance for which he gave a decree to be paid by the defendant Maharajah from his estate in R, which was in British India. *Held* that the decree in the former suit was not *res judicata* to show that the maintenance claimed in the present suit was a charge on the zemindary of Rs. 80 as to give the Court jurisdiction.—12 C. L. R., 473.

In a suit for possession of immoveable property before the Subordinate Judge, it was objected that the suit ought to have been instituted before the Munsif, the value of the property being less than Rs. 1,000. An issue having been framed on this point, other issues were also framed as to the sanity of the plaintiff, his having had possession of the property, and evidence upon all the issues was gone into. The Subordinate Judge dismissed the suit on the first issue, but expressed his opinion that the other issues ought also to have been decided against the plaintiff. In a subsequent suit by the plaintiff for the same relief in the Court of the Munsif, *held* that the questions depending on the issues raised, other than the issue as to the valuation of the suit, were not *res judicata*.—13 C. L. R., 83.

Suit to establish plaintiffs' title to certain land alleged by the defendants, who were the Secretary of State for India in Council and the natamaigar of a certain village, to be maniyam land attached to the office of the second defendant, and previously held to be such by a Revenue Court:—*Held*, the Court was not precluded either by Regulation VI of 1831, sec. 3, or by the decision of the Revenue Court from granting the declaration prayed for.—I. L. R., 13 Madr. 41.

In a summary suit filed by a landlord against his tenant in the Court of the Deputy Collector under the Rent Recovery Act (Madras), sec. 9, to enforce acceptance of a patta by the defendant, it appeared that, in a former suit between the same parties in the same Court, it had been decided that the defendant was the plaintiff's tenant and as such bound to accept a patta from him in respect of the land in question in the present suit:—*Held*, that the defendant was not entitled in the present suit to dispute the plaintiff's title, since the former decision constituted it *res judicata*.—13 Madr. 287.

A suit for partition of certain land was withdrawn as against one of the defendants who was entitled to a part of the land. The plaintiff and the remaining defendants entered into a compromise in the terms of which the Court passed a decree for delivery of a share of the land to the plaintiff. The decree-holder having died without executing the decree, his heir now sued for partition of the land and delivery of the above share, joining as defendants the various persons entitled to shares:—*Held*, that the decree in

the former suit could only operate as a declaratory decree and did not preclude the plaintiff from bringing the present suit.—13 Madr. 313.

A suit for land was dismissed in 1886 on the plaintiff's failure to comply with an order to pay a fee for the appointment of a commissioner to value the land. No issues were framed in the suit, and the order directing payment of the fee prescribed no time within which it was to be made. The plaintiff now sued the defendants again for the same land :—*Held*, that the claim was not *res judicata*.—13 Madr. 510.

G brought a suit against I for the establishment of her rights as purchaser of certain immoveable properties sold in execution of a decree obtained against I, and for possession of the same. After the settlement of issues but before the suit was finally disposed of, I died, and his brother J was made defendant as his legal representative. J consented to the suit being tried on the defence raised by I and upon the issues already settled. The suit was decreed, it being held that G was the purchaser. In execution of this decree, in which G sought to obtain possession. J objected that he was entitled to a half share of some and to the entire sixteen-annas of the other properties, and that his brother I had no right whatever in the same. This objection was disallowed by the Court executing the decree, on the ground that it had been raised in the original suit, and that, as the decree had been passed in the presence of the party then objecting, he was not entitled to urge it. Thereupon J brought a suit against G to establish his rights. The defence was that the order passed in the execution-proceedings, disallowing the plaintiff's objection, was a bar to the suit under secs. 13 and 244 of the Civil Procedure Code. *Held*, that the order disallowing the plaintiff's objection did not operate as *res judicata* under sec. 13 of the Civil Procedure Code. *The Delhi and London Bank v. Orchard*, I. L. R., 3 Cal. 47; L. R., 4 I. A., 127, relied on. *Held*, also, that this order was no bar to the suit under sec. 244 of the Civil Procedure Code. *Kanai Lall Khan v. Shashi Bhosun Biswas*, I. L. R., 6 Cal., 777; 8 C. L. R., 117, followed.—17 Cal. 57.

The refusal of an application for the filing of an award, under sec. 525, Civil Procedure Code, merely leaves the award to have its own ordinary legal effect; and it cannot be contended that an award is not to be relied on as a defence in a suit relating to the subject-matter dealt with by it, only because such an application has not been granted. Separable claims, viz., (a) to share property by right of inheritance, and (b) for the office of *lumberdar*, had been disposed of, on the reference of the present parties, without the intervention of a court by an arbitrator's award between them. An application under sec. 525 had been rejected, for the reason, among others, that (b) was not a matter of civil jurisdiction. *Held*, however, that the present suit, which was grounded on (a), was barred by the award made.—18 Cal. 414.

A as *ticcadar* brought a suit to eject B from certain lands, which he had claimed as *majhes* land, or land which is ordinarily cultivated by the landlord himself or by the *ticcadar*. B pleaded his right of occupancy. The Court found that the land was *majhes* land, but dismissed the suit on the ground that A had failed to prove notice to quit. Afterwards A brought a suit against B for ejectment from the same land. B again pleaded his right of occupancy. *Held*, that B was not precluded from raising the same plea, inasmuch as the finding in the previous suit upon the issue whether B was an occupancy tenant was not conclusive against him; nor could that issue be said to have been "finally decided" in that suit within the meaning of sec. 13 of the Civil Procedure Code.—18 Cal. 647.

In 1874 the plaintiffs' father filed a suit against the defendants for partition of joint family property. The subject-matter of the suit was referred to arbitration out of Court. The arbitrators made an award to the effect that partition should be postponed till the family debts were paid off. The award was accepted by all the sharers, and so the plaintiffs' father withdrew his suit. In 1880 the debts were paid off. Thereupon the plaintiffs' father demanded partition, but was refused. He therefore filed a partition suit in 1883 against the defendants. In his plaint he made no mention of the award of 1874, but relied on his right as a co-parcener to enforce partition. After the settlement of issues he applied for amendment of the plaint, so as to include his claim on the award. The Court refused the amendment, on the ground that it would materially alter the character of the suit, and dismissed the suit, as barred under sec. 373 of the Code of Civil Procedure (Act XIV of 1882). Against this decision plaintiffs' father did not appeal. In 1884 the plaintiffs filed the present suit for partition, relying expressly on their title under the award of 1874. *Held*, that the suit was not barred by the plea of *res judicata*.—14 Bom. 31.

The plaintiff purchased two distinct plots of land (A and B) from one Gopal by a deed of sale dated 30th September, 1875. In 1884, in execution of a decree against Gopal, plot A was attached and sold as his property, and purchased by the defendant. The plaintiff did not intervene, and at that time took no steps to establish his alleged right to this land. In 1885 the defendant obtained another decree against Gopal, and in execution attached plot B. The plaintiff intervened, and claimed the property attached as his own under the sale-deed of 30th Dec. 1875. The defendant disputed the sale, but the Court found in favour of the validity of the sale-deed, and allowed the plaintiffs claim. The defendant did not file a suit to set aside this order. The plaintiff then filed a suit to establish his title to plot A, relying on his sale-deed of the 30th December, 1875. The defendant again disputed the sale, pleading that it was a colourable and fictitious transaction. *Held*, that the order in the execution proceeding did not operate as *res judicata*, and did not estop the defendant from contesting the validity of the sale-deed in the present suit. *Per JARDINE, J.*:—If the decision as to the validity of the deed had been a final decision in a suit as distinguished from an execution proceeding, it would have created an estoppel by *res judicata*. Between the parties the orders to which sec. 283 of the Civil Procedure Code refers, are subject to the result of a suit, if any, conclusive, but this conclusiveness exists only as regards the particular property in dispute.—14 Bom. 206.

The plaintiff and defendant in a suit each appealed separately, and defendant's appeal first came on for hearing, and an issue as to whether the plaintiff or the defendant had title to the land in dispute was decided on the facts by the appellate Court adversely to the defendant. Subsequently, the plaintiff's appeal, involving the same issue, came on for hearing before the same Court. *Held* that although sec. 13 of the Civil Procedure Code did not apply, still the principal of *res judicata* applied, and the finding on the former appeal barred the trial of the same issue in the latter. *Ram Kirpal v. Rup Kuari* referred to.—12 Al. 578.

The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate, by the defendants. The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against the same defendants for the rent of the same tenures, and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in



that suit was that the present defendants were in possession, and were liable to pay to the then plaintiff his share of the rent. *Held* (MITTLE, J., dissenting) that the decree in the former suit was not a *res judicata* or even admissible as evidence in the present suit.—13 Cal. 352.

R, a Hindu widow, granted a *jungleburi* tenure to certain tenants in respect of a *chur* belonging to her husband's estate. An *amulnama* was granted to the tenants signed by a *karpardaz* of R in respect of the tenure. R died in January 1861, and was succeeded by J and P, two daughters, the last of whom died on the 31st December 1880. On her death the grandsons succeeded to the estate. On R's death J and P got possession of all estate papers, and amongst them a *dowl* granted by the tenants in return for the *amulnama*. In 1865 proceedings were taken by the tenants to obtain *kabuliyats* on the footing of those documents, which proceedings came to an end in 1868. In 1873, J and P instituted suits against the tenants, alleging the *amulnama* and *dowl* to be forgeries, and seeking to enhance the rents payable to them, as well as to have it declared that R's acts did not bind them. In these suits it was found that J and P had all along been aware of the claim made by the tenants that they held a permanent tenure, and the suits were dismissed on the ground that it was too late for J and P, after the lapse of twelve years from R's death, to raise the question. In 1884, D, a receiver, instituted a suit in the names of the grandsons to eject the tenants on amongst other grounds that the grandsons' reversioners were not bound by R's acts, and that the *jungleburi* tenure was not binding on them; that the tenants were middlemen and had no right of occupancy; that at all events the plaintiffs were entitled to rent on the area of land then held by the defendants, as there had been large accretions to the amount covered by the *amulnama* and *dowl*. The defendants amongst other things pleaded limitation, *res judicata*, and that R had the power to grant the *jungleburi* tenure so as to bind the reversioners. *Held* that, being middlemen, the defendants had no right of occupancy, and that, were the suit not dismissed for other grounds, they were liable to have the rent assessed on the whole amount of lands held by them, which was in excess of that covered by the *amulnama* and *dowl*. That the suit was not barred by *res judicata* as in the suits brought by J and P, the question of whether R's acts bound the reversioners was never decided. That the suit was barred by limitation. Adverse possession began to run on R's death (as J and P who represented the estate were then well aware that the tenants claimed to hold the lands under a permanent lease, and though J and P received rent, the possession of the tenants was adverse to them), and more than twelve years elapsed before Act IX of 1871 came into force, and therefore the defendants had then obtained a good title by adverse possession as against all the reversioners which could not be defeated by the provisions of the subsequent Limitation Acts of 1871 and 1877. *Held*, further, that the question whether a *jungleburi* tenure granted by a Hindu widow is binding on reversioners depends on the circumstances of the land. *Quære*.—Whether such a tenure granted in respect of a *chur* where no legal necessity on behalf of the widow is shown could under any circumstances be binding on the reversioners.—14 Cal. 323.

A zemindar, having granted a putni lease, mortgaged the zemindari to the putnidar, who, having afterwards obtained a decree against the zemindar upon the mortgage, attached and purchased, at the sale in execution, the zemindari interest, subject to the mortgage. Before that purchase, though after the attachment, another holder of a decree against the zemindar brought the right, title, and interest in the zemindari to sale in execution of his decree, and himself became the purchaser. He then, claiming to have

obtained the zemindari estate, sued the putnidar for rent due under the lease. This suit was dismissed, save as to rent due for the time intervening between the two sales in execution, on the ground that the relation of zemindar to lessee had ceased on the purchase by the latter. The present suit was brought by the purchaser from the zemindar, stating his title, acquired at the prior of the two sales, and claiming to redeem the mortgage. *Held* that the dismissal of the rent, suit which involved the title, barred the present one; and the opinion was expressed that the plaintiffs had been rightly adjudged in the rent suit to be bound by the proceedings taken by the mortgagee, pending which the purchase relied upon had been made.—15 Cal. 756.

The present suit was preceded by others in which the plaintiff sought to establish a right in the same part of the talukdari estate that he now claimed to redeem from mortgage. The first suit in which he with another claimed as under-proprietors was dismissed in 1866 on the ground that they had not shown themselves to have held such right under the talukdars within the period since 1841. Proceedings not to be regarded as judicial, subsequently taken under Circular 4 of 1867, resulted in a finding that the dismissal was right upon the merits, the property having been transferred to the talukdar by a conditional sale which had become absolute. Another suit was then brought to recover the talukdari right, under the terms of Circular 106 of 1869, it being alleged that arrears of revenue paid by the talukdar had been paid on the plaintiff's account. That suit was also dismissed. *Held* that the present suit to redeem the same property under a mortgage was not barred under sec. 13 of Act X of 1877, as amended by sec. 6 of Act XII of 1879. The claim to redeem did not arise out of the former cause of action within the meaning of the section 7 of Act VIII of 1859 relating to the inclusion of the whole claim in a suit. The plaintiff not then being aware of his right when he sued before, it could not be regarded as a "portion of his claim," and he was not precluded, by having omitted it, from bringing it forward.—15 Cal. 800.

The widow of a talukdar, acting under his supposed will, appointed the present appellant to succeed to the taluks and other estate which had belonged to the deceased. The heir of the deceased, under the Oudh Estates' Act, I of 1869, obtained the judgment of the judicial Committee, declaring that he was entitled to the taluks as against the present appellant, whose title was under the will, which had been revoked, as the Committee found. Another suit brought by the present appellant for a decree declaring that, in virtue of his appointment by the widow under the will, he was entitled to the whole of the estate of the deceased, talukdari and non-talukdari, was dismissed by the judicial Committee on the ground that he had no such title to the whole or any part of the estate. *Held* that this prior judgment was conclusive to bar the present suit which, being founded entirely upon the appellant's appointment in pursuance of the will, was brought for possession of all the estate of the deceased as well as a declaration of right thereto. Although the heir was not entitled to possession of the estate of the deceased other than talukdari, inasmuch as the widow took her estate therein, nevertheless the claim of the present appellant being only founded upon her appointment under the will, as if unrevoked, and not being a claim for property as descending to the widow upon her husband's intestacy, the prior judgment was binding in the present suit.—15 Cal. 808.

The dismissal of a suit in terms of sec. 102, Civil Procedure Code, is not intended to operate in favor of the defendant as *res judicata*. When



read with sec. 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favor. Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree declaring that a gift, before then made by the widow in favour of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of secs. 102 and 103 (Act X of 1877), Civil Procedure Code. *Held* that the causes of action in the two suits were not identical, and fresh suit was not precluded by sec. 103, the gift having afforded the new ground of claim, which also had subsequently arisen.—16 Cal. 98.

A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebait, and providing that "the family of us five brothers shall be supported from the *prasad*," "offerings to the deity." One or other of the brothers then for some years managed the estate as shebait, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait. In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it. *Held*, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb-sheba*, and maintaining the rights of members of the family under the will, this suit was barred under sec. 13 of Act X of 1877 as to all but the claim to be shebait. The plaintiff's claim to a preferential title to this office depended on a sentence in the will constituting, as construed by the Courts below, to be shebait the senior in age of the heirs of the original shebait, the defendant now holding the office coming within this provision according to the judgments of both Courts. As to this no reason had been shown in appeal for a different conclusion.—16 Cal. 103.

To apply the law of estoppel by judgment, stated in sec. 6 of Act XII of 1879 and in sec. 13 of Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided; for which purpose the judgment must be looked at. The decree is usually insufficient for showing this, as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided. This suit was to establish a right to land, and for possession, against two defendants, who alleged their rights respectively. The claimant had previously obtained a decree against one of the defendants, and in that decree the land now claimed had been excepted. *Held* that the matter now in issue, not having been directly and substantially in issue in the prior suit, the present suit was not barred under sec. 13, Act XIV of 1882, Civil Procedure Code.—16 Cal. 173.

The decision of an issue in one of two suits tried together, which is not appealed against, cannot be treated as *res judicata* so far as the same issue is concerned in an appeal from the decision in the other suit. A, a *ticcadar*, sued B for rent in respect of a holding in the *ticca*. In that suit B pleaded that he was a partner of A in the *ticca* transaction, and that no rent was due from him in consequence thereof. B then sued A for an account of the partnership in the same transaction, and A, in that suit denied the partnership. Both suits were heard together by the Munsiff who held A was not a partner. B appealed against the judgment and decree in the account suit, but did not appeal against that in the rent suit. It was contended on the appeal that the question as to whether B was or was not a partner was *res judicata*, by reason of the decision in the rent suit not being appealed against and having become binding. *Held* that sec. 13 of the Code of Civil Procedure did not apply, and that the question was not *res judicata*. There was no bar at the time the issue was tried and decided by the Munsif, and the Appellate Court was bound to decide the appeal upon the evidence.—16 Cal. 233.

A mere statement of an alleged rate of rent in a plaint in a rent suit in which an *ex parte* decree has been obtained, is not a statement as to which it must be held that an issue within the meaning of sec. 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree. Neither a recital in the decree of the rate of rent alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*, assuming that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case.—16 Cal. 300.

In September 1886 the plaintiff sued in a Munsif's Court certain defendants for possession of one biggah of land, and for damages for the cutting and carrying of certain paddy from such land on the 23rd December 1885. This suit was dismissed on the ground that no dispossession had taken place, the plaintiff being referred to a Small Cause Court for his damages. No appeal was made against this decision. In March 1887 the plaintiff sued these defendants in the Munsif's Court for possession of 5 biggahs 6 cottahs of land and for mesne-profits, and obtained a decree for possession of 3 biggahs 6 cottahs of land with mesne-profits; possession of the one biggah, the subject of the suit of 1886, being included in the 3 biggahs 6 cottahs decreed. He subsequently sued the same defendants in a Small Cause Court for damages for the paddy cut and carried on the 23rd December 1885. *Held* that such suit was not barred by either sec. 13 or sec. 43 of the Civil Procedure Code.—16 Cal. 545.

B sued L N and P V to recover certain property claimed under a nuncupative will of his father N. P V denied the will and alleged that the property was ancestral and had vested in him by survivorship. L N set up title to the property under a will in writing executed by N and denied the title both of B and of P V. The question whether P V was divided or not from N was tried. It was found that the will in writing was valid, that P V was divided, and that B's title was not proved. In a suit by L N against P V to recover certain land granted to her by the will executed by N:—*Held* that the question whether P V was divided from N was *res judicata* under sec. 13 of the Code of Civil Procedure by reason of the decision in the former suit, although in that suit P V and L N were both defendants.—11 Madr. 204.

Where the uraima right over a certain devasam was vested in five trustees representing different illams, and a suit was brought by one of the trustees to recover certain property alleged to have been illegally alienated by three other trustees to a stranger and dismissed :—*Held* that the decree in such suit was a bar to a second suit brought for the same purpose by the fifth trustee, who had not been a party to the former suit, on the ground that he must be deemed to claim under the plaintiffs in the former suit within the meaning of sec. 13, expl. v., of the Code of Civil Procedure.—11 Madr. 191.

A Hindu widow obtained a decree in 1876, which provided that she should receive future maintenance annually at a certain rate, but did not specify any date on which it should become due. In 1887 she filed the present suit claiming arrears of maintenance at the rate fixed in the decree of 1876. *Held*, that the suit did not lie. *Sabhanatha v. Lakshmi* (I. L. R., 7 Madr. 80) distinguished.—12 Madr. 183.

A suit for two declarations filed in a Subordinate Court was valued by the plaintiffs at a sum in excess of the pecuniary jurisdiction of a District Munsif. It was pleaded that the matter in dispute was *res judicata* by reason of decrees passed in District Munsifs' Courts. No objection was taken in the Subordinate Court to the valuation of the suit. *Held*, that the plea of *res judicata* failed. *Per* MUTTUSAMI AYYAR, J.—For the purposes of jurisdiction the value of a suit for a mere declaratory decree must be taken to be what it would be if the suit were one of possession of the property regarding which the plaintiff seeks to have his title declared.—12 Madr. 323.

The karnam in a certain mitta sued to recover certain land as part of the *mirasi* property attached to his office. It appeared that the plaintiff's father and predecessor in office had sued by virtue of his office to recover the same land and that his suit had been dismissed. *Held*, that the plaintiff's claim was *res judicata*.—12 Madr. 235.

In 1883, A, the trustee of a certain charity, executed in favour of X and Y an agricultural lease for nine years and delivered over possession of the lands comprised in it, being part of the trust property. The lease contained a provision that it should be cancelled on default being made in payment of the rent and kist, and it contained no express covenant for quiet enjoyment. In 1887 default was made in payment of the rent and kist. A thereupon cancelled the lease and sued X and Y in a subordinate Court and obtained a decree for the arrear, the total amount of his claim being Rs. 2,807. In that suit X alleged that Y was merely a name-lender for A, who desired to benefit himself at the expense of the charity, and also that certain raiyats setting up a false claim had evicted X from the lands demised at the instigation of A, who had subsequently sought unsuccessfully to obtain further advantages for himself. The Subordinate Judge framed an issue on each of these allegations and recorded findings in the negative. In the same year X filed a suit for damages for breach of contract against A and Y in the High Court, repeating in his plaint the above allegations. When that suit came on for hearing, it was dismissed for default, Y being the only party who appeared. X now sued A again on the same cause of action, making the same allegations. Y was subsequently brought on to the record as being a necessary party to the suit, being joined as second defendant, but he applied to be and was struck off the record on the ground that the dismissal of the former suit in the High Court was final as against him :—*Held*, (1) that the suit was not bad for the non-joinder of the co-lessee as a plaintiff, nor for the reason that the plaintiff could not prosecute the suit against him ; (2) that the matters put in issue in the Subordinate Court

were not *res judicata* by reason of the decision of that Court; (3) that the plaintiff disclosed a good cause of action against the lessor; (4) that even if the plaintiff had substantiated his allegations against his lessor, he would not have been entitled to recover the cost of civil and criminal proceedings against the raiyats who had evicted him.—15 Madr. 111.

In 1863 Balaji and Gyanu mortgaged certain land to one Gopal under a mortgage deed, which provided that, if the mortgage-deed was not paid at the stipulated time, the land should become the absolute property of Gopal, the mortgagee. In 1871 Gopal filed an ejectment suit against Balaji and Gyanu and one Hari, alleging that he had become owner of the land by operation of the above clause, and that he had subsequently let it to Hari, who now, in collusion with the other two defendants (the mortgagors), denied his title. The ejectment suit was subsequently converted into one for a declaration of Gopal's title as owner as against the mortgagors, Balaji and Gyanu, who claimed a right to redeem. A decree was passed in 1872 ordering Balaji and Gyanu to pay Rs. 100 to Gopal within one month, or, in default, to deliver up to him possession of the land. The money was not paid, and Vishnu, as purchaser from Gopal, got possession in execution of the above decree in August 1873. In September 1885, the plaintiff, as Balaji's heir and legal representative, filed a suit against Gopal and Vishnu to redeem the property. The Court of first instance dismissed the suit, holding that the plaintiff's claim was *res judicata* by virtue of the decree passed in 1872, and that the right to redeem was lost. In appeal, the Court reversed this decision, and passed a decree for redemption on payment of Rs. 100 by the plaintiff within six months. The defendant Vishnu then applied to the High Court under its extraordinary jurisdiction. *Held* that the plaintiff's claim was *res judicata*. In the suit brought by Gopal (the mortgagee) in 1871 he had claimed the land as owner through the forfeiture clause in the mortgage-deed, and the mortgagors insisting in that suit on a right still to redeem, the decree plainly meant to give them, by way of indulgence, one month within which to regain the land by payment of Rs. 100 to Gopal. It renewed the mortgage, but with a condition, which was a material part of the decree. They having failed to pay, the mortgage was extinguished. After the lapse of the month Gopal could not have recovered the Rs. 100. Had he sought to recover that money, he would have been met by the terms of the decree. He was entitled to the land, and nothing else. So, too, was Vishnu as his vendee. As, then, there was no debt that could be recovered, there was, and could be, no subsisting mortgage that could be redeemed. *Held*, also, that the suit was barred under art. 134 of Sch. II of the Limitation Act (XV of 1877)—Vishnu having purchased the land for value from Gopal, the ostensible owner, more than twelve years before suit. A tenant, repudiating the title under which he entered, becomes liable to immediate eviction at the option of the landlord.—12 Bom. 352.

The plaintiff Fatmabai in this suit alleged that both she and the defendant had been the wives of one Haji Adam Haji Ismail, a Cutchi Memon Mahomedan, who died intestate in 1878, leaving them his widows and other members of his family him surviving. The plaintiff had a daughter named Mariambai. Both plaintiff and defendant had since Haji Adam's death filed separate suits, in which they respectively claimed parts of his estate. In 1879 the defendant Aishabai had filed a suit (No. 616 of 1879) against the executors of her father-in-law's will, to recover certain money belonging to her husband. She obtained a decree, and the suit was referred to the Commissioner to make inquiries. In 1882 the present plaintiff Fatmabai and her daughter Mariambai filed a suit (No. 227 of 1882) against the present

fendant Aishabai, claiming a share of the estate of her deceased husband Haji Adam. In that suit she alleged that she had been lawfully married to Haji Adam, and had ever since cohabited with him, and that her child Mariambai was his legitimate daughter; and she prayed (*inter alia*) for a declaration that she was the lawful wife and that Mariambai was the lawful daughter of Haji Adam. In the written statement filed by Aishabai in that suit she alleged that Fatmabai was not the lawful wife of Haji Adam, but only his kept mistress, and she denied that Fatmabai was entitled to share in his property. On the 3rd May 1882, an order of reference was made, by which both the above suits, *viz.*, No. 616 of 1879 and No. 227 of 1882, "and all matters in difference thereon," were, by consent of all parties thereto, referred to arbitration. The arbitrators were the respective attorneys of the parties. Awards were duly made, and, on the 1st October 1883, decrees were passed in both suits in accordance with the said awards. By the decree and award in Suit No. 227 of 1882 Fatmabai was to be paid by Aishabai a sum of Rs. 55,000 in full satisfaction of all the claims of Fatmabai and her daughter Mariambai upon the estate of Haji Adam, the rest of the estate being declared the sole property of Aishabai. The material part of the decree was as follows: "This Court doth by consent pass judgment according to the said award . . . and doth order that the said Aishabai do pay for the said Fatmabai to her attorneys, Messrs. Tyabji and Dayabhai, within seven days after the date of this decree, the sum of Rs. 55,000 in full settlement of all and singular the claims and claim of the said Fatmabai and Mariambai or either of them against or upon the estate of the said Haji Adam Haji Ismail whatsoever and wheresoever . . . and doth declare that upon the payment of the said sum of Rs. 55,000 by the said Aishabai to the said Fatmabai as aforesaid, *all claims whatsoever* of the said Fatmabai and Mariambai or either of them upon the estate of the said Haji Adam Haji Ismail, in the hands of any person whatsoever, or upon the said Aishabai as heir of the said Haji Adam Haji Ismail personally or otherwise howsoever, shall be considered to have been fully satisfied by the said Aishabai, and absolutely waived for ever by the said Fatmabai and Mariambai; and doth further declare that the said Aishabai is entitled absolutely to all the rest of the estate and effects of the said Haji Adam Haji Ismail as her sole property as against the said Fatmabai and Mariambai." The defendant Aishabai in 1882 also filed another suit (No. 198 of 1882) against her father-in-law's executors, and recovered certain ornaments which she alleged to be her *stridhan*. In October 1886, Aishabai married again; and in December 1887, Fatmabai filed the present suit against her, alleging that, by the law and custom of Cutchi Memons, Aishabai had, by reason of such second marriage, forfeited all rights and interests to and in the property of her first husband Haji Adam, and also to the ornaments which she had recovered in the last mentioned suit, and she claimed that the said property and ornaments now belonged to her (Fatmabai) as sole surviving widow of the said Haji Adam. She prayed for a declaration that Aishabai had by her second marriage forfeited her right to the said property and ornaments, and that she (the plaintiff) was now entitled thereto; that the defendant might be ordered to deliver, &c., &c. The defendant Aishabai filed a written statement in which (*inter alia*) she contended that the plaintiff was never the wife of Haji Adam, but had been merely his kept mistress; that in suit No. 227 of 1882 she (the defendant) had denied that the plaintiff Fatmabai was the widow of Haji Adam; that the award and decree in that suit were not made upon the basis of her (Fatmabai's) being such widow, and she (the defendant) sub-



mitted that the said award and decree were a bar to the present suit. It was contended for the defendant (1) that the plaintiff had in the former suit prayed for a declaration that she had been the lawful wife of Haji Adam; that the decree in that suit contained no such declaration, and that her prayer must, therefore, be taken to have been refused under sec. 13 of the Civil Procedure Code (Act XIV of 1882), and that she was consequently not now entitled to sue as his widow—her claim to be his widow being *res judicata*; (2) that the decree in Suit No. 227 of 1882 expressly declared that the Rs. 55,000 awarded to the plaintiff by that decree was in full settlement of her all claim; and that she was, therefore, precluded from claiming against the estate in any possible contingency; and that, therefore, the defendant's remarriage gave her no right to sue; (3) that the latter part of the decree amounted to a release and assignment by the plaintiff Fatmabai to the defendant of all her (the plaintiff's right to the property in question. *Held* (1) that the status of the plaintiff as widow of Haji Adam was not *res judicata*. The question of the plaintiff's marriage with Haji Adam had not been controverted before the arbitrators and finally decided in a manner sufficient to establish *res judicata*. An award can only operate as an estoppel in respect of questions properly brought before and considered by the arbitrators. Expl. iii. of sec. 13 of the Civil Procedure Code (Act XIV of 1882) does not apply where the Court is silent on a head of relief only claimed as ancillary to the main relief, and which by implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief claimed and duly controverted. (2) That the declaration in the former decree, that the Rs. 55,000 was paid to the plaintiff in full settlement of all her claims upon the estate, did not bar the present suit. The previous suit was brought by Fatmabai as widow against Aishabai as widow. The present suit was brought by Fatmabai as widow against Aishabai remarried. The ground relied upon in the present suit was a new ground not known and not in existence at the time of the former suit, *viz.*, that Aishabai was no longer a widow, and had, therefore, lost all legal right to the estate of her late husband. There was not the necessary condition to establish an estoppel, *viz.*, *eadem causa petendi* and *eadem conditio personarum*. (3) But that the award and release contained in the decree constituted a binding agreement, by which the plaintiff Fatmabai for the sum of Rs. 55,000 waived all her rights against Aishabai, including the claim made in the present suit, which existed at the time of the award as a present right dependent on a contingency, and the suit, therefore, should be dismissed. At the hearing of a case on a preliminary issue the defendant, by whom the issue is raised, has the right to begin. Two counsel for the same party may be heard in argument of a preliminary issue. Bom. 454.

In appeal it was—*Held*, affirming the decision of Scott, J., that the present suit was not barred under sec. 13 of the Civil Procedure Code (Act XIV of 1882) by reason of the former suit No. 227 of 1882. Although Fatmabai litigated in the former suit as widow of Haji Adam as she did in the present suit, the matters "substantially in issue" in the two suits were quite distinct. In the former suit she claimed her share in the estate of Haji Adam as one of his lawful heirs entitled to succeed to him on his death. In the present suit her claim was based on a subsequent event by reason of which she contended that Aishabai's share was by law and custom forfeited, and reverted to the estate of Haji Adam. *Held*, also (affirming the decision of Scott, J.,) that the status of plaintiff as widow of Haji Adam was not *res judicata*. The plaint in Suit No. 227 of 1882, no doubt, asked for a

declaration that she was the widow of Haji Adam, and no such declaration had been made. But the declaration was not sought for by way of specific relief, but simply as the ground for the real and substantial relief to obtain which the suit was instituted, *viz.*, the payment by Aishabai of Fatmabai's share of Haji Adam's estate. Expl. iii. of sec. 13 was not intended to apply to such a case. *Held* (reversing the decision of SCOTT, J.), that the declaration in the former decree, that the Rs. 55,000 were paid to the plaintiff in full settlement of all her claims upon the estate, did not bar the present suit. The words of the award and decree were to be read with reference to the character in which the parties were litigating as widows of the deceased Haji Adam claiming to succeed to his property on his death. Such general language was to be controlled by the circumstances of the case. Upon the proper construction of the award there was no such clear intention shown to include in the settlement a contingent claim of the special nature now made as to preclude the plaintiff from setting it up in the present suit.—13 Bom. 242.

To constitute a partition, there need not be an actual partition by metes and bounds. An agreement to divide is sufficient to constitute partition. Two brothers drew up a memorandum of partition, whereby they agreed to divide the family property in equal shares, and provided that, if at any future time their sons did not agree and there were any partition, they should exercise ownership in accordance with this document; neither was to take more than was mentioned in the document. *Held* that this agreement constituted a partition between the brothers, and was binding on their descendants. In 1876 the plaintiffs, alleging a partition of the family estate in 1864, sued their uncle (father of the present defendants) to recover their share of the rent of a certain piece of land which had formed part of the family estate. The plaintiffs relied in that suit upon a memorandum or agreement of partition executed in 1864. The defendant in that suit, however, contended that the family was still joint, and that the plaintiff could not claim a share of any particular piece of land, but must sue for partition of the whole property. At the hearing of that suit an issue was raised as to whether partition had taken place. The Court found in the affirmative, and awarded the plaintiff's claim. In the present suit the plaintiff sued the defendants (the sons of the defendant in the former suit) to recover possession of certain property which they alleged formed part of the share awarded to them at the partition of 1864, but of which they had been dispossessed by the defendants in 1873. The defendants denied that there had been any partition of the family property. *Held* that the question of partition was *res judicata*, and could not be raised again by the defendants. The question had been directly and substantially in issue in the former suit. No doubt the dispute in that suit was as to a different piece of land, but there was no allegation that that land was held, on any different tenure to the land now in suit. The plaintiffs there, as now, alleged that there had been a partition, and that they had a separate share. The defendants there contended, as the defendants now contended, that there was no partition, and that the family estate was joint. The decree in that suit depended on that issue, and where the decree depends on an issue the finding in that issue, is binding as *res judicata*. The *status* of the family having been thus tried and determined in the former suit was binding on the parties in subsequent suits.—13 Bom. 25.

By a mortgage-deed, dated the 24th January 1873, Sakharam and Vishnu, two of three brothers constituting an undivided family, jointly mortgaged to the plaintiff Balaji a part of the family property. On the 28th July 1873, Sakharam alone further mortgaged to the plaintiff for a fresh



advance a portion of the property already mortgaged. Subsequently the three brothers effected a partition among themselves of all the undivided property, and the property jointly mortgaged by Sakharam and Vishnu fell, along with other property, to the share of Vishnu and the third brother Narayan. In 1881, the plaintiff Balaji sued Sakharam on the second of the above mortgage, *vis*, that of the 28th July 1878. He obtained a decree, and at a sale held in execution of that decree himself purchased the property comprised in that mortgage. In the meantime, on the 27th January 1882, and on the 6th December 1883, Vishnu and Narayan respectively mortgaged with possession to the defendant Moro, portions of the land comprised in the first mortgage of the 24th January 1878. In 1883, the plaintiff filed the present suit upon his first mortgage of 24th January 1878, claiming to recover Rs. 316-14-0 from Sakharam and Vishnu personally. He also prayed that the defendant Moro, who had been in possession of the property in dispute, should be prevented from obstructing him in selling the property. Sakharam and Vishnu did not appear. The third defendant Moro alone appeared, and contended (*inter alia*) that the plaintiff, having sued upon his second mortgage without including the earlier one, was now barred from suing on the latter by secs. 13 and 43 of the Civil Procedure Code (Act XIV of 1882). He also contended that the plaintiff, having purchased part of the lands comprised in the mortgage, now sued upon in execution of the decree obtained by him upon his second mortgage, could not now seek to burden the remaining lands included in the mortgage with the whole of the mortgage-debt, but that a proportionate part of that debt must be satisfied. *Held* (1) that the plaintiff's suit was not barred by his previous suit on the second mortgage under the provisions of secs. 13 and 43 of the Civil Procedure Code (Act XIV of 1882). *Held* (2) that the plaintiff could not recover the first mortgage-debt from the remaining lands without deducting a proportionate part of that debt. A mortgagee will not be allowed without special reason deliberately to execute his decree exclusively against one of the owners of the equity of redemption for the whole debt.—13 Bom. 45.

The words in sec. 13 of the Code of Civil Procedure (Act XIV of 1882), “a Court of jurisdiction competent to try such subsequent suit,” mean a Court having concurrent jurisdiction with the Court trying the subsequent suit, whether as regards the pecuniary limit of its jurisdiction or the subject matter of the suit, to try it with conclusive effect. Reading expl. vi. with the earlier part of sec. 13, the term “Court of competent jurisdiction” includes a foreign competent Court. The plaintiff sued as the adopted son of C to recover certain property in British territory. The defendants disputed plaintiff's adoption. The plaintiff relied on a decree of a Native Court which he had obtained against defendant No. 2 in a suit for possession of certain other property belonging to C and situate within the territorial jurisdiction of the Native Court. In that suit the question of plaintiff's adoption had been raised and decided in plaintiff's favour. In the present suit both the lower Courts, without attaching any weight to this decree of the Native Court, held that the plaintiff's adoption was not proved, and dismissed the suit. *Held*, on second appeal, that the question of plaintiff's adoption was *res judicata* as between him and defendant No. 2, the judgment of the Native Court being one on the merits, and conclusive between the parties within the territory of the Native State.—13 Bom. 224.

In suit by A, the *inamdar*, against B, the *khot* of a certain village, it was decided that A was the proprietor of the forest or waste lands attached to the village. *Held*, that this decision did not operate as *res judicata* bet-

ween A and B so as to estop B in a subsequent suit from setting up a proprietary title, as against A, to the cultivated lands in the village.—11 Bom. 355.

A decree cannot be extended in execution beyond the real meaning of its terms. A decree obtained on a mortgage directed that the judgment debtor should pay the sum adjudged out of the property mortgaged. After executing the decree against the mortgaged property, the decree-holder made an application for execution against the person of the judgment-debtor. A notice was issued calling upon him to show cause why execution should not be further proceeded with. But the notice did not give him any intimation of the application for the arrest of his person. He did not appear, and, in his absence, an order was made for his personal arrest; but the order was not executed, as the decree-holder did not pay the process fee. Subsequently a fresh application was made for execution against the person of the judgment-debtor. *Held*, that as the decree merely provided for the satisfaction of the judgment-debt out of the property mortgaged, the decree could not be executed against the person of the judgment debtor. *Held*, also, that the question as to the personal liability of the judgment debtor to satisfy the decree was not concluded by the order made in the previous execution-proceedings for execution to issue against his person. The order would have operated as a *res judicata* if the judgment-debtor had been called upon to contest the right claimed by the decree-holder to hold him personally liable under the decree, and had then failed in his contention to the contrary, or allowed the judgment to go by default. The order was *res judicata* as to the legal possibility of further execution in terms of the decree, but not as to the special construction which the judgment-creditor sought to impose on it —11 Bom. 537.

Upon the death of R. a Hindu, who was separate from his brother S, his widow G became life-tenant of his estate, and his daughter B became entitled to succeed after G's death. In 1832, a suit was brought by S and G against V to recover the value of a branch of a mango tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that R was not the owner of the grove, nor was G the owner. In 1885, B brought a suit against G, S, V, and A, to whom V had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1832 were carried on in collusion between S and G on the one hand and V on the other, for the purpose of improperly preventing her from asserting her rights. *Held* that, if the suit of 1832 was a genuine suit, and was properly contested by the then plaintiffs, though S might have been improperly joined as plaintiff, any decision then passed against G would be binding upon the present plaintiff, and estop her again litigating questions which were then decided. *Held*, also, that if the plaintiff's specific allegation of fraud and collusion in the proceedings of 1832 were established, and even if the decree of 1832 did dispose of the question now sought to be re-opened, the decision in that suit would not be binding on the plaintiff under the circumstances. *Katama Natchiar's case* (9 Moore's L. A. 539), *Adi Deo Narain Singh v. Dukharan Singh* (I. L. R., 5 Al. 532), and *Sant Kumar v. Deo Saran* (I. L. R., 8 Al. 365), referred to.—8 Al. 429.

The plaintiff sued the father and brother of defendant for trespass to a wall. His right to the wall was denied, but he obtained a decree. On executing the decree he was resisted by the defendant, who claimed the wall as his ancestral property, and alleged that he was no party to the suit in

which decree has been obtained against his father and brother. His claim was registered as a suit under sec. 331 of the Code of Civil Procedure. Plaintiff contended that defendant was concluded by the decree obtained against his father and brother. *Held* that a Hindu son in a joint family becomes entitled by reason of his birth and in his own right, a right which he can enforce against his father; he does not claim under his father within the meaning of sec. 13 of the Civil Procedure Code. *Held* also that the defendants in the former suit did not claim any right in common for themselves and others within the meaning of expl. v. of sec. 13 of the Code of Civil Procedure. The case of *Narayan Gop Habbu v. Pandurang Ganu* (I. L. R., 5 Bom. 685) distinguished.—10 Al. 411.

Prior to the cession of the town of Jhansi to the British Government, plaintiff had instituted a suit in the Subah's Court in the Gwalior State on a judgment of the British Court in Jhansi district. After the cession, the suit was made over for trial to the Court of the Assistant Commissioner of the Jhansi district. The suit was dismissed by the first Court as barred by sec. 13 of the Code of Civil Procedure, but remanded by the lower Appellate Court for trial on the merits. *Held* that the recital in Part II of Act XXVII 1886 shows that it was intended that suit pending in the Courts of the Gwalior State prior to the cession of the town of Jhansi to the British Government should be continued in the Courts of the Jhansi district after the cession thereof; therefore the present suit, which, if it had been originally instituted in a Court of British India, could not have been maintained, being an action on a judgment of a Court of British India, was a good and maintainable action in the Court where it was instituted, and is to be deemed to be a properly instituted suit, to which in other respects the law of the Courts of British India may now be applied. *King v. Hoare* (13 M. & W. 504; S. C. 14 L. J. Ex. 29) referred to as illustrating the distinction between an original cause of action founded upon a judgment recovered on the original cause of action.—10 Al. 517.

A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one third share of such property. The decree included an order in these terms: "This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammatt Lachimnia in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another suit upon the same title to recover possession of the one-third share referred to in the order just quoted. *Held* by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect; that, as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, and the whole of the claim in that suit was dismissed, the decree in that suit was a decision within sec. 13 of the Civil Procedure Code; and the present suit was consequently barred as *res judicata*. *Kudrat v. Dinu* (I. L. R., 9 Al. 155), *Ganesh Rai v. Kalka Prasad* (I. L. R., 5 Al. 595), *Salig Ram Pathak v. Tribhawan Pathak* (Weekly Notes, 1855, p. 171), and *Muhammad Salim v. Nabian Bibi* (I. L. R., 8 Al. 282), explained.—11 Al. 187.

The dismissal of a suit to have set aside an order made in one district, for the sale of the plaintiff's interest in property therein, is not a bar under secs. 13 and 43, Civil Procedure, to another suit to obtain relief against an

order in another district for the sale of property therein belonging to the same plaintiff, or of other property not included in the order or sale against which the dismissed suit was directed. An operative decree, obtained after the death of a defendant, ascertaining for the first time, the extent and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced.—13 Al. 53.

Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become, by lapse of time or otherwise, unenforceable, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for a declaration of their right for partition. Such a suit will not be barred by reason of the former decree for partition, through that decree may operate as *res judicata* in respect of any claim or defence which was, or might have been raised in the suit in which it was passed. If a Revenue Court in disposing of an application for partition determines a question of title, it must, in so doing, act in conformity with the provisions of sec. 113 of Act XIX of 1873. If it disposes of the application otherwise than in the manner contemplated by sec. 113, its proceedings are *ultra vires* and will not debar the parties from suing in a Civil Court for a declaration of their right to partition.—13 Al. 309.

For the purposes of the rule of *res judicata* it is not essential that the subject-matters of the present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of title by claiming a subsequent item or instalment. The *Rajah of Pittapur v. Sri Rajah Rau Buchi Sittaya Garu*, (L. R., 12 I. A. 16) referred to. A judgment liable to appeal or under appeal is only a provisional and not a definitive or final adjudication, and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. Expl. IV of sec. 13 of the Civil procedure Code commented on. *Sri Raja Kakarlapudi Suriyanarayanarazu v. Chellamkuri Chellamma* (5 M. H. C. R., 176) and *Nilvaru v. Nilvaru* (I. L. R., 6 Bom. 110) referred to. The rule of *res judicata* contained in sec. 13 of the Code applies equally to appeals and miscellaneous proceedings as to original suits. Having regard to its main object, so far as it relates to the re-trial of an issue, it refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. Where, after the commencement of the trial of an issue, a final judgment upon the same issue in another case is pronounced by a competent Court (the identity of parties and other conditions of sec. 13 being fulfilled), such judgment operates as *res judicata* upon the decision, original or appellate, of the issue in the later litigation. On the 17th August 1885, a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291, and 1292 fasli. On the 5th October 1885, the Munsif dismissed the suit. On the 10th March 1886, the Subordinate Judge on appeal reversed the Munsif's decree and decreed the suit. On the 21st June 1886, the defendant appealed to the High Court, which, on the 4th July 1887, reversed the Subordinate Judge's decree, and restored that of the Munsif, on the ground that the plaintiff had never received and was not

entitled to *malikana*. Meanwhile, on the 8th June 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 fasli, which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November 1886, the lower Courts decreed this suit, holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, operated as *res judicata*, and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May 1887, the defendant appealed to the High Court, and on the 16th May 1888, (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July 1887), the appeal came on for hearing. *Held* that the lower Courts were wrong in holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, which, at the date of the institution of the present suit on the 8th June 1886, was liable to appeal, and, at the dates of the decisions of those Courts in August and November 1886, was the subject of a second appeal pending in the High Court, could operate as *res judicata* in favour of the plaintiff's title to *malikana* (ii). That the High Court's judgment dismissing the former suit on the 4th July 1887, though passed after the decisions of the lower Courts in the present suit and after the institution of the second appeal in the present suit, was nevertheless binding on the High Court in deciding such second appeal, and, being final, was conclusive as *res judicata* against the plaintiff's title to *malikana*. (iii.) That the effect of the High Court's judgment, dismissing the former suit on the 4th July 1887, was not affected by the circumstance that the second suit was brought for recovery of *malikana* for a different year, inasmuch as that judgment went to the root of the plaintiff's title to *malikana*, and its scope was not limited to the particular item then claimed.—11 Al. 148.

It is by the decree and not by the judgment that a question of *res judicata* must be decided. In 1881 A sued K and others claiming a declaration of his title to certain land and an injunction against interference with his possession. K claimed part of the land by purchase from M. The Munsif decreed for A and this decree was confirmed on appeal by the District Judge, but in his judgment the District Judge recorded that K's claim was not adjudicated upon and that he should bring a fresh suit if he had any claim. In 1883 K sued A to recover the land, which he claimed by purchase from M. A pleaded that the claim was *res judicata* by virtue of the decree in the former suit. The District Munsif, and on appeal, the District Judge held that the claim was not *res judicata* and decreed for K:—*Held*, on appeal to the High Court, that as no reservation was made in the decree of K's right to bring another suit, the plea of *res judicata* was good, but that, under the circumstances, an opportunity should be given to K to apply to the District Court to have the decree in the former suit brought into conformity with the judgment. This having been done, the decree of the lower Courts was confirmed.—8 Madr. 77.

A competent Court having decided upon an issue directly raised in a suit brought by a person alleging himself to have been adopted, that this adoption had not taken place, it was held that the present suit was barred under Act X of 1877, sec. 13, as *res judicata*, having been brought by the son of the defendant in the former suit, claiming through his father, to establish the same adoption; and that the section applied, although the suits related to different properties. The establishment of the adoption alleged in the first suit would have obliged the father of the present plaintiff to share with the adopted son his ancestral estate. That adoption having been negatived, the son, in this suit, ought to be estopped from making title on



the ground that the adoption had placed the person, from whom he claimed to inherit, in the relation of father's brother to him.—8 Madr. 212.

The words “in a Court of jurisdiction competent to try such subsequent suit,” refer to the jurisdiction of the Court at the time when the first suit was brought. Where therefore a suit was brought and decided in 1867 in the Court of a Deputy Collector, that Court being at the time of suit the only Court competent to try suits of the nature of the one brought, and subsequently a second suit, regarding the same subject and between some of the same parties and the representatives of others, was brought in 1881 in the Court of a Munsiff, which latter suit, if it had been brought in 1867, would have been cognizable by a Deputy Collector alone:—*Held*, that the decision of the Deputy Collector was a bar to the second suit under sec. 13. The principal in *Gopinath Chobey v. Bhaghwat Pershad*, I. L. R., 10 C., 697, approved. *Rughunath Panjah v. Issur Chunder Chowdhry*.—11 Cal. 153.

In a suit by a landlord against his tenant for ejectment, the defences were (1) no notice to quit had been served; and (2) the tenure was a permanent one. The suit was dismissed on the first ground, the Court holding at the same time that the tenure was not a permanent one. In a subsequent suit for ejectment from the same holding, brought by the same plaintiff against the same defendant, the defences were: (1) the tenure was permanent; and (2) the plaintiff was estopped by the conduct of his predecessor in title from asserting as against the defendant that the tenure was not a permanent one. The lower Appellate Court found the question of estoppel in favour of the defendant, and dismissed the suit. On appeal to the High Court:—*Held*, that the decision was right, and must be affirmed. *Semble*, that where a former suit between the same parties in respect of the same subject matter has been dismissed on a preliminary point, a finding in that suit on the merits in the plaintiff's favour will not bar the defendant from putting forward the same defence on the merits in a subsequent suit by the same plaintiff against the same defendant. *Semble*, that the case of *Niamut Khan v. Phadu Buldia*, I. L. R., 6 Cal. 319, has been impliedly overruled by the case of *Run Bahadoor Singh v. Lucho Koer*, L. R., 12 I. A., 23; I. L. R., 11 Cal. 301, *Nundo Lall Bhattacharjee v. Bidhoo Mookhy Debee*.—12 Cal. 17.

Where a decree, awarding to one of the parties money deposited in a Treasury by a third party, as the compensation for land taken by the latter for railway purposes, was based upon the right to the land, the question of title having been directly and substantially in issue between the parties:—*Held* that the contest of title was conclusive between them under sec. 13 of Act X of 1877.—12 Cal. 484.

In a suit for arrears of rent and possession of certain property, a person intervened and was made defendant on his alleging that he was entitled to an eight annas share of the property in question, and that the plaintiffs were not entitled to any portion thereof. Issues were fixed on the questions of title, but the plaintiffs failed to adduce evidence and their suit was dismissed. They afterwards brought a suit for possession of the same property, on the same title, against the intervenor in the former suit:—*Held*, that the second suit was barred as *res judicata*.—12 Cal. 563.

In 1875, P sued in a Munsif's Court to eject a tenant from a house and to recover arrears of rent. S intervened and claimed the house under a deed of gift. The value of the property comprised in the deed of gift exceeded the limit of the pecuniary jurisdiction of the Munsif's Court. The

suit was dismissed. But on appeal the claim of S under the deed of gift was adjudicated upon and rejected, and P obtained a decree for the land. In 1882, S sued P to recover all the property comprised in the deed of gift:—*Held*, that, S was estopped by the decree in the former suit from claiming the house. It was contended by P that the deed of gift was invalid:—*Held*, that as to validity of the deed of gift, the decree of the Munsif's Court was not the decree of a competent Court within the meaning of sec. 13 of the Civil Procedure Code, 1882, and, therefore, that S was not estopped from showing that the deed was valid, and claiming the rest of the property comprised therein.—8 Madr. 83.

In 1877, S, claiming to be the adopted son of M, sued A, the widow of M, to recover his estate. A denied the adoption, S failing to adduce any evidence, the suit was dismissed under sec. 158. In 1882, by an agreement made between A and S, A acknowledged the title of S as adopted son of M. A having died, a suit was brought against S by a reversioner of M to recover the estate of M:—*Held* that S was estopped by the decree in the former suit from setting up his claim as adopted son against the plaintiff, and that the subsequent agreement between A and S did not affect plaintiff's right.—8 Madr. 348.

Plaintiff sued to recover certain land from the defendant on a demise of 1856, which he alleged was a renewal of a prior demise of 1835. The suit was dismissed on the ground that the demise of 1856 was not proved. Plaintiff then sued to recover the same land on the demise of 1835 and on title:—*Held*, that the decree in the former suit was no bar to this suit.—9 Madr. 251.

In 1879 the plaintiff brought a suit against the defendants to recover Rs. 119 which he alleged had been wrongfully exacted from him by the defendants as enhanced rent of certain land in his occupation. He claimed to be owner of the land subject to a quit-rent payable to the defendants. The defendants denied his ownership, and asserted their right to levy the enhanced rent. The lower Court held that the defendants were entitled to the enhanced rent, and dismissed the plaintiff's claim, and the decree was confirmed, in appeal, by the District Court. The plaintiff appealed to the High Court, which held that the plaintiff's claim being for an amount less than Rs. 500 and within the cognizance of a Court of Small Causes, no second appeal lay.

In 1883 the plaintiff brought the present suit in the District Court to recover from the defendants the sum of Rs. 689 alleged to have been wrongfully exacted from him by the defendants as enhanced rent of the land in question. He made the same allegations as in the former suit. The District Judge dismissed the suit, holding it to be *res judicata*. The plaintiff appealed to the High Court:—*Held*, that, although the material question in both suits was the same, *viz.*, as to the defendant's right to enhance the plaintiff's rent, yet the decision of the District Court upon that point in the previous suit was not *res judicata* so as to prevent the question being again raised between the parties. From the decision in the former suit there was no appeal by reason of the suit being one for an amount less than Rs. 500. Had that suit been for a larger amount, the decision of the District Court would have been subject to an appeal to the High Court. It could not have been intended by the Legislature that a decision should acquire a conclusive importance from the fact of its being made in a suit for a small amount which it could not have had if the amount was larger. The former decision could not be appealed against to the High Court, and thus, though the District Courts, which gave that decision, was in one sense "com-



petent to try" the second suit, and did try it, yet it was not competent to try the second suit with final effect, as it had tried the earlier one. In sec. 13 the words "competent to try such subsequent suit or issue" must mean "competent to try the suit or issue with conclusive effect." The District Court could not, in the present suit, have tried with conclusive effect, and disposed of the issue tried in the first suit, and hence the prior decision was not *res judicata*.—9 Bom. 75.

Two-thirds of a village were sold by T, P, and B. B was the widow of S, her name being recorded in respect of the property formerly recorded in his name, and what she sold was his one-third share in the village, the other one-third being sold by T and P. The vendors having refused to give possession of the property, the purchasers sued them for possession of it and joined as defendants to the suit C, D, and M, to whom belonged the remaining one-third share in the village. These latter persons contended, *inter alia*, that the family was a joint one, and that B was not competent to alienate her deceased husband's share in the village. The Court decided that the family was joint. After B's death her daughter K, whose name had been recorded in place of her mother's, made a usufructuary mortgage of another village in which her deceased father had formerly owned a share. A suit was brought by certain persons who had purchased the right in the same village of the representatives in interest of C, D, and M, against K, her mortgagee, and their vendors, to set aside the mortgage and recover the interest which they had purchased. They contended that the family was joint, and that the question whether it was joint or divided was *res judicata* by reason of the decision in the former litigation :—*Held* that the question whether the family was joint or divided had not, in the former suit, been determined among the defendants, *inter se*, but simply as against the plaintiff, and could only be *res judicata* against him or parties claiming under the same title ; and the decree in that suit was therefore not binding against K in the hands of the present plaintiffs, who were not the assignees of the plaintiff in the former suit, but of persons who were arrayed in it as defendants along with B, K's mother, and on the same side.

Shadal Khan *v.* Amin-ullah Khan referred to by STRAIGHT J., and distinguished by TYRELL, J. Narain Kuar *v.* Durgan Kuar referred to by STRAIGHT, J.—8 Al. 91.

S sued K for four bonds, alleging that the same had been satisfied. K had formerly sued S on two of these bonds. S had alleged in defence of that suit that those two bonds, as also the other two, had been satisfied. It was decided in that suit that not one of the bonds had been satisfied :—*Held* by PETHERAM, C. J., OLDFIELD, BRODHURST and DUTHOIT, JJ., that the only issue in the former suit which had to be decided being whether the bonds on which that suit was brought had been satisfied or not, the second suit was, under sec. 13 *res judicata* only in respect of those bonds, and not in respect of the other two bonds.

The Court which tried the former suit had no jurisdiction to try the subsequent suit.

*Per Mahmood, J.*—This being so, if the word "suit" in sec. 13 were taken literally, it might, with some plausibility, be contended that there was no *res judicata* in respect of any of the bonds. The word "suit," however, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as sec. 45, which enables the plaintiff to unite several causes of action in one and the same suit.

Adopting this interpretation, it was clear that the two bonds which were the subject of the former suit could not be allowed to form the subject of litigation again.

As to the other two bonds, which were not the subject-matter of the former suit, they did not, in the former suit, constitute a "matter directly and substantially in issue," within the meaning of sec. 13; and even if they were "directly and substantially in issue," the decision in the former suit would not support the plea of *res judicata*, because the Court which tried that suit was not a Court of jurisdiction competent to try the subsequent suit in which the plea was raised.—7 Al. 247.

The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed upon two grounds, firstly, that the suit was under-valued and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court, and secondly, for misjoinder. The purchaser subsequently brought a second suit:—*Held* that the dismissal of the former suit was not, under the circumstance a decision within the meaning of sec. 13 such as could bar the second suit by way of *res judicata*.

*Also per Mahmood, J.*—The condition in sec. 13, that the former suit must have been "heard and finally decided," means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Ramnath Roy Chowdhary v. Bhagbut Mohaputter*; *Shokhee Bewah v. Mehdee Mundul*; *Dullabh Jogi v. Narayana Lakhu*; *Rungrav Ravji v. Sidhi Mahomed Ebrahim*; *Fatek Singh v. Lachmi Koer*; *Raghoonath Mundul v. Juggut Bunhoo Bose and Sikappa Chetti v. Rani Kulandapuri Nachiyar*, referred to.—8 Al. 282.

Upon the death of G, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son A, one upon each of his five daughters, and one upon his widow B. The name of B only was recorded in the revenue registers in respect of the zemindari property left by G. In 1876, A and B gave to X a deed of simple mortgage of  $2\frac{1}{2}$  biswas out of a 5 biswas share of a village included in the said property. In 1878, A and B gave to S a deed of simple mortgage of the 5 biswas, which were described in the deed as the widow's "own" property. In 1882, X obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by X himself in January 1884. In February and November 1884, the daughters of G obtained *ex parte* decrees against A and B in suits brought by them to recover their shares by inheritance in the 5 biswas. In 1885, S brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 biswas. To this suit he made defendants A and B, G's daughters, and X, alleging that the decrees of February and November, 1884, were fraudulently and collusively obtained; and as to the auction-sale of January, 1884, that the  $2\frac{1}{2}$  biswas were sold subject to his mortgage, he not having been made a party to the suit brought by X upon the deed of 1876, and, therefore, not being bound by any of the proceedings taken therein or consequent thereto. It was contended that B's position as head of the family entitled her to deal with the property so as to bind all the members of the family, though using her name only, and it was suggested that, at the time of the mortgage of

1878, some of the daughters were minors. On behalf of the daughters it was contended (*inter alia*) that the decrees obtained by them against A and B in February, 1884, were conclusive, by way of *res judicata*, against the plaintiff, who, as mortgagee from A and B, claimed under a title derived from them:—*Held*, that there being no evidence to show that the decrees of February and November, 1884, were fraudulently and collusively obtained, the Court of first instance was right in exempting the shares of the daughters from the lien sought to be enforced by the plaintiff; and that, inasmuch as the deed of 1876 was prior in date to the plaintiff's deed of 1878, and there was no allegation of fraud or collusion in regard to it, the decree and sale in enforcement of the former deed would defeat the rights of the plaintiff under the latter. *Khub Chand v. Kalaian Das and Ali Hasan v. Dhirja* referred to.

*Also per Mahmood, J.*—The decrees of February and November, 1884, did not operate as *res judicata* against the plaintiff, inasmuch as a mortgagee cannot be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage, and to which he was not a party. After a mortgage has been duly created, the mortgagor, in whom the equity of redemption is vested, no longer possesses any such estate as would entitle him to represent the rights and interests of the mortgagee in a subsequent litigation, so as to render the result of such litigation binding upon, and conclusive against, such mortgagee. The plaintiff in the present suit could not be treated as a party *claiming under* his mortgagors within the meaning of sec. 13 and that section must be interpreted as if, after the words “under whom they or any of them claim,” the words “by a title arising subsequently to the commencement of the former suit,” had been inserted. *Dooma Sahoo v. Jeonarain Lall and Bonomalee Nag v. Koylash Chunder Dey* referred to. *Outram v. Morewood, Boykuntanath Chatterjee v. Ameeroonissa Khatoon, Katama Natchiar v. Srimut Raja Mootoo Vijaya Ragundadha and Ram Comar Sein v. Prosunno Coomar Sein*, distinguished.—8 Al. 324.

The defendant's great-grandfather was uncle of one Balaji Hari, who was the great-grandfather of the plaintiffs, and they (*i. e.*, the defendant's great-grandfather and his nephew Balaji) were entitled in equal half shares to a certain *vatan* property. The defendant and his brothers now represented the former, and were entitled to his half share and the plaintiffs represented the latter, and were entitled to his half share. The plaintiffs' father, Balaji Rudra, lived with the defendant and the defendant's brothers, Mahadaji and Krishnaji, as members of an undivided family up to the year 1845, in which year the plaintiff's father (Balaji) being then absent from the village, the defendant's brothers, Mahadaji and Krishnaji, executed a deed of partition whereby they divided the ancestral property into two equal shares, one-half of which the plaintiffs father was to receive—the other half going to the defendant and his brothers. The deed among other recitals, contained a clause to the effect that the plaintiff's father being then absent from the village, the defendants' brothers would manage his share during his absence, and on his return hand the same over to him on his paying the expenses incurred by them in such management.

In 1873 the plaintiffs' undivided brother brought a suit against the defendant and others on an agreement alleged to have been executed between him (plaintiffs' brother) and the defendant and his brothers by which the said brothers had bound themselves to return one-third share to him (the plaintiffs' brother). This suit was dismissed as against the defendant, as he had not been a party to that agreement, and plaintiffs' brother was referred to a separate suit for partition against the defendant.

The plaintiffs, therefore, now brought the present suit, claiming their share in the vatan estate. The defendant (*inter alia*) contended that the suit was barred as *res judicata* by the former suit, that neither the plaintiffs nor their forefathers had enjoyed the property during the previous 150 years, and that the claim was barred by limitation. Both the lower Courts allowed the plaintiffs' claim. The defendant preferred a second appeal to the High Court :—*Held*, confirming the decree of the lower Court, that the former suit having been brought on an alleged agreement, it did not bar the present suit, which was based on the plaintiffs' hereditary right to sue as members of the family.—10 Bom. 24.

A brought a suit against B, claiming certain property as tenant of C, who was also made a defendant in the suit : this suit was on the merits decided in favor of B. C then brought a suit against B for possession of the same property :—*Held*, that such suit was not barred by sec. 13.—12 Cal. 580.

The decision in a suit in order to be final and conclusive, as *res judicata* upon an issue raised in another suit, must be the decision of a Court which would have had jurisdiction to decide the question raised in the subsequent suit, in which the prior decision is given in evidence as conclusive. This proposition stated in the judgment in *Mussumat Edun v. Mussumat Bechun*, 8 W. R., F. B., 175, and affirmed by the Judicial Committee in *Misir Raghosbardial Sheo Baksh, Singh*, I. L. R. 9 C., 439, is applicable equally to cases under Act VIII of 1859, sec. 2 (as supplemented by the general law), and to cases under the more complete enactment in Act X of 1877, sec. 13, which is not to be construed as having altered the former law. A suit was brought in the Court of a Subordinate Judge by a Hindu against the widow of his deceased brother, claiming his property by right of survivorship, the issue being whether, at the death of the latter, the ownership of the brothers was joint or separate. An order under Act XXVII of 1860, granting a certificate to the widow, did not, on the above issue, operate as *res judicata* in the widow's favour, being a proceeding of representation, and not otherwise of title :—*Held* also that a decision of the same issue in a Munsiff's Court in a rent suit brought by the widow, the surviving brother on his application having been made a party defendant under sec. 73 of Act VIII of 1859, did not constitute *res judicata* in her favour. *Krishna Behary Roy v. Brojeswari Chowdhurani*, (L. R., 2 I. A., 283) referred to and followed :—*Held* also that the brother having appealed against a decree dismissing the suit as *res judicata* (the judgment which that decree followed having, nevertheless, found that the widow was disentitled by reason of the brothers having been, in fact, joint in estate), the widow could have supported the decree, without filing a cross appeal as to that finding, on the ground that the decree had been rightly made, (though not for the reason given) in her favour.—11 Cal. 301.

*Explanation 5* :—In 1881 A sued B, C, and others for damages for the loss of his crops by the diversion of a water-channel by the defendants. A claimed a right common to himself and other raiyats of his village to use the water during the day time under an arrangement, by which B, C, and the other defendants in the suit, were entitled to use the water during the night time. In 1882 A and four other raiyats, not parties to the former suit sued B, C, and thirteen others not parties to the former suit, for a decree declaring that the plaintiffs were entitled to the exclusive use of the water in the channel by day. The Lower Courts held that the suit was barred by sec. 13 :—*Held* that as between the plaintiffs other than A and the

defendants, and as between A and the defendants other than B and C, the suit was not barred by sec. 13.—8 Madr. 496.

In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set-off as the price of cloth which, he alleged, the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set-off; as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission-sale. The suit was dismissed on the ground that there was no proof of a sale of cloth, and the question whether any sum was due for cloth sold on commission-sale was not gone into. The cloth now alleged to have been delivered on commission sale was the same as that alleged in the former suit to have been actually sold to the plaintiff:—*Held* that the defendant was entitled, under sec. 111 to set-off the amount claimed as due for goods sold on commission against the plaintiff's demand, and that the claim for such set-off was not barred under the provisions of sec. 13:—*Held* also that the court-fee payable on the claim for set-off was the same as for a plaint in a suit.—8 Al. 396.

In a suit in which the plaintiffs claimed exclusive possession, and, in the alternative, joint possession of certain land, evidence was taken upon the issues raised; but the Court, without discussing the evidence, held that the alternative claims were "contradictory," and the plaintiffs' claim, therefore, "uncertain," and accordingly ordered "that the plaintiffs' claim, as brought, be dismissed with costs." The plaintiffs did not appeal from this decision, but subsequently brought a suit against the same defendants, claiming joint possession of the same property. *Held* that the suit was barred by sec. 13 of the Civil Procedure Code, the Court in the former suit not having reserved to the plaintiffs the right to bring a fresh action. *Ganesh Rai v. Kalka Prasad, Muhammad Salim v. Nabian Bibi, and Watson v. Collector of Rajshahye* referred to by TYRRELL, J.—9 Al. 155.

Upon an application made under Chapter IV of the N.-W. P. Land Revenue Act (XIX of 1873) for partition of common land, in which the owners of six *pattis* were interested, into six equal parts, an objection was raised that the land should be divided into parts proportionate the size of the different *pattis*. The Assistant Collector before whom the objection was made, disallowed it with reference to the provisions of the *wajib-ul-arz* in which the custom of the village was recorded, and made the partition in the manner prayed. No appeal was preferred by the objectors to the District Judge. The Collector confirmed the partition, and after an appeal to the Commissioner, the Assistant Collector's decision was upheld. The objectors then brought a suit in the Civil Court for a declaration that the defendants were only entitled to a share of the common land proportionate to the area of their *pattis*. *Held* that the objection which was raised in the Revenue Court was one which raised a question of title or of proprietary right in respect of the common land, within the meaning of sec. 113 of the N.-W. P. Land Revenue Act; that the decision of the Assistant Collector was a decision within the meaning of sec. 114 of the Act; and that, consequently, the suit was barred by sec. 13 of the Civil Procedure Code. *Held* also that the question was not affected by any mistakes in procedure that had been made in the Revenue Courts.—9 Al. 388.

A, sued in 1885 to recover certain estates from B, alleging claim under



his adoption which took place in 1865. A suit to recover the same estates had been filed on behalf of A by his next friend and had been dismissed for default in 1872. In 1875 A, being still a minor, relinquished his claim to the estates for Rs. 12,000 under exhibit B; but now alleged that he thought he was relinquishing it only in favour of the defendant's predecessor in title who died in 1883, having been in possession of the estates since 1867. The plaintiff attained his majority in 1878:—*Held*, that the claim was *res judicata*, the plaintiff having failed to prove fraud on the part of his next friend: that whether the cause of action arose in 1865 or 1867, it was equally barred from 1879: that assuming the plaintiff was a minor of 15 years of age at the date of the deed of relinquishment, it is not likely he would not have understood its effect, or that he failed to ascertain it when he attained his majority in 1878. *Per cur.*—The plea of *res judicata*, ordinarily presupposes an adjudication on the merits; but sec. 148 of the Code of Civil Procedure (Act VIII) of 1859 contains a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the Court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff.—10 Madr. 272.

A decree having been obtained against the karnavan and senior anandravan of a Malabar tarwad whereby the tarwad was dispossessed of certain land, the junior members of the tarwad who had not been impleaded in the suit sued to recover the land:—*Held*, that the plaintiffs were entitled to recover upon proof that the decree in the former suit was not substantially correct, and that they were not bound to prove *mala fides* on the part of their karnavan in defending the former suit as a condition precedent to recovery.—10 Madr. 79.

An order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*.—6 Cal. 203.

Under Act X of 1877, sec. 13, the law is now the same as it was under Act VIII of 1859, prior to the passing of Act I of 1872.—3 Bom. 3.

Sec. 13 is not exhaustive as to the effect of *res judicata*. It does not deal with the case of judgments *in rem*, nor with that of parties represented by, though not claiming under, the parties to a former suit.—6 Bom. 703.

Act X of 1877, sec. 13, expl. 5 only applies to cases where several different persons claim an easement or other right under one common title, *e. g.*, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well.—6 Cal. 49.

The section does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. The maxim, *Nemo bis vexari debet in eadem causa*, cannot apply where the right on which the second suit is brought is not the same as that asserted in the former suit.—2 Madr. 352.

An application by petition under Act II of 1874, sec. 63, is a suit within the meaning of Act X of 1877, sec. 13, and therefore is barred by the disposal of a former application in the same matter under the same section or under Act XXIV of 1867, sec. 60, which the Act of 1874 repeals; this is so whether the order is one for payment of money or one dismissing the petition.—3 Cal. 840.

Explanation 5 to sec. 13 of the Code of Civil Procedure would not make a judgment obtained in a suit against one co-sharer binding on another



co-sharer no party to such suit in respect of the rights enjoyed in common by such co-sharers in their common property. Nor could such explanation be applied to a case instituted, or the judgment delivered in such case, during the time when the old Code of Civil Procedure was in force.—6 Cal. 31.

Not only may the plea of *res judicata* though not taken in the memorandum of appeal, be entertained in second appeal, under the provisions of sec. 542 of Act X of 1877, but even when such plea has not been urged in either of the lower Courts, or in the memorandum of appeal, if raised in the second appeal, it must be considered and determined either upon the record as it stands, or after a remand for finding of fact.—4 Al. 69.

Where one of several co-sharers, owners of a piece of land defined by metes and bounds forming part of a revenue-paying estate, brings a suit for partition, in which he does not seek to have his joint liability for the whole of the Government revenue annulled, such suit is cognizable by the Civil Courts, which have jurisdiction to determine the plaintiff's right to have his share divided, and to make a decree accordingly.—7 Cal. 153.

When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata*, and becomes *res sub-judice*; and if the Appellate Court declines to decide that issue, and disposes of the case on other grounds, the judgment of the first Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of appeal.—6 Bom. 110.

A claim to certain pecuniary benefits and payments in kind which a plaintiff alleges himself to be entitled to receive from the defendants in respect of the performance of certain religious services, is a claim which the Courts of Justice are bound to entertain; and if, in order to determine the plaintiff's right to such benefits, it becomes necessary to determine incidentally the right to perform the services, the Courts must try and must decide that right.—2 Madr. 62.

*Held* by the Full Bench that the law of *res judicata* does not apply in proceedings in execution of a decree. *Held*, therefore by the referring Bench, where on an application for the execution of a decree the question was raised whether the decree awarded mesne-profits or not, and the Court executing it determined that it did not award mesne-profits, that such determination was not final, but such question was open to re-adjudication on a subsequent application for execution of the decree.—3 Al. 141 (F. B.)

In a suit by raiyats against their zemindar, praying for measurement of certain land, and for a declaration of the amount of yearly rental, it appeared that, in a previous suit for rent by the zemindar against the raiyats, the raiyats had alleged that the amount of rent and the extent of land had been over stated by the zemindar, but the Court decided that the raiyats were bound by a jamabandi signed by them, and refused to try whether the extent had been over-stated. *Held*, that the present suit was not barred as *res judicata*.—7 Cal. 214.

The plaintiff sued to recover certain lands claiming them as a portion of A, and alleging that A was portion of a mouza which had been leased to him in patni by the zemindar. The suit was dismissed, on the ground that though, A was known as a part of the plaintiff's mouza, yet it had been included in a patni-lease of an adjoining mouza, which the zemindars had granted to the defendants previously to the date of the plaintiff's lease. The plaintiff brought a second suit claiming another portion of A on the same title. *Held* that the claim was barred as *res judicata*.—6 Cal. 715.

In 1874 V sued P to recover certain lands held by him under a rental agreement dated 1873. S was made a defendant on the ground that he held one plot as under tenant to P. S claimed to hold under N. As to this plot, the issue raised was whether the land was held by S under P; the decision, that S did not hold under P, but under N, since 1828; the decree, that V's suit be dismissed as to this plot. *Held*, in a suit brought in 1881 by V against N and S to recover the same plot of land, that the suit was not barred by reason of the previous decision in 1874.—5 Madr. 9.

Plaintiff sued for a declaration of *murosi mokurari* rights to certain lands and for mense-profits, alleging that he had been wrongfully ejected by the predecessors in title of the defendants. A previous suit on the same cause of action was heard and dismissed on the ground of limitation: *Held* that the present suit was not barred as *res judicata* under Act VIII of 1859, sec. 2 (corresponding with Act X of 1877, sec. 13), inasmuch as the first suit having been brought after the period allowed by law, the Court in which it was instituted was not competent to hear and determine it.—5 Cal. 246.

According to the rule of *res judicata* in England, in order to make an adjudication in one suit a bar to the plaintiff's proceeding in another, it must be shown, 1st, that the parties in both suits are the same; 2nd, that the thing sought to be recovered is the same; 3rd, that the grounds upon which the claim is founded are the same; and 4th, that the character in which the parties sue, or are sued, is the same.—2 Cal. 152.

Matter in issue may be defined as matter from which, either by itself or in connection with other matter, the existence, non-existence, nature, or extent, of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows (sec. 3, Ev. Act); and the first and second explanations shew that matter will be considered to have been directly and substantially in issue, if it is a matter in issue which might and ought to have been put forward by either plaintiff or defendant in the previous suit. If the plaintiff might have made the same claim in the prior action, but did not, the subsequent suit will be barred.—2 Cal. 152.

The question whether the parties to a suit in a Court of Revenue for arrears of rent stand in the relation of landlord and tenant is one which it is necessary for such Court to try incidentally for the purpose of disposing of such suit, but not one which such Court has special jurisdiction to determine, and its determination of that question is not that of a competent Court. Consequently, where a Court of Revenue determines, in such a suit, that the parties do not stand in such relation, such determination does not bar the party alleging that the parties do stand in such relation from suing in the Civil Court to establish such relation.—3 Al. 51.

A Decree against a Karnavan of a Malabar tarwad, as such, is binding upon the members of that tarwad, though not parties to the suit, in the absence of fraud or collusion. A Karnavan is not a mere trustee, nor do the rules of Courts of Equity as to the necessity of making *cestui que* parties to suits against trustees by strangers apply to the case of a Karnavan and the members of the tarwad. Explanation 5 of sec. 13, Civil Procedure Code, is not limited to the case of a suit under sec. 30. The members of a tarwad claim under a Karnavan, suing as such, within the meaning of Explanation 5 of sec. 13. Status of Karanavan discussed.—2 Madr. 328.

Act X of 1877, sec. 13. expl. 2, was meant to apply to a case where the defendant has a defence which, if he had so pleased, he might, and ought to, have brought forward; but, as he did not bring it forward, the

suit has been decreed against him. Under such circumstances the defendant is as much bound by the adverse decree as if he had set up the defence, and he is equally estopped from setting up that defence in any future suit under similar circumstances. The explanation was never intended to enable a party to treat a point of law as having been decided in his favour in a former suit, which was in fact not so decided, and which it was not necessary, for the purposes of the suit, to decide at all.—5 Cal. 923.

A sued B for rent in the Court of the Deputy Collector of Tipperah under the provisions of Act X of 1859. C intervened, claiming that the land in respect of which the rent was claimed was his property, and the suit was dismissed. On appeal, the District Judge of Tipperah reversed this decision and decreed the claim, on the ground that C had no right whatever to the land. In a subsequent suit brought by C against A and B for possession of the same land: *Held* that the previous decree of the District Judge did not constitute the plaintiff's claim a *res judicata*, and was no bar to the suit. *Dinanath Bose v. Kali Kumar Roy* [B. L. R., Sup. vol., 364; S. C. 5 W. R., (Act X Rul.) 23] followed.—8 Cal. 470.

I, to whom the obligee of a bond for the payment of money in which immoveable property was hypothecated had assigned by sale her right thereunder, sued, by virtue of the deed of sale on such bond, for the money due thereunder, claiming to recover by the sale of the hypothecated property. The suit was dismissed on the ground that the deed of sale, not being registered, could not be received in evidence, and consequently I's right to sue on such bond failed. I, having procured the execution of a fresh deed of sale, and caused it to be registered, brought a second suit on such bond by virtue of such deed of sale, claiming as before. *Held* that the second suit was not barred by the provisions of sec. 13 of Act X of 1877.—3 Al. 334.

A Karanavan of a Malabar tarwad, having a right at any time to demand restoration of the property of the tarwad in the hands of the Anandravan, is not debarred by sec. 13 or sec. 43 from bringing a second suit to recover lands in the wrongful possession of an Anandravan, either by the fact that in a former suit between the same parties, the Karnavan only laid claim to some of the lands sued for, or by the fact that the former suit was dismissed upon the joint petition of the parties, alleging a compromise and a surrender of the lands, which, as a fact, were not surrendered, but wrongfully retained by the Anandravan. An Anandravan has no right to the value of improvements effected by him upon tarwad property surrendered to the Karnavan when such improvements are not made with private funds.—5 Madr. 1.

In a suit recover to possession of certain land, where it appeared that there had been a previous suit between the same parties with respect to the same land, in which the then plaintiff sought to have their possession confirmed, and that in that suit the lower Courts had decided the case both on the question of title and possession, but on special appeal the High Court had dealt only with the question of possession, and in dismissing the appeal, had not gone into the question of title, and, the defendant in that suit subsequently sued to recover possession of the land, *held* that the question of title was still open between the parties, and had not been heard and finally decided by a Court of competent jurisdiction in a former suit within the meaning of sec. 13 of Act X of 1877.—7 Cal. 381.

When a question of title has to be, and is, decided by a Court of competent jurisdiction with reference to the value of the subject-matter in dis-

pute, such decision, or the ultimate decision upon appeal from such decision, is final, and the question of title becomes a *res judicata* as between the parties to the suit, although it may have the effect of determining the title to an estate or estates, the value of which exceeds the jurisdiction of the Court in which the suit was instituted. *Per* WHITE, J.—In considering, on the hearing of an appeal, the competency of a Court for the purpose of deciding upon a question of *res judicata*, the powers of the Court in which the suit was instituted, and not those of the Court in which the suit was decided on appeal, must be looked to.—5 Cal. 832.

In order to see whether a question is *res judicata* within the meaning of sec. 13, Civil Procedure Code, the former decree and the questions decided thereby must alone be considered. The words in sec. 13, “has been heard and finally decided by such Court,” do not apply to an opinion expressed in the judgment on other issues not material for the purpose of the decree, though properly determined under sec. 204 by the Court of first instance. *Niamut Khan v. Phadu Buldia* (I. L. R., 6 Cal. 319) and *Lachman Singh v. Mohun* (I. L. R., 2 Al. 497) dissented from. Where a plaintiff improperly brings a defendant before a Court, and this suit is dismissed, the defendant should not be deprived of costs, merely because the Court considers the defence a fabrication to meet the plaintiff’s claim.—4 Madr. 134.

Where the plaintiff in a suit prays that a person may be substituted on the record as the heir of a defendant who has died, the Judge should raise an issue as to whether the person sought to be substituted is the heir of the deceased defendant. In 1872, A brought a suit on a mortgage against the mortgagor, a Hindu widow, who died pending the suit. A then applied that the suit should be revived against B as the representative of the defendant. B denied that he was such representative, but the Judge refused to go into the question, made B a party, and gave A a decree for the sale of the mortgaged property. B subsequently brought a suit to have it declared, *inter alia*, that the mortgage and decree only covered the widow’s life-interest. *Held* that the suit was not barred either as *res judicata* or under the provisions of sec. 234 of the Code of Civil Procedure.—6 Cal. 777.

That a claim has been included in a previous suit, without its having been directly and substantially put in issue and decided, does not upon the dismissal of that suit preclude a subsequent suit upon it. A consent decree of 1873 decided that alluvial land belonged to the plaintiff’s village Sipah. The area was judicially determined in 1876 on a map of 1874, but actual possession was not obtained from the defendant, who owned villages on the opposite side of the river. The decree-holder in 1877 included a claim for part of the same land in a suit for an accretion to another of his riparian villages, Khasapur, and the latter suit was wholly dismissed. To get possession of the land decreed in 1873 he then brought rent-suits against two tenants upon it, the defendant intervening under sec. 111 of the Oudh Rent Act, 1868. Both the rent-suits were dismissed; and, according to the right reserved in the latter section, the plaintiff, to establish his title in a competent Court, brought the present suit, including in it the land which he had made part of his claim in the dismissed suit of 1877. *Held*, first as to limitation, that the twelve years’ bar must be calculated from 1876, the date of the judicial ascertainment of the land decreed. Secondly, on the question whether the dismissal of the suit of 1877 precluded further suit for that part of the land which had been included in it, *held*, that it did not, and that section 13 of the Civil Procedure Code was inapplicable. The pleadings and judgment in the suit of 1877 were referred to, showing that what

belonged to Sipah had not been in issue, and that nothing respecting it had been heard or decided. Thirdly, *held*, as to the rest of the land claimed in this suit, that there was no bar on account of its omission from the suit of 1877. As to mesne profits, it would have been open to the High Court to direct an enquiry under sec. 212 of the Civil Procedure Code.—19 Cal. 159.

The plaintiff brought in 1876 a suit against the defendant in respect of the same subject-matter, and founded on the same cause of action as the present suit. Issues of fact arising on the merits were inquired into; but a certificate of the Collector under sec. 6 of the Pensions Act (No. XXIII of 1871), which was necessary to give jurisdiction to the Court, not having been obtained, the claim was rejected on that ground. *Held* that the Court not having legally pronounced on the merits of the former case, the opinions expressed on the issues were not *res judicata* so as to bar the maintenance of the present suit. The non-production of the Collector's certificate does not necessarily constitute such a want of due diligence on the plaintiff's part as to disentitle him to the deduction of time allowed by sec. 14 of the Limitation Act XV of 1877.—3 Bom. 223.

S caused a notice of ejectment to be served upon K in respect of certain land, alleging that he held the same by virtue of a lease which had expired. K contested his liability to be ejected under sec. 39, denying that he held the land by virtue of such lease, and alleging that he held it under a right of occupancy. The Revenue Court decided that K held the land under a right of occupancy, and not under such lease. S thereupon sued K in the Civil Court, claiming possession of land, on the allegation that K was a trespasser wrongfully retaining possession thereof after the expiration of his lease. *Held* that the suit was cognizable in the Civil Courts, and the decision of the Revenue Court did not render the matter in issue *res judicata*. The provisions of sec. 13 of Act X of 1877 do not apply to applications such as those under sec. 39 of Act X VIII of 1873.—3 Al. 521.

S and B jointly sued N for the redemption of a mortgage of an eight-auna share of a village, B suing as the purchaser from the mortgagor of a moiety of such share. N did not, in defence of such suit, assert a right of pre-emption in respect of such moiety, although such right had accrued to him on its sale by the mortgagor to B. S and B obtained a decree in such suit, and the mortgage was redeemed. N subsequently sued B and his vendor to enforce his right of pre-emption in respect of such moiety. *Held* that it was incumbent upon N in the former suit to have asserted in defence his right of pre-emption in respect of such moiety, inasmuch as, if that right had been established, it must, so far as B was concerned, have proved fatal to his title to redeem, and that, as he had not done so, the suit to enforce his right of pre-emption was barred by the provisions of sec. 13 of Act X of 1877. Explanation II.—3 Al. 189.

A decree obtained *ex parte* is not final within the meaning of expl. 4, sec. 13 of Act X of 1877. Such a decree is not conclusive evidence of the amount of rent payable by the same defendant in another suit for subsequent rent of the same property. Where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for a previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree, which had been obtained *ex parte*, and which he also alleged had been duly executed, as evidence of the amount of rent due to him by the defendant, but it appeared that the lower Court had found that the alleged execution-proceedings were fraudulent, and that no steps had been taken which gave finality to the decree: *Held* that the decree was not conclusive evidence of the



amount of rent due from the defendant, or of the questions with which it dealt.—7 Cal. 23.

In 1870 the plaintiffs sued to redeem a mortgage of certain lands from the defendants' predecessors in title. The suit was dismissed on the ground that the plaintiff's equity of redemption had been sold in execution of a decree to A B. The plaintiffs, having re-purchased the equity of redemption from A B, brought a second suit to redeem the lands in the defendants' possession. *Held* that the question whether the equity of redemption of the lands in suit had been sold to A B was *res judicata*, and could not be re-opened by the defendants on the ground that the plaintiffs were litigating under a different title in the former suit. The admissions of a person whose position in relation to property in suit it is necessary for one party to prove against another are in the nature of original evidence and not hearsay, though such person is alive and has not been cited as a witness.—5 Madr. 239.

In a suit to redeem a kanom on certain land, the jenm of a devasom in Malabar, it appeared that the plaintiff held a melkanom in respect of the same land executed to him (subsequently to the date of the kanom sought to be redeemed) by defendant No. 3, the samudayam of the devasom. Defendant No. 3 represented one Chitambaram, in whose favour the Uralers had, in 1741, executed a document appointing him samudayam and stating that they had received from him a kanom of 18,000 fanams on the devasom properties and providing that he should appropriate part of the rents towards the loan. It appeared that in a suit to eject tenants, the Uralers had sued as co-plaintiffs with the samudayam: in subsequent suits, however, two of the Uralers had sued other tenants for rent and the samudayam for an account; both of these suits were dismissed on second appeal, and in the judgments of the High Court the samudayam was described as a mortgagee in possession:—*Held*, (1) on its appearing that no opinion was expressed in the former suits as to the construction of the document of 1741 that the former decisions had not the force of *res judicata*; (2) in view of the conduct of the parties and on the terms of the document of 1741 that the samudayam was not thereby constituted a mortgagee in possession and the melkanom set up by the plaintiff was invalid.—14 Madr. 301.

In a suit brought in 1886 by a zemindar to recover an estate granted by his predecessor to the predecessor of the defendant on a service tenure, a small money rent being also reserved, it appeared that in 1864 the right of the plaintiff's predecessor to rent had been established by suit, but there was no evidence that the service was then dispensed with, but in 1885, it was intimated to the defendant that the service was dispensed with, and a notice to quit was given to him; the option of holding the estate at an enhanced rent was however given to him at the same time:—*Held*, (1) that the suit was not barred by limitation, nor precluded by Civil Procedure Code, sec. 13 or sec. 43; (2) that the plaintiff was not precluded by any implied contract from increasing the rent; (3) that the burden of proving the plea that the plaintiff was not entitled to eject lay on the defendants and had not been discharged. In computing the time for an appeal to His Excellency the Governor in Council, under the rules made by virtue of Act XXIV of 1839 against a decree passed by the Agent to the Governor, the time necessary for procuring copies of decree and judgment appealed against may be deducted.—14 Madr. 365.

In a suit in 1882 between the members of a family following the Muhammadan law of inheritance, in which the plaintiffs sued as sharers for



the recovery of their share in certain property, one of the defendants pleaded that a paramba, part of the property in dispute, was not subject to division, but this plea was unsuccessful, and a decree was passed for the plaintiffs. The present suit was brought by a mortgagee from one of the defendants in the former suit (who had been ex-parte) to recover his share of the above-mentioned paramba, the subject-matter of his mortgage; the mortgagor was joined as defendant, among others including the defendant who had raised the plea above stated. This plea was repeated by the same person :—*Held* (1), distinguishing *Venkatarama v. Labai Meera* (I. L. R., 13 Madr. 275), on the ground that the parties were governed by the Muhammadan law of inheritance, that the suit was maintainable; (2) that the claim that the paramba was not subject to division was *res judicata* by virtue of Civil Procedure Code, sec. 13, explanation V.—14 Madr. 324.

In a suit for the partition of a zemindari, the plaintiffs asked, *inter alia*, for “ten years’ past profits and for subsequent profits.” The Judge passed a decree for partition in which mesne profits for three years prior to the suit were decreed to the plaintiffs, but his judgment and decree were silent with regard to the subsequent profits claimed in the plaint. The defendant appealed against this decree, and the plaintiffs preferred a memorandum of objections against part of it, but did not object to it so far as it omitted to provide for subsequent mesne profits. The plaintiffs instituted the present suit to recover from the defendant mesne profits from the date of the above suit :—*Held*, that the plaintiffs’ claim so far as concerned mesne profits accrued since the decree in the former suit was not *res judicata*, and the suit to that extent was not precluded by Civil Procedure Code, sec. 13.—14 Madr. 328.

In a suit brought by the Uralers of a devasom in Malabar to recover certain land in the possession of the defendant, it appeared that the defendant held under an instrument, dated 1741, whereby his predecessor in title was appointed samudayam and was authorised to appropriate part of the rents of the devasom properties to the interest on a loan made by him to the Uralers. Two of these Uralers had brought a previous suit against the defendant for an account of the rents received by him and for an injunction : that suit was dismissed on second appeal when the High Court described the defendant as a mortgagee in possession, but the question whether or not he was a mortgagee with or without possession was not then directly and substantially in issue :—*Held*, (1) that the status of the defendant was not *res judicata*, by reason of the judgment in the previous suit; (2) that the Court having held, following *Krishnan v. Veloo* (ante p. 301), that the defendant was not a mortgagee in possession under the instrument of 1741, the suit was not barred by limitation.—14 Madr. 312.

In a suit for a declaration that the members of the Nambudri illom to which the plaintiffs belonged were the sole heirs and successors of an illom known as Kiluvapura, of which the natural line had become extinct, and for possession of certain land which had formed part of its property, the defendants were the karnavan and manager of the plaintiffs’ illom and the members of another illom. It was found on the evidence that the plaintiffs’ karnavan had been adopted unto the Kiluvapura illom, and that subsequently that illom and the plaintiffs’ had been amalgamated under a karar executed by, among others, the wife of the last male member of the Kiluvapura illom, and that she had died less than twelve years before this suit. The defendants, other than the karnavan and manager of the plaintiffs’ illom, asserted a right to a moiety of the property of the Kiluvapura illom (with which, however, it was now found on the evidence that they were

less closely connected than the plaintiffs), and it appeared that that right had been similarly asserted in suits brought after the date of the karar above referred to, by a member of the defendants' illom against the karnavan and manager of the plaintiffs' illom, and that decrees had been passed therein negating the title now set up by the plaintiffs and that part of the property now claimed was held under one of those decrees. The plaintiffs did not ask that those decrees should be set aside:—*Held*, (1) that the suit was not barred by limitation; (2) that it was unnecessary for the plaintiffs to prove *mala fides* against their karnavan in respect of his conduct in the former suits or to seek that the decrees passed therein be set aside, and that those decrees did not constitute the present claim *res judicata*, as the karnavan was not then impleaded in his capacity as such; (3) that the adoption of the plaintiffs' karnavan was valid even assuming that no datta homan was performed, and the last male member of the Kiluvapura illom had died after merely indicating him as his heir and that the widow adopted him in the Dwayamushyayana form; (4) that the plaintiffs were entitled to a decree as prayed.—15 Madr. 6.

The plaintiff, a junior member of a Malabar tarwad, alleged that her karnavan had assigned to her his kuikanom right over certain land, and that she had obtained a fresh demise from the jenmi and placed a tenant in possession. The tenant was dispossessed by the present karnavan, and in 1886, sued him and the plaintiff to recover possession of part of the land. That suit was dismissed on the ground that the above allegations of the plaintiff were unfounded. She now sued the present karnavan for possession of the entire land:—*Held*, that the claim of the plaintiff was *res judicata* as far as it related to the land in question in the former suit, but not as to the rest.—15 Madr. 264.

In a suit to recover a parcel of land, the plaintiff's case was that it had been purchased by him *benami* in the name of his brother, who had sued the present defendants to obtain possession in 1887, but had been negligent in the conduct of the suit which was consequently dismissed. It was found that there had been no negligence in the conduct of the suit, and that it had been instituted with the plaintiff's knowledge:—*Held*, that the plaintiff was bound by the decree in the former suit, and could not recover on his secret title.—15 Madr. 267.

In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed a "decree for the plaintiffs as prayed," but the decree ordered payment by one anandravan only. Property of the tarwad was attached and sold. The decree was then amended and brought in conformity with the judgment. Other members of the tarwad sought to have the sale set aside, but it was found that the judgment debt had been contracted for proper tarwad purposes, and that suit was dismissed. Application was now made for the attachment of other property of the tarwad in further execution of the amended decree:—*Held*, that the members of the tarwad were not entitled to contend that the decree was not binding on them, that matter being *res judicata*. *Quære*.—Whether the rule in *Sundara v. Subbanna* (I. L. R., 9 Madr., 354) as to the amendment of decrees is correct.—15 Madr. 403.

In 1882, the daughter of a deceased Hindu brought a suit in the Court of a District Munsif for a declaration that the defendant was not the adopted son of her father (deceased) as he claimed to be. It was found that the alleged adoption was valid and the suit was dismissed. The then defendant now brought, in 1889, a suit in the same Court to recover possession of

land from the then plaintiff, alleging that it had been wrongfully transferred to her by way of gift by his adoptive mother. The defendant denied the adoption and asserted that the transfer was valid as having taken place in accordance with an arrangement made by her father in his lifetime. It was admitted that the value of the whole property, to which the plaintiff was entitled by virtue of his adoption, if it was a valid adoption, exceeded Rs. 2,500. The Court of first appeal held that the question of the adoption was not *res judicata*, and observed that the transfer to the defendant was apparently made to induce her to abandon her litigation as to the adoption:—*Held*, (1) that the defendant was not at liberty to question the plaintiff's adoption: (2) that the Court should try whether the transfer was made *bona fide* by the plaintiff's mother as his guardian for his benefit.—15 Madr. 498.

A claim in execution to a house which had been attached was dismissed, and the claimant now sued the decree-holder to establish her title to it. It appeared that the house had been previously attached in execution of another decree obtained against the same judgment-debtor and his father (since deceased); that the present plaintiff had then preferred a claim, which was allowed; that the judgment-debtor had taken no steps to have the order allowing the claim set aside; and that a suit filed by the decree-holder with that object had been dismissed:—*Held*, that the plaintiff's claim was not *res judicata*, and the defendant was not estopped from contesting it.—15 Madr. 477.

A suit for a declaration of the title of the plaintiffs' tarwad to certain land was filed in a District Court against the Maharaja of Cochin and others, including the trustees of a devasom. It appeared that the same land was the subject of suit instituted in a Subordinate Court on the 6th August 1877, to which the representatives of both the plaintiff's tarwad and the devasom were parties, and that the land was then found to be the property of the devasom and a decree was passed accordingly. It was contended that the present claim was not *res judicata* by reason of that decree, because, under the provision of Act X of 1877, sec. 443, which came into operation during the pendency of that suit, no Sovereign Prince could be sued in any Court subordinate to a District Court, and the Court which passed that decree was not therefore "a Court of jurisdiction competent to try" the present suit within the meaning of Civil Procedure Code, sec. 13:—*Held*, that, although these words must be taken to refer to the jurisdiction of the Court at the time the suit was heard and determined, yet the present claim was *res judicata* since the title to the land was a matter in issue within the cognizance of the Subordinate Judge and was adjudicated on by him.—15 Madr. 494.

Where there has been a suit between an agriculturist mortgagor and his mortgagee for an account merely, a subsequent suit for possession on payment of the money declared to be due is barred under either sec. 13 or sec. 43 of the Code of Civil Procedure.—7 Bom. 377.

In 1866 S obtained a decree authorizing him to recover certain property on payment of a certain sum to the mortgagee, but not declaring that S would be foreclosed if he did not exercise his right of redemption: *Held* that S was not debarred from bringing a suit to redeem the same property in 1881.—6 Madr. 119.

A Hindu widow and her son, the then presumptive heir to property claimed by the widow, obtained a decree against a more remote reversionary heir. The son predeceased his mother, and the person against whom

the decree had been obtained became the next reversionary heir. *Held*, in a suit for possession by him, that the decree in the previous suit did not operate as *res judicata*.—9 Cal. 463.

K, the purchaser of certain immoveable property in execution of a decree, sued for possession of the same. The suit was dismissed “in the form in which it was brought,” because the plaintiff had not filed with the plaint the sale-certificate. K subsequently brought a fresh suit. *Held* that the dismissal of the former suit “in the form it was brought” did not amount to permission to sue again contemplated by sec. 373 of the Civil Procedure Code, and such dismissal must be regarded as a “decision” thereof in the sense of sec. 13, expl. iii., and therefore as a bar to the fresh suit.—5 Al. 595.

Where a person on his own application was added as a party respondent to an appeal, and on the case in appeal being remanded under sec. 562 of the Code of Civil Procedure for re-trial on the merits practically took no steps whatever to defend the suit.—*Held* that he could not afterwards plead, by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit, had he chosen to defend it. *Ram Kirpal v. Rup Kuari* referred to.—14 Al. 64.

The plaintiff, having obtained a decree for possession of certain land, applied for execution by delivery of possession. Whereupon a third party filed an objection in the Court of the Munsif, that he held a prior decree for possession of the same land and therefore the plaintiff's decree was incapable of execution. This objection was allowed and the plaintiff then sued for establishment of his right to possession of the land jointly with the objector, making the former judgment-debtor and the objector defendants to the suit. The Subordinate Judge in first appeal held that the Munsif had acted under sec. 331 of the Code of Civil Procedure, and, applying sec. 13 of the same Code, dismissed the plaintiff's suit. The plaintiff then appealed:—*held* that circumstances did not exist to give the Munsif jurisdiction to act under sec. 331, and that his order must be taken to have been made, as it purported to have been made, under sec. 278. *Buhal Singh Chowdhry v. Behari Lal* referred to.—14 Al. 417.

In 1870 two plots of land, numbered 147 and 155, belonging to the same owner, were sold in execution of a decree. The purchaser of plot 155 sold it to A, who in 1877 sued the tenant of a portion of the land for rent. In this suit A prayed that it might be declared that he was the owner. The tenant alleged that B, the purchaser of plot 147, was the owner of the land in respect of which rent was sought to be recovered, and B was made a party to the suit. At the hearing A did not appear, and the suit was dismissed for default. Subsequently A sold plot 155 to the present plaintiff, who now sued for possession. *Held* that the suit was not barred as *res judicata*.—9 Cal. 426.

The plaintiff, in a suit for rent which was contested, having failed to prove that the rent was payable at the rate claimed by him, the Court, in trying the issue “what is the amount of the jama,” after considering the whole of the evidence and the circumstances of the case, held that the plaintiff had entirely failed to prove his allegation of the jama, and gave him a decree for the amount admitted by the defendant, which was less than that claimed by the plaintiff. In a later suit the plaintiff sued the defendant, in respect of the same holding, for rent for a subsequent year, and he claimed at the same rate as he had claimed in his previous suit. It was contended on behalf of the defendant that the question as to the rate at which the rent was payable was *res judicata*, it not being alleged that there had been any

agreement subsequent to the first suit by which the rate was altered. *Held*, that the question as to the rent payable for the period covered by the first suit was *res judicata*; but that it did not follow that the decree in that suit operated as *res judicata*, and conclusively determined the rate of the rent payable for the year in respect of which the subsequent suit was brought. That depended on whether the previous decision was that the plaintiff should recover from the defendant the sum admitted by him to be due, or that the sum so admitted to be due was the proper amount of rent payable for the period in question. *Held*, that in this case the previous decision was to the latter effect, and that the question of the rate at which the rent was payable by the defendant was *res judicata*. *Punnoo Singh v. Nirghin Singh and Jeo Lal Singh v. Surfun* referred to.—19 Cal. 656.

A leased lands to B, who sued C for possession of a certain mauza, alleging it to be a portion of the lands leased. A was made a defendant, and supported the case of the plaintiff, who obtained a decree. C appealed, making A and B respondents, when the decree was reversed, and the suit dismissed, on the ground that the mauza sued for was the property of C; and that ruling was upheld on special appeal to the High Court. Subsequently A brought a suit against C for the same mauza, making B a defendant. *Held* that the title to the mauza was *res judicata* between A and C, and that the suit would not lie. *Govind Chunder Koondoo v. Taruck Chunder Bose* (I. L. R., 3 Cal. 149).—9 Cal. 120.

An allowance for the maintenance of a younger member of a family was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his lifetime, founded on an *ekrarnama*, did not afford a defence under sec. 13 of the Code of Civil Procedure. *Held* also that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced.—9 Cal. 945.

An occupancy tenant, who had been ejected under secs. 34 and 93 (b) of the North Western Provinces Rent Act, on the ground that he had committed an act mentioned in those sections which rendered him liable to ejectment, sued in the Civil Court for a declaration of his right of occupancy and to have the decree of the Revenue Court directing his ejectment declared of no effect, on the ground that his act was not one of those rendering him liable to ejectment, being authorized by local custom. *Held* that the question of the plaintiff's liability to ejectment on account of the act in question, being a matter the cognizance of which was limited to the Revenue Courts, and the decision of the Revenue Court against him having become final, the plaintiff's suit was barred by sec. 13 of the Civil Procedure Code. *Raj Bahadur v. Birmha Singh* (I. L. R., 3 Al. 85) distinguished.—5 Al. 245.

An adoption having been held to be valid by the High Court on appeal from a Subordinate Court, an appeal to the Privy Council was preferred, when the parties entered into a compromise, and the appeal was permitted to be withdrawn. *Held* that the decree of the High Court as to the validity of the adoption became final, and was not affected by the compromise so as to allow the matter to be again litigated between the parties or their previes. Although the decision of a Court as to the validity of an adoption in a suit between A and B may, in any subsequent proceedings between



A and those claiming under him on the one side, and B and those claiming under him on the other, estop the parties to such proceedings from again questioning the validity of the adoption, yet in a suit where both the contesting parties claim under B, such decision will not operate as an estoppel so as to prevent the validity of the adoption being again questioned by either party to such suit.—6 Madr. 43.

The obligee of a bond payable by instalments sued the obligor for four instalments, claiming with reference to the terms of such bond interest on such instalments from the date of such bond. The obligor contended in that suit that, on the proper construction of the bond, the interest on such instalments should be calculated from the dates of default. The obligee obtained a decree for interest as claimed. The obligee subsequently again sued the obligor for four instalments, again claiming interest of such instalments from the date of such bond. The obligee contended again in the second suit that interest should only be calculated from the dates of default. *Held* that the question as to the date from which interest due on the defaulting instalments was exigible under the terms of such bond was *res judicata*. It is the "matter in issue," not the "subject-matter" of the suit, that forms the essential test of *res judicata* in sec. 13 of Act X of 1877.—4 Al. 55.

N sued W for a moiety of a brick-kiln, claiming by right of inheritance, and alleging in respect of the other moiety that it was his own property. W, in her defence to the suit, denied that N had any right in the kiln, and that a moiety of the kiln belonged to him. An issue was framed on the point whether a moiety of the kiln belonged to W, which the Court of first instance decided in N's favour. N eventually obtained a decree for a moiety of the kiln which he claimed by right of inheritance. W appealed, contending, *inter alia*, that it was not proved that a moiety of the kiln belonged to N. The appeal was decreed, and the decree of the Court of first instance in N's favour was set aside. W subsequently sued N for the value of bricks which he had wrongfully taken from the kiln. N set up as a defence to the suit that a moiety of the kiln belonged to him. *Held* that the issue whether a moiety of the kiln belonged to N was *res judicata* under sec. 13, expln. i. of the Civil Procedure Code.—5 Al. 514.

A Hindu sued for compensation for the loss of his daughter's services in consequence of her abduction by the defendant, and for the costs incurred by him in prosecuting the defendant criminally for such abduction. The defendant was convicted on such prosecution: *Held* that the decision of the Criminal Court did not operate under sec. 13 of Act X of 1877 to bar the determination in such suit of the question whether the defendant had or had not abducted the plaintiff's daughter. Also that the plaintiff was entitled to recover the costs of such criminal proceedings. The daughter in this case was a married woman who had been deserted by her husband, and at the time of her abduction was living with the plaintiff, her father. *Held* by STUART, C. J.—That the suit by the father for compensation for the loss of his daughter's services in consequence of her abduction was, under the circumstances, maintainable. *Held* by OLDFIELD, J.—That a suit by a Hindu father for the loss of his daughter's services in consequence of her abduction is not maintainable. 4—Al. 97.

G sold an estate nominally to the minor son of K, but in reality to K. K brought a suit in his minor son's name against N, the mortgagee of such estate, to redeem the same. N set up as a defence to such suit that such sale was invalid under Hindu law, as such estate was a share of certain



undivided property of which he was a co-sharer, and had been made without his consent. It was finally decided in that suit that such estate was a share of such undivided property, and not the separate property of G, and that such sale was invalid, having been made without the consent of N, a co-sharer of such undivided property. G subsequently redeemed such estate, and, having done so, sold it a second time to K. N thereupon sued K to set aside such sale on the same ground as that on which he had defended the former suit. *Held* that the issue in such suit, whether such estate was a share of undivided property or the separate property of G, was *res judicata*, inasmuch as K, though not in name, yet in fact, was a "party" to the former suit in which such issue was raised and finally decided.—3 Al. 812.

Explanation 5 of sec. 13 of Act X of 1877 only applies to cases where several different persons claim an easement or other right under one common title, as, for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well. Where, therefore, A, in defending a suit brought against him by B, to have it declared that he had a right to build a wall across a drain, set up a prescriptive right to use the drain, and it was decided that no such prescriptive right existed in A; and, subsequently, C brought a suit against B, claiming to use the same drain as an easement, and asking for the removal of the wall in question in the former suit, and B set up the judgment in the suit between himself and A as a bar to the suit. *Held* that the right claimed by C not being one which he and other inhabitants of the neighbourhood claimed under one common title, but a prospective right which he claimed individually in respect of his own house and premises, and depending upon the length of time he had used the right, was a separate claim, and that the judgment in the suit between B and A did not separate as a bar to his suit—6 Cal. 49.

Certain immoveable property was attached in execution of a money-decree held by A, dated 22nd August 1871. On 1st April, 1872, the same property was subsequently attached in execution of a decree held by B, dated 19th August 1871, which directed the sale of the property in satisfaction of a charge declared thereby. The property was sold in execution of the decree. The Munsif directed that the proceeds of the sale should be paid to B. A, who claimed them on the ground that he had first attached the property, appealed against this order. The Judge, declaring that A was entitled to the proceeds, reversed the Munsif's order. A then obtained an order from the Munsif, directing B to refund the money, which he did, and it was paid to A. B sued A to recover the money by establishment of his prior right to the same, and for the cancelment of the Judge's order, alleging that the same was made without jurisdiction: *Held* (by a majority of the Full Bench) that the suit was one for money received by the defendant for the plaintiff's use, and was, therefore, governed by sch. 2, art. 60. *Held* (by the Division Bench) that A was not entitled, as the first attaching creditor, to the sale proceeds.—*Ram Kishan v. Bhawani Das*, I. L. R., 1 Al. 333 (F. B). See also *Bhawani Kuar v. Rikhi Ram*.—2 Al. 354.

The decision of a Court, in order to be conclusive in another Court, must have been that of a Court which would have had jurisdiction to decide the question raised in the subsequent suit in which the decision is given in evidence as conclusive. The words, "Court of competent jurisdiction," used in sec. 13 of the Code of Civil Procedure, include the meaning that the first Court must not have been precluded by the pecuniary limits of its

jurisdiction from deciding the question raised in the other. The two Courts must exercise such concurrent jurisdiction in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond the powers of the Court which disposed of the prior one. The defence made to a suit on a bond for Rs. 12,000 and interest thereon, in a Court having no pecuniary limit of jurisdiction, was that in a prior suit for Rs. 1,665, balance of interest, brought in a Court with power to try suits not exceeding Rs. 5,000 in value, the principal sum due on that bond had been decided to be Rs. 4,790. *Held* that the issue as to the amount of principal due on the bond has not been heard and finally decided by a Court of competent jurisdiction within the meaning of sec. 13.—9 Cal. 439.

Plaintiff sued for a declaration that certain lands were his, and for possession of them. Defendant No. 1 claimed the ownership of the lands; defendant No. 2 claimed to be mortgagee in possession. The decree simply dismissed the suit; but the lower Court found, as a fact, that the ownership of the lands was in the plaintiff, although the plaintiff was not entitled to possession of them by reason of the mortgage to defendant No. 2. Defendant No. 1 now appealed on the ground that, although the decree itself was entirely in her favour, she would be prejudiced in any future proceedings if the finding of fact, as to the ownership of the lands, were left unchallenged. *Held* that the appeal would not lie; for the decree is what must be looked to see what was conclusively decided, and there was nothing in the decree actually passed which the plaintiff could afterwards use as *res judicata* in his favour; and an appeal is not admissible on any point not having the authority of *res judicata*. An adjudication is only conclusive evidence of the facts established therein or properly tending thereto; hence from a simple judgment against him a party cannot reduce anything in his favour as *res judicata*, for nothing in his favour can have been an essential element of an adverse decree.—7 Bom. 464.

N brought a suit against P for enhancement of rent. P's defence was, *first*, that no notice of enhancement had been given; *secondly*, that the rent was not enhanceable, as he and his predecessors in title had held it at a fixed rent from the date of the Permanent Settlement. The suit was dismissed on the ground that no notice had been given; but the Munsif stated in his judgment that he considered the rent enhanceable, because he did not believe in the genuineness of the documentary evidence produced by P. The decree merely ordered that the suit should be dismissed, the portion of the judgment as to the enhanceability of the rent not being embodied in the decree. P, therefore, had no right of appeal against that portion of the judgment. In a subsequent suit by N against P, for enhancement of rent of the same tenure, it was held that, on the rule laid down by the Privy Council in *Soorjeemonee Dayee v. Suddanund Mohapatter*, and *Krishna Behari Roy v. Bunvari Lall Roy*, P was precluded, by the decision in the former suit, from denying that the rent of the tenure was enhanceable, although the decision on that point was not embodied in the decree. The material findings in each case should be embodied in the decree, and if they are not, it is incumbent on the parties, to avoid their being bound by decisions against which they have no right of appeal, to apply to amend the decree in accordance with the judgment.—6 Cal. 319.

The plaintiff, a member of a Malabar Nambudri family, sued for certain land, claiming it as the property of his family, the *Vadasheri* illam. He had been dispossessed by the defendants, under a decree declaring their title to the land against the plaintiff's elder brother, who claimed it on

behalf of the *Vadasheri* illam : *Held* that the plaintiff was not estopped by the former decree from recovering the land. *Per* INNES, J.—The question whether a decree obtained against the Karnavan of a Nayar tarwad or of a Nambudri illam in Malabar is binding on the family is purely one of procedure. The *dictum* in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi* (I. L. R., 2 Madr. 328) that in the absence of fraud or collusion a decree against the Karnavan, as such, is binding on the Anandravans of the tarwad, is not warranted by any provision of the Code of Civil Procedure. Every member of the tarwad is entitled to be made a party, or to have notice under sec. 30 of the Code of Civil Procedure, in any suit, the object of which is to affect the tarwad property. Explanation 5 of sec. 13 of the Code of Civil Procedure does not refer to *bona-fide* defences, but to *bona-fide* claims, and does not make a decree binding on a person not a party to it, where the actual defendant was jointly interested with such person in the subject-matter of the suit, and defended the suit *bona-fide*. *Hazir Ghazi v. Sonamonee Dasse* (I. L. R., 6 Cal. 31) approved. —6 Madr. 121.

In December 1878, H, a Hindu widow, in possession, by way of maintenance, of a certain estate, of which R owned one-third, and P, B, and S, one-third jointly, made a gift thereof to N. H died in January, 1879. In February 1879, R & P, B and S, joined in suing N for a declaration of their proprietary right to two-thirds of the estate, and to have the deed of gift set aside. The Court trying this suit treated it as one for a mere declaration of right, and dismissed it, with reference to the provisions of sec. 42 of the Specific Relief Act, 1877, on the ground that the plaintiffs had omitted to sue for possession, although they were not in possession, and were able to sue for it. In Nov. 1879, R and P, B and S, again joined in suing N. In this suit they claimed possession of two-thirds of the estate, and to have the deed of gift set aside. *Held* by the Full Bench (reversing the judgment of PEARSON, J., and affirming that of OLDFIELD, J.,) that the decision in the first suit was no bar to the determination in the second suit of the question as to the validity of the deed of gift. *Per* STUART, C. J., and STRAIGHT and OLDFIELD, JJ., that the causes of action in the two suits being different, the second suit was not barred by the provisions of sec. 43 of the Civil Procedure Code. *Per* TYRRELL, J., that the plaintiffs being entitled to only one remedy in the former suit, the provisions of sec. 43 were not applicable to the second suit. *Held* by the Full Bench that there was no mis-joinder of plaintiffs in the second suit, S. A. No. 1050 of 1879 (decided on the 12th May 1880, not reported) distinguished.—4 Al. 261.

The erroneous decision by a competent tribunal of a question of law directly or substantially in issue between the parties to a suit does not prevent a Court from deciding the same question, arising between the same parties in a subsequent suit, according to law. Persons of whatever sect are at liberty to erect a building, and therein conduct public worship on their own land, provided they neither invade the right of property enjoyed by their neighbours, nor cause a public nuisance; and are also entitled to conduct religious processions through public streets, so that they do not interfere with the ordinary use of such streets by the public, and subject to such directions as the Magistrate may lawfully give to prevent obstruction of the through fare or breaches of the public peace. In a suit in 1850 between the Tenkalais and Vadakalais, rival religious sects, represented by the plaintiffs and defendants respectively, the Vadakalais having endeavoured to open a temple for public worship in a certain public street, were, by the decree of the Sadr Court, prohibited from erecting a temple or institut-

ing public worship on the spot of ground objected to by the Tenkalais, and which lay within the range of the Tenkalais' temple, i. e., within the usual range of the processions conducted in connection with the temple-worship. In 1879 the Vadakalais open a temple for public worship on another site, their private property, in the same street. *Held* that a decree of the Sadr Court in the former suit was no bar to the action of the Vadakalais.—5 Madr. 304.

The plaintiff, mortgagee in possession of certain property, applied for the removal of an attachment placed on it by the defendant in execution of a decree against a third party. In default of payment of court fees by the defendant the attachment was removed, but, in ignorance of this fact, the plaintiff's application was proceeded with, and ultimately rejected. The plaintiff then brought a suit for a declaration of his right, but it was dismissed, on the ground that the attachment had already been removed. Subsequently the defendant placed a second attachment on the property, which the plaintiff again applied to remove. The defendant contended that the plaintiff's application was barred by the proceedings on the first attachment. *Held* that the decision on the plaintiff's first application having no object existing on which to operate, the attachment having then been removed, it could not properly be regarded as *res judicata* at all, since no one was seriously interested in having it decided in a different way; and that, supposing submission to that decision on the part of the plaintiff for a certain time could have given it a final effect, there had, as a matter of fact, been no such submission, the plaintiff having done all that was incumbent on him to get the summary inquiry and orders replaced by a formal trial and judgment; and that there was nothing, therefore, in these proceedings disentitling the defendant to oppose the second attachment. *Held* also, that the second attachment, after the first has been removed, was a new and distinct act, giving rise to a new cause of action, or complaint, to the plaintiff, to which, in any case, he was entitled to a fresh enquiry and decision.—7 Bom. 408.

B, who held a decree for money against I, caused certain property to be attached in execution of such decree as the property of his judgment-debtor. M, the wife of I, objected to such attachment, claiming such property as her own. Her objection was disallowed, and she consequently brought a suit against B to establish her right to such property. She died while that suit was pending, leaving by will such property to her sons. That suit proceeded in the names of her sons, who claimed such property under such will. The lower Courts only decided in that suit that such property belonged to M, and not to I, and it was therefore not liable to be sold in execution of B's decree against the latter. They did not consider the question whether M's sons were entitled to such property under the mother's will. In second appeal in that suit B contended that I, as an heir to M, was entitled to a fourth share of such property, and such share was liable to be sold in execution of such decree. M's sons did not contend before the High Court that they were entitled to the whole of such property under their mother's will to the exclusion of I. The High Court allowed B's contention. B brought a fourth share of such property to sale in execution of his decree, and purchased it himself. Thereupon M's sons sued him for such share, claiming it under their mother's will. *Held* that their mother's will was a matter which should have been made a ground of defence by M's sons in the course of the trial of the second appeal in the former suit between them and B, and that, not having been so made, it was *res judicata* in the sense of sec. 13, explanation ii., Act X of 1877.—4 Al. 21.

The plaintiff sued to recover possession of certain houses and grounds as belonging to his zemindari, setting forth that the premises in question had been occupied by his paternal grandmother, on whose death the defendants had taken wrongful possession. The defendants claimed to be legally entitled to the premises in question, and contended that the plaintiff's suit was barred under this section by reason that the plaintiff had already, during his grandmother's lifetime, brought a suit against her and the defendant's father, as a co-defendant, to establish his right to the same premises, which suit has been dismissed. The defendants also pleaded limitation. It appeared that in the former suit the relief sought by the plaintiff was substantially to restrain his grandmother from acts of waste in alienating property which had belonged to her deceased husband by assigning it to her co-defendant; but that, as regards the property now claimed, although it was mentioned in the plaint, no charge had been made that she had assigned it, or intended to assign it, to her co-defendant, nor any allegation to show that the co-defendant had any interest in it. *Held*, reversing the decisions of the lower Courts, that, under the circumstances, the decision in the former suit was not a decision in a suit between the same parties or parties under whom they claimed, and that the cause of action in the present suit was not determined in the former suit. *Held* also that the defendant's plea of limitation could not be determined without a finding as to whether the plaintiff's grandmother, who died within the period of limitation, had held the premises with the plaintiff's leave, or as a trespasser.—2 Madr. 23.

Certain immoveable property was mortgaged to R, and then sold to N. It was then brought to sale in execution of a decree against N, and was purchased by H. The balance of the sale-proceeds, after satisfaction of that decree, was paid to N. Under the terms of the mortgage to R, interest on the principal amount was payable annually, and its payment was charged on the property as well as the payment of the principal amount. The mortgagors having failed to pay the interest annually, R in 1875 sued them and N and H to recover the interest due. It was decided in that suit that N was primarily and personally liable for the interest then due on the mortgage, as he had received the sale-proceeds of the property, and that property was only liable in case he failed to satisfy the claim. N subsequently paid into Court the sale-proceeds he had received, and R was paid the same. In 1878 R again sued the same persons for interest, and again N was declared primarily and personally liable, on the ground that he had not at once made over the sale-proceeds to R. In 1880 R sued the same persons to recover the principal amount and interest due on the mortgage by the sale of the mortgaged property. *Held* that, whatever might have been the rights and relations of the parties, so long as any portion of the sale-proceeds remained with N, their position towards him assumed an entirely different character when once he had discharged himself of those moneys, and with this change in the situation the "*ratio decidendi*" of the suits of 1875 and 1878 no longer existed, and, therefore, the decisions in those suits did not preclude R from bringing a suit to recover the principal and interest due on his mortgage from the mortgaged property.—5 Al. 118.

H, the proprietor of one-third share of a certain undivided estate, made a gift of such share to P. He subsequently, in February, 1875, gave a mortgage of such share, in his capacity as P's guardian, to N and S, the two other co-sharers of such estate. In March, 1878, P, having attained his age of majority, brought a suit, as a co-sharer of such estate, under such  
against N and S for possession of certain land appertaining to such



estate, on the ground that they were using such land as if they were the sole proprietors thereof. The lower Appellate Court, observing that such land was the property of the three co-sharers, that the mortgage of P's rights to N and S did not affect those rights as such, and that N and S were not justified in using such land as if they were the exclusive proprietors thereof, gave P a decree for possession of one-third share of such land. N and S appealed to the High Court on the ground that P should not have been awarded possession, as they were in possession of such land as mortgagees. The High Court remanded the case for the determination of the issue thus raised by N and S; and the lower Appellate Court found that N and S were in possession of P's share of such estate as mortgagees under the mortgage made by H above referred to, and of such land as such. P did not take any objection to this finding; and it was adopted by the High Court, and embodied in its final decree. In October 1879, P sued N for possession of his share in such estate, claiming under the gift from H, and alleging that the mortgage of such share by H to N was invalid. *Held* that, inasmuch as such mortgage was matter substantially in issue in the former suit, the matter in issue in the second suit was *res judicata* under explanations 1 and 2, sec. 13 of Act X of 1877.—4 Al. 65.

In 1864 the obligee of an instalment-bond, in which certain immoveable property was hypothecated as collateral security for the payment of the instalments, brought a suit upon such bond "against Z and A (the obligors) and the property hypothecated in the bond, defendants," claiming to recover instalments which were due and unpaid, and a declaration of his right to recover instalments which were not due as they fell due. He obtained a decree in such suit for "the amount claimed" against the "two defendants." It was also provided in such decree that, "until the satisfaction of the entire amount of the bond, the plaintiff can realise the amount of each instalment by executing this decree." The obligee applied in execution of such decree to recover, by the sale of such property, which had passed into the hands of third parties after the passing of such decree, instalments which had become due after the passing of such decree and had not been paid. Such execution having been refused on the ground that such decree was a money decree, the obligee brought a second suit upon such bond to recover such instalments by the enforcement of the lien therein created on such property. *Held* that, although the enforcement of such lien was claimed in the former suit, yet, inasmuch as it was very questionable whether the Court was competent to grant the second relief claimed in that suit, *vis.*, a declaration of right to recover instalments which were not due in execution of a decree for instalments which were due, and the claim in the second suit was not the same as that in the former suit, the plaintiff asking for instalments said to be actually due, and not for a declaratory decree for instalments not due, the second suit was not barred by sec. 13 of Act X of 1877.—3 Al. 297.

M sued R in the Court of the Munsif for a bond, alleging that he had satisfied the bond-debt, and for a certain sum which he alleged had been paid by him to R in excess of the bond-debt. On the 24th November 1875, the Munsif, having taken an account, and found that Rs. 188-7-4 of the bond-debt were still due, made a decree dismissing the suit. R appealed to the Subordinate Judge, who, on the 16th September 1876, finding that Rs. 520-2-2 of the bond debt were still due, affirmed the Munsif's decree. M appealed to the High Court on the ground that an appeal by R did not lie to the Subordinate Judge, as R was not aggrieved by the Munsif's decree. The Division Bench before which the appeal came,



on the 10th August 1877, holding that R was not competent to appeal to the Subordinate Judge, set aside the proceedings of the Subordinate Judge. In deciding the case the Division Bench made certain observations to the effect that the account between the parties was not finally settled, but might be taken again in a fresh suit. In November, 1877, M instituted a fresh suit against R to recover the bond on payment of Rs. 188-7-4, the sum found by the Munsif in the former suit to be due by him to R. *Held*, on the question whether the finding of the Munsif in the former suit was final and conclusive between the parties, or the account might be again taken, that that finding being a finding on a matter directly and substantially in issue in the former suit, which was heard and finally decided by the Munsif, was final and conclusive between the parties, and the account could not be again taken. *Held* also that the observations of the Division Bench in the former suit were mere "*obiter dicta*," which did bind the Court's disposing of the fresh suit.—2 Al. 843.

The jurisdiction of a Small Cause Court is not ousted in a suit for damages for carrying away the produce of certain land when the defendant sets up title to the land in answer to the claim. Sec. 586 of the Code of Civil Procedure precludes a second appeal in a suit for damages under Rs. 500, although the suit has been instituted in the District Munsif's Court and not in a Court of Small Causes, and although a question of title has been raised by the defendant and decided. *Per* TURNER, C. J.—When a suit is brought in a form in which it is cognizable by a Small Cause Court under Act XI of 1865, the Court cannot decline jurisdiction if it appears that incidentally a question of title is raised which it has not jurisdiction to determine for any other purpose than the decision of the suit before it. Under such circumstances the Court may, however, properly grant a reasonable adjournment that the question may be litigated and determined by the proper tribunal. *Per* MUTTUSAMI AYYAR, J.—The question, what is a suit of the nature cognizable in Courts of Small Causes within the meaning of sec. 586 of the Civil Procedure Code, has reference to the mode of adjudication, and not to the *forum*; and the fact that the suit is instituted in the District Munsif's Court, and not in a Court of summary jurisdiction, makes no difference for the purposes of that section. If the matter adjudicated on in a suit is only incidentally in issue or cognizable, the adjudication is final, whether by a Court of concurrent or limited jurisdiction, only for the purpose and object of that suit. *Per* INNES, J.—The decree of a Small Cause Court in a case where a question of title is raised incidentally is no bar to a suit upon the title under sec. 13, expl. 2, of the Civil Procedure Code, because the Small Cause Court is not competent to pass a decree upon the title.—3 Madr. 192.

In 1856, V, a member of an undivided Hindu family, sued the defendants, and obtained a decree for the redemption of certain immoveable property, but the decree was never executed. At the date of that suit, V was the manager of the family, consisting of himself and the plaintiff N, who was then a minor. The decree did not provide for the foreclosure of the mortgage in the event of V failing to redeem. In 1878, N brought another suit to redeem the same property. The lower Court held that as the former decree did not direct foreclosure, the relation of mortgagor and mortgagee continued between the parties, and that the plaintiff's suit was not barred by the former decree. The defendants appealed. *Held* (PINHEY, J., *dissentiente*), reversing the decree of the lower Court, that the plaintiff's suit was barred. A decree for redemption on the default of the decree-holder to pay the money declared to be due within the time fixed by the decree, or, if

none be fixed, within the time allowed by the law for the execution of the decree, operates as a judgment of foreclosure, and debars the mortgagor from afterwards bringing a second suit to redeem the same property. A Hindu family is regarded as a corporation whose interests are necessarily centred in the manager, the presumption being that the manager is acting for the family, unless the contrary is shown. Before the introduction of the Civil Procedure Code this was so equally with regard to litigation as to other transactions and it was not obligatory, or even customary, for a Hindu manager to set forth that he sued in a representative character (as now required by the Code, sec. 50), or to add the co-owners as parties to the suit (as required by English law.) V's suit, therefore, being brought in 1856, and no fraud or collusion being alleged, bound the present plaintiff, though then a minor, and he could not now bring a second suit on the same cause of action.—7 Bom. 467.

R, on the 30th December, 1870, obtained an *ex parte* decree against D, in execution of which he attached properties X and Y on the 4th January 1871. D applied for a re-hearing, which was granted; and on the 30th of December 1871, a decree was again passed against D, in execution of which the same properties were attached on the 9th of August 1872, and purchased at the execution-sale on the 1st August 1874, by R. On the 14th February 1871, D had executed a solehnama and mortgage in favour of G, pledging, among other properties, X and Y as security for a loan made to him by G. D having made default in payment, G obtained a decree against him in terms of the solehnama on the 28th February, 1871. Subsequently, D granted another mortgage of the same properties in favour of G. G sold his decree and mortgage to the plaintiff, who in execution of the decree attached properties X and Y. In these execution-proceedings R brought forward the fact of his purchase of the same properties in August 1874, and his claim was allowed, and the properties X and Y released from attachment on the 4th March 1876. The plaintiffs had, on the 8th March, 1872, obtained a mortgage from D, on which they had obtained a decree on the 28th September 1874, in execution of which they had attached X & Y; but on R claiming them under his purchase in August, 1874, an order was made on the 10th April 1875, releasing X and Y from attachment; and in a suit by the plaintiff to set aside that order, they failed as to properties X and Y, on the ground that those properties were not included in the mortgage of March 1872. In a subsequent suit brought by the plaintiffs against R and D, to set aside the order of the 4th March 1876, and to have X and Y declared liable to be sold under the decree of the 28th February 1871: *Held* that the suit was not barred under sec. 2 of Act VIII of 1859 by the decree in the previous suit, nor was it barred by sec. 7 of the same Act. *Held* also that the purchase by R in August 1874, was subject to the mortgage to G of the 14th February 1871.—Radhanath Kundu v. Land Mortgage Bank of India, Limited.—6 Cal. 559.

The decision by a competent Court, that an application for the execution of a decree is barred by limitation, has the effect of *res judicata*; and although such decision may be erroneous, yet, so long as it remains unreversed in appeal, it is valid and binding, and the question cannot be reopened. A decision, that an application for execution is not time-barred, has a similar effect. On the 15th April 1868, the plaintiff applied for the execution of a decree held by him against the defendant, and certain houses were thereupon attached. In April 1869, the attachment was raised on the intervention of a third person. The plaintiff then brought a suit to establish his right to attach the houses, and obtained a decree on the 28th

February 1871. An appeal was made, and the suit was finally decided in the plaintiff's favour in April 1873. After the plaintiff had obtained his original decree, and while the appeal was pending, he applied for the sale of the houses in execution on the 30th November 1871, and subsequently made three other applications within three years of each other, the last of which was dated the 30th October 1876. The Court rejected this application on the 28th November 1876, on the ground that the execution of the decree was barred, as more than three years had elapsed between the first and second applications (*i. e.*, the applications of the 15th April 1868, and 30th November 1871.) The plaintiff appealed against the order; but his appeal was rejected, because he had failed to produce with it a copy of the order appealed against. The plaintiff took no further steps in that proceeding, but made a fresh application for execution on the 10th August, 1878. The Subordinate Judge rejected it, on the ground that the execution was barred, the matter being *res judicata*. In appeal, the District Judge reversed that order, and allowed execution. On appeal to the High Court, *held*, on the authority of *Mangul Pershad Dichit v. Grija Kant Lahiri Chowdry* (L. R. 8 Ind. App. 123) that the rules of *res judicata* applied, and that the application of the 30th November 1871 was time-barred, and *a fortiori*, every subsequent application was barred. *Semble*.—A proceeding in execution is a proceeding which terminates in a decree as defined by sec. 244 of the Civil Procedure Code (Act X of 1877,) and is, therefore, a suit within the meaning of the Code.—6 Bom. 54.

The three defendants, G, R, and K, and their brother M, the grandfather of the plaintiff, were members of one family, possessing undivided ancestral property consisting of the villages of B, P, and S, the two former being situated in the Poona Zilla, and the latter in the Satara Zilla. In 1866, three defendants (each in a separate suit) sued M in the Poona Courts for partition of the villages of B and P. They in their plaints alluded to the village of S, stating that it was their own, and not subject to partition. M in his answer contended himself with denying the right to partition of the villages of B and P, and made no claim, in the alternative, to a share in the ownership of S. The plaintiff, the grandson of M, now sued the defendants in the Satara Courts for partition of the village of S, contending that he was not precluded from so doing by the former proceedings in the Poona Courts. *Held* that the plaintiff's claim was *res judicata*, and that his suit was concluded under the provisions of the Civil Procedure Code (Act X of 1877), sec. 13, expl. 1 and 2. A member of an undivided family, suing his co-parceners for partition of family property, is bound to bring into hotchpot any undivided property in his own possession, in order that there may be a complete and final partition, and cannot claim to withhold any such property on the ground that it is situated within another jurisdiction. That being so, the plaintiff's grandfather, M, having neglected in the previous suit to make the execution of the village of S a ground of defence, the judgment which followed involved the decision of every claim of title upon the cause of action, and must be taken between the parties as amounting to a positive adjudication of all such claims, including the claim to the village of S. No doubt, the rule that every partition-suit shall embrace all the joint family property has been held to be subject to certain qualifications, as, for instance, where different portions of it lie in different jurisdictions, or where a portion is not available for actual partition as being in the possession of a mortgagee; but there is no authority for the proposition that a member, who sues for partition of property in the hands of the defendants, can refuse to bring into hotchpot any undivided property

held by himself, on the ground that it is situated within another jurisdiction. *Subba Rau v. Rama Rau* (3 Madr. H. C. Rep., 376) referred to and distinguished.—7 Bom. 272.

A Hindu of the Southern Marata country, having two sons undivided from him, died in 1871, leaving a will disposing of ancestral estate substantially in favour of his second son, excluding the elder, who claimed his share in this suit. In 1861, a suit brought by this elder son against his father and brother to obtain a declaration of his right to a partition of the ancestral estate was dismissed, on the ground that he had no right in his father's lifetime to compel a partition of moveables; and that as to the immoveables the claim failed, because they were situate beyond the jurisdiction of the Court. *Held*, first, that this suit was not barred under Act VIII of 1859, sec. 2; the proceeding of 1861 not having amounted to an adjudication between the brothers as to their rights in the estate arising on their father's death. Secondly, that the suit was not barred under the Limitation Act, (XIV of 1859), sec. 1, clause 13. As to the immoveables setting aside the fact that the plaintiff had remained in possession of one of the houses of the family, which had been treated by the father as continuing to be part of the joint property, the decision of 1861, based as to the immoveables in the absence of jurisdiction to declare partition of them, caused this part of the claim to fall under the provisions of Act XIV of 1859, sec. 14. As to the immoveables, assuming that they could, on the question of limitation, be treated as distinct from the moveables, and that no payment had been made within twelve years before this suit by the ancestral banking firm to the plaintiff, the adjudication of 1861, whether in law correct or incorrect, had been that the elder son could not assert his rights in the moveables until his father's death. The defendant in this suit, who had taken the benefit of that judgment, could not now insist that it did not suspend the running of limitation on the ground that his brothers might have appealed from it if erroneous. So far, also, as the father's interest was concerned, the succession only opened on his death. Thirdly, it having been contended that as a father and his sons were during his life co-parceners in the family estate, one of such co-parceners being able according to the decision of the Courts, by act *inter vivos*, to make an alienation of his undivided shares binding on the others, it followed that the father might dispose by will of his one-third share. *Held* that under the Mitakshara Law, as received in Bombay, the father could not dispose of his one-third share by will. The doctrine of the alienability by a co-parcener of his undivided share, without the consent of his co-sharers, should not be extended, in the above manner, beyond the decided cases. The Bombay Court had ruled that a co-parcener could not, without his co-sharers' consent, either give or devise his share, and that the alienation must be for value. The Madras Court had ruled that although a co-parcener could alienate his share by gift, that right was itself founded on the right to partition, and died with the co-parcener, the title of other co-sharers vesting in them by survivorship at the moment of his death. Without a decision as to which of these conflicting views, in regard to alienation by gift, was correct, the principles upon which the Madras Court had decided against the power of alienation by will were held to be sound and sufficient to support that decision.—5 Bom. 48.

A landlord, having tendered a patta at a certain rate, sued his tenants in the Court of the District Munsif to recover rent for Fasli 1289 (1879-80). The tenants pleaded that they were not bound to accept the patta tendered by virtue of an implied contract, which entitled them, without exchange of patta and muchalka, to hold the land permanently at a lighter rent. The

District Munsif and, on appeal, the District Court decided that no implied contract had been proved by the tenants. The suit was dismissed on the ground that the patta tendered was not one which the tenants were bound to accept under Act VIII of 1865 (Madras). The landlord then sued in the Revenue Court to compel the tenants to accept a patta for Fasli 1291 (1881-1882), and the tenants again put forward the same plea:—*Held*, that the question whether the tenants were entitled to hold permanently at a lighter rate without exchange of patta and muchalka was not *res judicata* by virtue of the decree in the former suit.—7 Madr. 145.

In 1876 A sued K and others to recover certain lands, alleging that he was the karnavan of their tarwad and that the lands were granted to them for maintenance under an oral agreement, which had been broken by K having mortgaged some of the lands. This suit was dismissed. In 1881 A sued the same defendants to recover the same lands, on the ground that as karnavan of the tarwad he was entitled to resume possession of the lands:—*Held*, reversing the decrees of the Lower Courts that the suit brought by A in 1881 was not barred by sec. 13 of the Code of Civil Procedure, 1877. *Per* MURTUSAMI AYYAR, J.—Explanation II to sec. 13 of the Code of Civil Procedure, 1877, refers to the title litigated in the former suit as distinguished from the relief claimed. Where several independent grounds of action are available, a party is not bound to unite them all in one suit, though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action.—7 Madr. 264.

A decision of a Revenue Court disallowing an application to eject a tenant, because he has built on his land, does not, under sec. 13 of the Civil Procedure Code, bar a suit in the Civil Court to have the building demolished.—6 Al. 68.

The plaintiff in a suit upon a certain instrument not duly stamped was compelled to pay the amount of duty and penalty. The defendant was the person bound to bear the expense of providing the proper stamp for such instrument. The plaintiff, with reference to sec. 41 of the Stamp Act, 1879, sued the defendant to recover such amount. *Held* that such amount could not be regarded as part of the costs in the suit in which it was paid, and a separate suit to recover it was maintainable.—6 Al. 70.

A Subordinate Judge, to whom an appeal is transferred under the Bengal Civil Courts Act (VI of 1871), has not the power to dispose of it in the manner provided by secs. 206, 207 and 208 of the N.-W. P. Rent Act, 1881: the District Judge alone has the power to dispose of appeals in that manner. *Ram Prasad v. Rai Kishen* followed. The plaintiffs, who claimed to be tenants of certain land under a lease from the zemindar, alleging that the defendant was their sub-tenant, under sec. 36 of the N.-W. P. Rent Act, 1881, caused a notice of ejectment to be served upon the latter under the provisions of that Act. The defendant did not make an application under that Act contesting his liability to be ejected, and the plaintiffs applied under secs. 40 and 95 (f) of that Act for assistance to eject him. The Revenue Court trying this application rejected it on the ground that the defendant was not a sub-tenant of the plaintiffs, but a co-sharer in their tenancy. The plaintiffs thereupon sued the defendant in the Civil Court for a declaration that the latter was not a partner with them in the lease, and for possession of the land by his ejectment therefrom. *Held* that the relief sought in the suit by the plaintiffs was not one which a Revenue Court could give under any of the clauses of sec. 95 of the Rent Act, which presupposes an admitted relation of landholder and tenant; and therefore the



determination by the Revenue Court of the plaintiffs' application for ejectment of the defendant was not the decision of a Court competent to try the suit, and was no bar to its maintenance in a Civil Court, within the principle of sec. 13 of the Civil Procedure Code.—6 Al. 295.

L was the owner of a four-anna share in a village. On the 1st March, 1880, his childless widow, R, and his nephew, B, who had separated from his two brothers, and lived for some years with both L and R, sold to S one-third of the four-anna share. The brothers of B sued the vendors and the vendee to enforce a right of pre-emption, alleging that they, as well as B, had acquired and entered into exclusive possession of the estate of L as his heirs. In the second appeal in this suit the High Court held that, as it was proved that the four-anna share was L's separate estate, and R had succeeded to it, and was in possession of it, and thus the plaintiff's had not established a title to, or acquired possession of, any part of the share, the plaintiffs were not in a position to assert a preferential claim to purchase the property in dispute. The plaintiffs also pleaded that the question of the right and title asserted by them as the actual heirs of L should have been tried and determined in the suit; but the High Court rejected this plea on the ground that the suit had been based merely on the allegation of *de facto* possession, and that their claim was to obtain by purchase one-third share only, and not for any remedy in respect of their right to possession by inheritance of the entire four-anna estate. Subsequently to this decision, the same plaintiffs, alleging equal rights with B as reversionary heirs of L, sued the same defendants for a declaration of the incompetence of R, the widow, to alienate the property, and that the sale-deed might be declared, as against them, null and of no effect. The cause of action was stated to be the execution, on the 1st March 1880, of the deed of sale. *Held* that the plea of *res judicata* failed. The matter now substantially in issue between the parties, *viz.*, the presumptive title of the plaintiffs to possession of the property, had not been "heard and finally decided" in the sense of sec. 13 of the Civil Procedure Code. Such title was not "alleged and denied" by the parties in that suit, within Explanation I, sec. 13. It was no matter which "might and ought" to have been made the ground of attack in the former suit, within Explanation 2. The law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. A plaintiff may, with the leave of the Court (sec. 44, Civil Procedure Code), join causes of action; but he is now here compelled to do so. The cause of action in the second suit, although the date of its accrual was the same, was separate and distinct from the cause of action asserted in the previous suit.—6 Al. 358.

Certain persons, claiming by right of inheritance to C, sued B, N, A, K, and others for possession of certain immoveable property, and, on appeal to the High Court in August 1876, their claim was decreed in full. In the course of the litigation which ended in that decree, Z purchased certain immoveable property from B, N, A, and K. Z was subsequently dispossessed of such property in execution of the decree of August 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited it from D; that the figures of the total of C's property given in the plaint in the former suit were erroneous; that the property now in suit was not affected by that decree, and that he had been improperly dispossessed of it. It appeared that there was, in fact, a mistake in the total of extent of C's property as stated in the plaint in the former suit. *Held* that the plaintiff, having purchased *pendente lite*, was



bound by the decree of the High Court against the persons through whom he claimed ; that the claim in the former suit having been decreed in full, the property now in suit was then decreed to the present defendants ; and that the claim of the plaintiff to go behind that decree could not be entertained.—6 Al. 506.

So long as the benami-system is recognized in this country, it is to be presumed, in the absence of any evidence to the contrary, that a suit instituted by a benamidar has been instituted with the full authority of the beneficial owner, and any decision made in such suit will be as much binding upon the real owner as if the suit had been brought by the real owner himself. *Meheroonissa Bibee v. Hur Churn Bose*, (10 W. R., 220,) *Kalee Prosunno Bose v. Dino Nath Bose Mullick*, (19 W. R., 434,) and *Sita Nath Shah v. Nobin Chunder Roy*, (5 C. L. R., 102,) discussed. In a suit for malikana the issue between the parties substantially raises the question of the proprietary right to the estate in respect of which the malikana is claimed, and when the question of the proprietary right has been decided in a previous suit between the same parties a subsequent suit for malikana will be barred as *res judicata*. In sec. 13 of Act XIV of 1882 the words "in a Court of jurisdiction competent to try such subsequent suit" refer to the jurisdiction of the Court at the time the first suit is brought. Thus, when the first suit is within the jurisdiction of a Munsiff, and the subsequent suit, by reason of an increase in value of the property, is beyond his jurisdiction, such subsequent suit would nevertheless be barred, inasmuch as, if the subsequent suit had been brought at the time when the first suit was brought, the Munsiff would have been competent to try it.—10 Cal. 697.

In 1878 A, as the auction-purchaser of a taluq, sued 35 persons for possession of a part of this taluq. In this suit the issues raised—(1) whether A had purchased the whole taluq, or an eight-anna share of the right, title and interest of the judgment-debtors therein ; (2) as to the correctness of the boundaries of the taluq as given in the plaint. The Court held that A had purchased the right, title and interest of the judgment-debtors in the taluq, and as it appeared that some of the defendants were not judgment-debtors, and as it did not appear what portions of the taluq were held by the several defendants, the lower Appellate Court dismissed the suit, with liberty to the plaintiff to bring a fresh suit within the proper time. In 1880 A brought a fresh suit against 16 of the same defendants and 19 others, for possession of a portion of the same taluq. The issues raised were—(1) whether the suit was barred under sec. 13 of the Code ; (2) whether A had purchased the whole or a portion of the taluq ; (3) whether the defendants were in possession of all the disputed lands, and, if not, what portions of the taluq were held by the several defendants ; (4) as to the correctness of the boundaries of the taluq. The Munsiff held that the suit was not barred, and on the merits gave A a decree. The Subordinate Judge held that the suit was barred, and refused to go into the merits. *Held*, that the question, whether A had purchased the whole or only a portion of the taluq, was *res judicata*, but that the question, as to *what lands* A was entitled to by virtue of his purchase having been left undecided in the former suit, A was entitled to a decision on that point.—10 Cal. 856.

Through ignorance of the position of affairs, one only of two persons, joint owners in a property, was sued for a debt for which the property had been pledged by the person sued, and a decree was obtained and execution issued against the property ; and in such execution proceedings the other sharer put in a claim, and obtained an order releasing her share of the property from attachment. A second suit was then brought by the judgment-

creditor against both sharers, for the purpose of making the share of the co-sharer, who had not been previously sued, available to satisfy the defendant, and praying that the order releasing the property from attachment might be set aside. *Held*, that such a suit would lie, and would not be barred as *res judicata*.—10 Cal. 924.

Where a Division Bench of the High Court decided, as a point of law, that a property had not passed under a certain deed of sale, and subsequently the decision on that point of law was in another case disapproved of by a Full Bench, the decision of the Division Bench, (where the same plaintiff has again sued to recover the same property relying on the same deed of sale) is no less a *res judicata*, because it may have been founded on an erroneous view of the law, or a view of the law which a Full Bench has subsequently disapproved.—10 Cal. 1087.

See I. L. R., 11 Al. 386, noted under sec. 93 of the Transfer of Property Act; 15 Madr. 336, noted under sec. 17 of the Registration Act; 14 Bom. 408, noted under sec. 18 of the Limitation Act; 14 Madr. 1, noted under sec. 14 of Act XX of 1863. (Religious Endowments Act.) 17 Cal. 968, noted under sec. 211.

When foreign judgment  
no bar to suit in British  
India.

**14.** No foreign judgment shall operate as a bar to a suit in British India—

- (a) if it has not been given on the merits of the case :
- (b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India :
- (c) if it is, in the opinion of the Court before which it is produced, contrary to natural justice :
- (d) if it has been obtained by fraud :
- (e) if it sustains a claim founded on a breach of any law in force in British India.

Where a suit is instituted in British India on the judgment of any foreign Court in Asia or Africa except a Court of Record established by Letters Patent of Her Majesty or any predecessor of Her Majesty or a Supreme Consular Court established by an Order of Her Majesty in Council, the Court in which the suit is instituted shall not be precluded from inquiry into the merits of the case in which the judgment was passed. \*†

#### Notes.

This section applies to Provincial Small Cause Courts.

Where a suit is instituted against a Collector and another person, and the Collector does not appeal, *held* that the question of the District Court's jurisdiction to entertain the suit being a ground common to all the parties affected by the judgment, it is open to the other person to object that the plaint did not disclose a cause of action against the Collector, and that the District Court consequently had not jurisdiction.—10 Bom. H. C. R., 194.

\* This paragraph has been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 5.

† This para does not extend to Provincial S. C. Courts.

Where the plaintiff alleges the defendant to be amenable to the jurisdiction of the Court, and the defendant denies its jurisdiction, *held* that the parties should be allowed to go into evidence to support their allegations, and the Court ought not to have rejected the plaint, without recording its reasons for the same, or taking evidence on the point, under sec. 8, Act XI of 1841.—1 Agra H. C. R., 222.

The High Court pointed out the necessity of a Court showing its jurisdiction and competency on the face of all its proceedings.—8 W. R., Cr., 45.

Courts, having jurisdiction over the subject-matter of a suit in which a right is asserted, have also jurisdiction over a supplemental suit in which the plaintiff seeks to follow out that right.—16 W. R., 240.

A judicial investigation of allegations and facts sufficient to guide the Court should precede the admission or rejection of jurisdiction.—Nusrun Beebee v. Watson & Co., 3 W. R., 215 ; See Huree Persad Malee v. Koonjo Behary Shaha, Marsh, 99 ; 1 Hay 238 ; and Ishan Chunder Roy v. Tarruck Chunder Banerjee.—18 W. R., 238.

An *ex-parte* judgment of a French Court against a native of British India, not residing in French territory, upon a cause of action which arose in British India, imposes no duty on the defendant to pay the amount decreed so as to bar a suit in British India.—I. L. R., 4 Madr. 359.

A suit upon a foreign judgment is not cognizable by a Court of Small Causes established under Act XI of 1865.—6 Madr. 191.

The judgment of a foreign Court, obtained on a decree of a Court in British India, is no bar to the execution of the original decree.—7 Cal. 82

An Appellate Court cannot treat a plea to jurisdiction as a technical plea which may be disregarded if the Court is satisfied with the decision on the merits.—6 Madr. 192 ; 6 W. R., 289.

K sued C, who resided in British India, upon a bond executed by C in favour of K within the territory of P, a Native State, and obtained a decree. Having obtained satisfaction in part, K sued C upon the judgment of the Court of P in a British Indian Court at T. *Held*, reversing the decrees of the Lower Courts, that the Court at P had jurisdiction, and that K could sue upon the judgment of that Court in the Court at T.—7 Madr. 105.

The distinction made for the purposes of limitation between suits, appeals, and applications by the Limitation Acts, has no bearing upon a question of jurisdiction.—5 Bom. 680.

In a suit upon the judgment of a Court at Bastar, it appeared that in the suit in which the judgment was pronounced, the defendant took no objection as to the jurisdiction of the Court, and that he carried on business by his agent in the Bastar territory, and that a decree was passed for the plaintiff after evidence adduced on both sides in the ordinary way :—*Held*, (1) that the defendant was not entitled to have the case re-heard (2) that the defendant was not entitled to take objection to the jurisdiction of the Bastar Court.—15 Madr. 82.

## CHAPTER II. OF THE PLACE OF SUING.

**15.** Every suit shall be instituted in the Court of the lowest grade competent to try it.

Court in which suit to be instituted.

### Notes.

This section applies to Provincial Small Cause Courts.

Act IX of 1861 does not debar a District Munsif's Court from entertaining a suit by a Hindu father to recover possession of his minor son alleged to be illegally detained by the defendant.—I. L. R., 9 Madr. 31.

In a suit to declare title to four paid offices in a temple, the plaintiffs asked that the issues with regard to three of them should not be tried, but on cross-examination asserted right to them. *Held* that the plaintiffs were not shown to have relinquished their claim on the three offices for the purposes of the suit. On findings that the fourth office carried with it the right to the other three, and that united value of the four offices exceeded the jurisdiction of the District Munsif, *held* that the District Munsif had no jurisdiction to entertain the suit, and that the plaint should be returned for presentation in the proper Court.—10 Madr. 371.

The term "Court of lowest grade" in Civil Procedure Code, sec. 15, refers only to Courts to which the Civil Procedure Code is applicable, and consequently Small Cause Courts have concurrent jurisdiction with Courts of Village Munsifs to hear suits which are cognizable by the latter.—13 Madr. 145.

On the hearing of a suit in the Court of first instance, the Court came to the conclusion that the value of the property in dispute placed the claim beyond the jurisdiction of the Court; the suit was therefore dismissed with costs. On appeal this decision was reversed with costs, on the ground that the plaint ought to have been returned to the plaintiff for presentation in the proper Court. The defendant appealed to the High Court:—*Held* that the defendant ought to have been allowed his costs in both Courts, and that he was entitled to an appeal on that ground.—12 Cal. 271.

Sec. 15 of the Civil Procedure Code does not preclude a Subordinate Judge from trying a suit within the jurisdiction of the Munsiff's Court. *Ledgard v. Bull*, L. R., 13 I. A., 134, distinguished. The words "not affecting the jurisdiction of the Court" in sec. 578 of the same Code mean "not affecting the competency of the Court to try." The error in instituting a suit in a Subordinate Judge's Court instead of in that of the Munsiff is not an error which affects the jurisdiction of the former Court within the meaning of sec. 578.—17 Cal. 155.

The plaintiff, who was a money-lender residing within the limits of the Ahmedabad Cantonment, sued the defendants, who resided within the jurisdiction of the City Small Cause Court at the same place, upon a bond executed by them at the Cantonment. He presented his plaint to the Cantonment Magistrate, whose pecuniary jurisdiction extended to Rs. 200 only; but that officer, being of opinion that the suit was cognizable by the City Small Cause Court, returned it to the plaintiff, who subsequently presented it to the Judge of the City Small Cause Court, whose pecuniary jurisdiction extended to Rs. 500. On reference by him to the High Court, *held* that both the Courts had jurisdiction to try the suit, but that the Court of the Cantonment Magistrate was to be regarded as the Court of

lower grade, and, therefore, under sec. 15 of the Civil Procedure Code (Act XIV of 1882), was the proper Court to try the suit.—12 Bom. 169.

*Per* PETHERAM, C. J., and BRODHURST, MAHMOOD, and DUTHOIT, JJ.—The object of secs. 19 and 20 of the Bengal Civil Courts Act, 1871, was to create in the District Judge, Subordinate Judge, and Munsif, concurrent jurisdiction up to Rs. 1,000. *Per* PETHERAM, C. J.—Sec. 15 of the Civil Procedure Code is a proviso to those sections. The word “shall” in that section is imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be over-crowded with suits. Whenever an Act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it. *Per* DUTHOIT, J.—The words in sec. 57 of the Civil Procedure Code “shall be” are an instruction which the Court is bound to follow; and they are, therefore, a restraint upon jurisdiction. The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal. BRODHURST and MAHMOOD, JJ.—Sec. 15 of the Civil Procedure Code is a rule of Procedure, not of jurisdiction; and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of higher grades. *Russick Chunder Mohunt v. Ram Lal Shaha* (22 W. R., 301), *Sircar v. Begum Bibi* (25 W. R., 219), followed. *Per* OLDFIELD, J.—Sec. 15 of the Civil Procedure Code is a provision entirely of procedure as distinct from jurisdiction, and its effect on sec. 19 of the Bengal Civil Courts Act is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise to a certain procedure, namely, that the suits be instituted in the Court of the lowest grade competent to try them. *Held*, therefore, by PETHERAM, C. J., and OLDFIELD, BRODHURST and MAHMOOD, JJ., where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction. The plaint in such suit had been in the first instance presented to the Munsif who had returned it, to be presented to the Subordinate Judge. *Per* DUTHOIT, J.—The Decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for the jurisdiction was there, though it ought not to have been exercised. This view of the matter was consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction. *Per* MAHMOOD, J.—The institution of a suit in a Court of higher grade than the Court which is competent to try it is not a question either as to the jurisdiction or affecting the merits of the case. It is a question of the kind provided for by sec. 578 of the Civil Procedure Code, and the irregularity is not one which affects “the merits of the case or the jurisdiction of the Court” within the meaning of the section. The plea of want of jurisdiction can be entertained for the first time at any stage of a suit, provided there is on the record sufficient material to substantiate it.—7 Al. 230.

For the purpose of determining the question of jurisdiction the valuation of a suit should be computed according to the market-value of the subject-matter of the suit, and not according to the special rules applicable to valuation fixed in Act VII of 1870.—1 Bom. 543.

The valuation of suits, for the purpose of jurisdiction, is perfectly distinct from their valuation for the fiscal purpose of court-fees. Therefore Court-fees Acts, which are fiscal enactments, are not to be resorted to for construing enactments which fix the valuation of suits for the purpose of determining jurisdiction.—4 Bom. 515. (F. B.)

Where a person has preferred a claim to property attached in execution of a decree on the ground that such property is not liable to such attachment, and an order is passed against him, and he sues to establish his right to such property: *Held* that the value of the subject-matter in dispute in such suit, for the purposes of jurisdiction, will be the amount of such decree.—2 Al. 799.

Sec. 6 of Act VIII of 1859 (corresponding with sec. 15 of Act X of 1877), which provides that “every suit shall be instituted in the Court of the lowest grade competent to try it,” does not affect the jurisdiction of a subordinate Judge to try a suit wherein several causes of action are joined, the cumulative value of which is over Rs. 1,000 ; notwithstanding that, if separate suits had been brought on these several causes, such suits must have been instituted in the Court of the Munsif.—6 Cal. 6.

A suit was brought for a dissolution of partnership between plaintiff and 1st defendant, and for an account as between them. It was alleged in the plaint that plaintiff and 1st defendant entered into partnership in 1864 to work a jungle in the North Arcot district which had been leased to plaintiff for three years. That 4th defendant was subsequently admitted a partner, and that the contract was carried on under the style of R. T. and Co. That in March 1867, 4th defendant took up a contract in Madras, and another general partnership was established, of which plaintiff and 1st defendant were members ; that the funds of the 1st firm became incorporated in the 2nd firm, which was styled K. T. and K., and that this firm undertook several contracts in Madras and Chingleput. Finally, that the cause of action was the refusal of 1st defendant to account, and accrued in North Arcot district, where all the defendants resided permanently. The District Judge dismissed the suit on the ground that, under sec. 265 of the Indian Contract Act, he had no jurisdiction. *Held* on appeal that the District Court of North Arcot had jurisdiction, as the defendants were residents within the district. That the provision in the Contract Act is permissive, and does not prohibit a suit elsewhere than at the place where the partnership was carried on if a sufficient ground of jurisdiction exists.—1 Madr. 340.

A testator bequeathed the income of his “altamgha,” “zemindari,” and “thikadari” lands, situate in the districts of Dehli, Hissar, and Bulandshahr, to his five sons in equal shares, and to their issue ; directing that one of the sharers should manage the estate, accounting yearly to the others, and receiving ten per cent. per annum. The lands described as “altamgha” were in the Bulandshahr district, within the local limits of the jurisdiction of the Civil Court of Meerut ; and on them an establishment was maintained at the expense of the estate. At Hansi, in Hissar, there was also a residence belonging to the estate, and another at Dehli. The will directed that the brothers might, if they liked, live together at Bilaspur, and build houses “with mutual consent in the “altamgha and zemin-



dari," also that certain memorials of the testator were to be retained by the manager at Bilaspur. At this place the manager used to stay occasionally, though travelling, for the most part, about the estate during the cold weather. No particular place for rendering the yearly accounts was fixed, either by contract or in practice; but they were rendered by the manager to the sharers at different times and in different places, including Dehli, Bilaspur, and in Hansi; at which last place, it being the sadar station of Hissar, the older records of the estate were kept. When this suit was brought, the manager was actually residing at the hill station of Mussoorie, in the Saharanpur district, for the hot weather; and in his answer he stated that the unsettled accounts were open to inspection by the sharers at Bilaspur. *Held* that a person might "dwell" within the meaning of Act VIII of 1859, sec. 5, at more places than one; and that, on the evidence, this manager so dwelt at Bilaspur as to make him subject to the jurisdiction of the Meerut Court in this suit. It was, accordingly, not necessary to consider whether he was or was not also subject to that Court's jurisdiction by reason of the cause of action having arisen within its local limits; nor was it necessary to consider whether he had or had not such a dwelling place at Hansi as would have rendered him subject to the jurisdiction of the Hissar (Panjab) Courts. Other questions disposed of in the Court of first instance having remained undecided by the High Court, which dealt with the question of jurisdiction alone, were considered with reference to whether there had or had not been shown any good reason for reversing or varying the order of the original Court. Among these, the question whether the manager's commission was to be calculated on the gross rental of the estate, or on the income divisible among the sharers, was *held* to be settled by the indication of the latter mode of calculation in the will.—3 Al. 91.

See I. L. R., 8 Cal. 483, noted under sec. 43; 15 Madr. 241 noted under sec. 539.

Suits to be instituted  
where subject-matter situ-  
ate.

**16.** Subject to the pecuniary or  
other limitations prescribed by any law,  
suits

- (a) for the recovery of immoveable property,
- (b) for the partition of immoveable property,
- (c) for the foreclosure or redemption of a mortgage of immoveable property,
- (d) for the determination of any other right to, or interest in immoveable property,
- (e) for compensation for wrong to immoveable property,
- (f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property, held by or on behalf of the defendant, may, when the relief sought can be entirely obtained through his personal obedience, be instituted

either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.

*Explanation.*—In this section “property” means property situate in British India.

#### Notes.

This section applies to Provincial Small Cause Courts.

A Court has no jurisdiction, in execution of a decree, to sell property over which it has no territorial jurisdiction at the time it passed the order of sale. The decree-holder at a sale under a mortgage decree purchased the mortgaged property with leave of the Court. Before the order of sale was passed, the mortgaged property had been transferred by an order of Government to the jurisdiction of another Court. *Held* by the Full Bench:—That the sale must be set aside as being without jurisdiction. *Kamini Soondari Chowdhurani v. Kali Prasanno Ghose*, L. R., 12 I. A., 215; I. L. R., 12 Cal. 225, followed.—I. L. R., 17 Cal. 699.

A mortgaged at Calcutta to B his sayer compensation, payable at the General Treasury at Calcutta in respect of a certain hât within the Diamond Harbour sub-division. In a suit to enforce the mortgage bond in the Court of the Munsiff of Diamond Harbour, *held*, that sayer compensation did not partake of the nature of malikhana, that it was not immoveable property or any interest in immoveable property within the meaning of section 16 of the Code of Civil Procedure, and that therefore the Munsiff had no jurisdiction to entertain the suit.—19 Cal. 8.

In 1879 R gave J a bond containing a simple mortgage of immoveable property. Subsequently R and P jointly gave D a bond containing a simple mortgage of the same property. In 1881 D obtained a decree for the sale of the property under his mortgage, and it was put up for sale and purchased by the plaintiffs. In 1882 J obtained a decree in the Court of the Munsif of G, (within the local limits of whose jurisdiction the property was not situated) for enforcement of his mortgage-bond by sale of the property. The plaintiffs objected to the sale, and, their objection having been disallowed, brought a suit for cancellation of J's decree, so far as it ordered the sale:—*Held* that J's decree could only be regarded as a simple money-decree, because, as shown by sec. 16 of the Civil Procedure Code, the Munsif had no power under the law to direct enforcement of hypothecation against immoveable property situate beyond the local limits of his jurisdiction, and neither the proviso to sec. 16 nor sec. 20 of the Code met the circumstances:—*Held*, therefore, that the plaintiffs were entitled in this suit to have it declared that J's decree was a simple money decree only, on the basis of which no process in execution could issue in respect of the property in dispute to oust the plaintiff's possession from any part of it.—8 Al. 117.

In a suit for foreclosure or sale of immoveable property, it appeared that the mortgagee had conveyed the mortgaged premises to trustees. The summons to one of the trustees was personally served upon his duly constituted agent, who was at the time of service in charge of the mortgaged premises. *Held* that the service was sufficient, the suit being one to obtain “relief respecting immoveable property” within the meaning of sec. 16 of Act XIV of 1882.—9 Cal. 733.

*Held* that, though both suits were properly cognizable by the Court at

Cawnpore, yet the Sadr Court's order, which it was competent to pass under sec. 6, Act VIII of 1859, gave jurisdiction to the Principal Sadr Amin of another district, whose decision was not liable to be set aside for want of jurisdiction, in reference to the provisions of sec. 5 of that enactment.—1 Agra H. C. R., 178.

**16A.\*** (1) When it is alleged to be uncertain within local of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect, and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under subsection (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection if in its opinion there was, at the time of the institution of the suit, any reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto.

**17.** Subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction

- (a) the cause of action arises, or
- (b) all the defendants, at the time of the commencement of the suit, actually and voluntarily reside, or carry on business, or personally work for gain ; or
- (c) any of the defendants, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain : provided that either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution.

\* This section has been inserted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 6.

*Explanation I.*—Where a person has a permanent dwelling at one place, and also a lodging at another place for temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

*Explanation II.*—A Corporation or Company shall be deemed to carry on business at its sole or principal office in British India, or, in respect of any cause of action arising at any place where it has also a subordinate, office, at such place.

*Explanation III.\**—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following place, namely :—

- (i) the place where the contract was made ;
- (ii) the place where the contract was to be performed, or performance thereof completed :
- (iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

#### *Illustrations.*

(a) A is a tradesman in Calcutta. B carries on business in Delhi, B, by his agent in Calcutta, buys goods of A, and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta, and C at Delhi. A, B, and C, being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides or at Delhi, where C resides ; but in each of these cases, if the non-resident defendant objects, the suit cannot be maintained without the leave of the Court.

#### **Notes**

This section applies to Provincial Small Cause Courts.

In all applications under sec. 4, Act XXIII of 1861, in suits brought on a bond or other document, the place at which the document was executed must be definitely stated.—7 M. H. C. R., (App.) 34.

The actual presence of the defendant within the jurisdiction of the Court is not necessary, if he was there dwelling at the commencement of the suit, and a temporary dwelling is sufficient to give jurisdiction to a Small Cause Court.—5 M. H. C. R., 101.

Mere casual presence, or even residence for a temporary purpose, without the intention of remaining, is not dwelling within the jurisdiction of a Small Cause Court within the meaning of sec. 4 of Act XLII of 1860. A person resided at Coimbatore, but had some cultivated land within the

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\* This explanation (iii.) has been inserted by the Civil Procedure Code Amendment Act VII of 1888), sec. 7.

local jurisdiction of Ootacamund, to which place he came to answer another demand against him. *Held* that he did not dwell within the jurisdiction of the Ootacamund Small Cause Court.—2 M. H. C. R., 304.

The defendant, an officer in a regiment stationed at Vellore, was sued for money due for the rent of a house occupied by him at Madras. While absent on leave on medical certificate, he rented the plaintiff's house at Madras, where he was residing at the time of the institution of the suit; but he returned to Vellore previous to the hearing of the suit. The Small Cause Court Judge of Vellore held that the defendant was dwelling at Vellore at the time of the institution of the suit within the meaning of sec. 8, Act XI of 1865. *Held* that there was nothing in point of law to prevent the Judge from affirming his jurisdiction.—5 M. H. C. R., 471.

An order from the High Court was necessary to enable a Court of Small Causes to entertain a suit against several obligors, one of whom, at the time of filing the plaint, was neither resident nor personally working for gain within the limits of its jurisdiction. Such order should be applied for after the reception of the plaint, upon a statement of the circumstances of the particular case. Sec. 21 of Act XLII of 1860 was to have the same operation as if Act XXIII of 1861 had formed part of Act VIII of 1859 when it became law.—1 M. H. C. R., 103.

Since the passing of the Madras Civil Courts Act (III. of 1873) the general control over all the Civil Courts is vested in the District Judge to whom the application should be made. It is only in cases where the defendant is beyond the local jurisdiction of the District Court, and the Court before whom the suit is instituted has not otherwise jurisdiction under Act XI of 1865, sec. 8, that a reference to the High Court is necessary.—8 M. H. C. R., (App.) 10.

A suit for debt against two defendants, whose liability was joint, but one of whom at the time of filing the plaint was neither resident nor personally working for gain within the limits of the jurisdiction, might be tried by a Small Cause Court within whose jurisdiction the other defendant was resident at the time of the commencement of the suit, provided an order was obtained from the High Court under sec. 4 of Act XXIII of 1861.—3 M. H. C. R., 374.

A servant residing within the jurisdiction of one Small Cause Court, who has a family-house within the limits of the jurisdiction of another Small Cause Court in which his father lives, and which he himself occasionally visits, does not dwell within the local limits of the latter Court within the meaning of sec. 8 of Act XI of 1865, and, although the cause of action may have arisen there, a suit against him will not lie in that Court.—10 Bom. H. C. R., 409.

Where a pleader resides within the limits of a cantonment, and practises as a pleader within the jurisdiction of a Small Cause Court, both the Cantonment Magistrate and the Small Cause Court Judge have concurrent jurisdiction over him to the amounts respectively cognizable by them.—4 Bom. H. C. R., (A. C.) 187.

The provisions of sec. 4 of Act XXIII of 1861 were applicable to Courts of Small Causes in the mofussil.—6 Bom. H. C. R., (A. C.) 256.

Although a defendant may be temporarily absent from his dwelling-house, yet if he retains the same, he will be held to dwell there within the meaning of the Small Cause Court Act XI of 1865. To dwell in a place is to have one's permanent abode there.—3 N.-W. P. H. C. R., 121.

In the case of a person attached to a regiment stationed at Shahjehanpore, who had been gazetted to two years' furlough in India, served with a summons issued out of the Small Cause Court at Meerut whilst attending a race meeting at the latter place in respect of a debt contracted beyond the jurisdiction of that Court, *held* that, if he had not availed himself of furlough, but was only present on short leave at Meerut, he was not dwelling within the jurisdiction of the Meerut Court, or, if having availed himself of furlough, he retained his permanent residence at Shahjehanpore, and merely visited Meerut for a few days, he was in that case also not dwelling at Meerut, but if, having availed himself of furlough, and having retained no permanent place of residence at Shahjehanpore, not having any permanent place of residence elsewhere, he attended the race meeting at Meerut with the intention of leaving that place after the races, and of proceeding elsewhere in the enjoyment of his furlough, in such case he must be held to have been dwelling at Meerut when the summons was served.—4 N.-W. P. H. C. R., 25.

Where the cause of action occurs in the jurisdiction of a Court other than that in which the suit is brought, the plaintiff must, under the provision of sec. 17, Act X of 1877, show that the defendant, at the time of the commencement of the suit, actually and voluntarily resided or carried on business, or personally worked for gain, within jurisdiction of the Court in which the suit was brought.—6 C. L. R., 417.

Temporary imprisonment beyond the jurisdiction of a Small Cause Court was held not to bar the jurisdiction of that Court in respect of defendants who formerly resided within its jurisdiction, and whose families continued to reside within it, the inference from the latter fact being that the defendants had an intention of returning to their former place of abode on the termination of their imprisonment.—7 W. R., 349.

A suit against a woman living under the protection of her husband is not cognizable in a Small Cause Court, if at the time of the commencement of the suit, the husband does not dwell, nor personally or through a servant or agent carry on business, or work for gain, within the local limits of the jurisdiction of the Court.—10 W. R., 240.

A person, who carries on business at a place by a commission-agent, to whom he only consigns goods, cannot be said to carry on business or personally to work for gain within the local limits of a Court where the commission agent resides.—11 W. R., 530.

A suit against an Agent to the Governor-General, on the part of Government, is substantially a suit against Government, and ought, under sec. 9, Act XI of 1865, to be brought in a Court having jurisdiction at the seat of Government.—10 W. R., 142.

A suit by a gumashta for excess expenses incurred by him over and above the amount of rents collected by him was held to be cognizable in the Small Cause Court, notwithstanding that the nature of the defence might render it necessary to investigate the accounts of the mehal.—7 W. R., 422.

On the 29th May 1873 one T drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person his heirs sued the shroff to recover the sum deposited, and on the 30th January 1878 obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February 1884, the shroff



sued T, the heirs of the third party, and another person (who owned to having received some of the money from T), to recover the sum he had been compelled to pay under the decree of 1878. *Held* that the plaintiff's cause of action arose at the time when he actually paid down the money of the 15th January 1883, and that the suit therefore was not barred by limitation.—I. L. R., 13 Cal. 155.

Sec. 65 of 21 & 22 Vic., c. 106, does not constitute the Secretary of State a body corporate, but simply lays down that that officer and department are to be sued as a body corporate. A suit, therefore, brought against the Secretary of State is not one against any person or any real body corporate, but is one brought against a nominal defendant, such nominal defendant being put upon the record merely to enable the plaintiff to obtain the remedy secured to him by sec. 65. The words "cause of action in sec. 12 of the Letters Patent, 1865, mean all those things necessary to give a right of action; and in a suit for breach of contract, where leave has not been obtained to sue under that section, it must be established that the contract as well as the breach have taken place within the local limits of the Court. The work carried on by the Government of India in governing the country, in salt, opium, &c., although carried on by Government officers in charge of the several departments of Government, is not, properly speaking, business carried on by Government, but work carried on for the benefit of the Indian Exchequer. The words of sec. 12, "carry on business or personally work for gain," are, however, inapplicable to the Secretary of State for India in Council.—14 Cal. 256.

The fixed and permanent home of a man's wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of sec. 5 of Act VIII of 1859, and sec. 4 of Act XXIII of 1861.—1 Al. 51.

An application was made to the District Judge of Allahabad, under sec. 1 of Act IX of 1861, by a relative of a minor, alleging that the minor had, by the acts and with the connivance and assistance of the defendants, at Allahabad, been removed from the plaintiff's custody and guardianship at Allahabad, and praying for the minor's restoration thereto. At the time when the application was made, the minor was at Lahore. *Held* that, under secs. 1, 4 of Act IX of 1861, read with sec. 17 of the Civil Procedure Code, the application was cognizable by the District Judge of Allahabad, where the cause of action arose; and that, even apart from sec. 17 of the Code, the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer had full jurisdiction to deal with the application.—12 Al. 213.

Where a promissory note is executed in one district, and it is agreed that the amount of the note shall be paid in another, the Courts of the latter district have jurisdiction to entertain a suit on the note. The illustrations to sec. 17 of the Code of Civil Procedure afford no safe guide as to what is meant in the Code by the term 'cause of action.' *Gopi Krishna Gossami v. Nil Komul Banerjee* (13 B. L. R., 451; 22 W. R., 79), *Mahomed Abdul Kadar v. E. I. Ry. Co.* (I. L. R., 1 Madr. 377), and *Vaughan v. Weldon* (L. R., 10 C. P. 48), approved.—9 Cal. 105.

The expression "cause of action," as used in sec. 17 of the Civil Procedure Code, does not mean whole cause of action, but includes material part of the cause of action. In a suit for compensation for breach of a contract, the making of the contract is a material part of the cause of action. *Held*, therefore, where a contract was made at C, and broken at A, that

the Court at C had jurisdiction to try the suit for compensation for the breach of such contract. *Lewhellin v. Chunni Lal* (I. L. R., 4 Al. 423) and *Gopikrishna Gossami v. Nilkomul Banerjee* (13 B. L. R., 461) followed. *DeSouza v. Coles* (3 Madr. H. C. R., 384) and *Jumoonah Pershad v. Zai-bunnissa* (5 C. L. R., 268) dissented from.—5 Al. 277.

C and L entered into an agreement at a place in the Saran district, in which the latter resided and carried on business, whereby C promised to sell and deliver to L at a place in the Saran district certain goods, and L promised to pay for such goods on delivery “by approved draft on Calcutta or Cawnpore (where C carried on business), payable thirty days after the receipt of the goods, or by Government currency notes.” C delivered the goods according to his promise, but L did not pay for the same, and C, therefore, sued L for the price of the goods, suing him at Cawnpore. *Held* that the “cause of action,” within the meaning of sec. 17 of the Civil Procedure Code, was L’s breach of his promise to pay for the goods; that the parties intended that payment should be made at Cawnpore, and the cause of action, therefore, arose there; and that, therefore, the suit had been properly instituted there.—4 Al. 423.

**18.** In suits for compensation for wrong done to person or moveable property, if the wrong was done within the local limits of the jurisdiction of one Court, and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the plaintiff may, at his option, sue in either of the said Courts.

*Illustrations.*

(a) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

(c) A, travelling on the line of a Railway Company whose principal office is at Howrah, is upset and injured at Allahabad by negligence imputable to the Company. He may sue the Company either at Howrah or at Allahabad.

**Note.**—This section applies to Provincial Small Cause Courts.

**19.** If the suit be to obtain relief respecting, or compensation for wrong to, immoveable property situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be instituted in the Court within whose jurisdiction any portion of the property is situate; provided that, in respect of the value of the subject-matter of the suit, the entire claim be cognizable by such Court.

Suits for immoveable property situate in single district, but within jurisdiction of different Courts.

If the immoveable property be situate within the limits of different districts, the suit may be instituted in any

Court, otherwise competent to try it, within whose jurisdiction any portion of the property is situate.

**Notes.**

This section applies to Provincial Small Cause Courts.

A decree obtained in a suit, brought under the provisions of sec. 19 of the Code of Civil Procedure in the Court of the Subordinate Judge of Rajshahye on a mortgage of certain properties situated in the districts and jurisdictions of Rajshahye and Nyadumka, directed that the properties mentioned in the mortgage should be sold, and the proceeds applied in payment of the mortgage-debt. The properties were sold by the Court of Rajshahye. *Held* that the authority given by sec. 19 of the Code included an authority to make the order for the sale of the properties, and that the Rajshahye Court was within its jurisdiction in directing and carrying out the sale. *Quære*—Whether, where a sale takes place under a money-decree of property partly within the local limits of the Court whose decree is being executed, and partly without that Court's jurisdiction, the sale of the property without the jurisdiction would be valid and binding in consequence of the provisions of secs. 19 and 223 of the Code of Civil Procedure. *Per* GHOSE, J.—Sec. 223 of the Code of Civil Procedure merely provides that when it may be necessary for a Court to send a decree for execution to another Court by reason of the property being situate beyond its local jurisdiction, it ought to do so; and the words of sub-section (c), “sale of immoveable property situate without the local limits of the jurisdiction of the Court which passed it,” contemplate a case where *the whole of the property*, and not any portion of it, is situate beyond the local limits of the Court which passes the decree.—I. L. R., 14 Cal. 661.

Under Act X of 1877, sec. 19, it is not necessary to obtain the leave of the Court under cl. 12 of the Chapter to sue in respect of immoveable property situate partly within and partly without the ordinary original civil jurisdiction of the High Court.—3 Cal. 370.

A suit was instituted on a mortgage of a single revenue-paying estate in the Court of the Subordinate Judge of the district of Backergunge, under the provisions of sec. 19, Act X of 1877, and a decree was obtained for the sale of the mortgaged property. On an application for execution of the decree to the Court which passed it, *held* that the Court was competent to order a sale of the whole of the mortgaged property, though only a portion of it was situated in the district of Backergunge. *Kally Prosunno Bose v. Dinonath Mullick* (11 B. L. R., 56; 19 W. R., 434) followed and cited.—8 Cal. 703.

A, the mortgagee, under a bond, of properties situated in district B and C, sued in the B Court on his bond, and obtained a decree for the mortgage-money and interest, with a declaration that the decree should be satisfied by sale of all the mortgaged property. A had not obtained the permission of the High Court under sec. 12, Act VIII of 1859, which was necessary to enable him to proceed against the property in the C district. Having attached and sold all properties comprised in his decree situate within the jurisdiction of the B Court, A, under a certificate issued by such Court, obtained an order from the C Court attaching lands included in his decree situate in that district. D intervened, on the ground that he had purchased the same property in execution of another decree of the C Court against the same judgment-debtor, and the property was released from attachment. A then sued D and the mortgagor to enforce his mortgage-line against the property in the C district. *Held* that the B Court had juris-

diction to give A a decree for the amount of the mortgage-money and interest, though it had not power to enforce the decree against the property in the C district ; that the only effect of the decree was to change the nature of the original debt, which was a bond-debt, into a judgment-debt for the mortgage-money and interest ; and that though A could not enforce his lien against the property in the C district under the decree of the B Court, yet, as that property had been sold to a third person, D, he was at liberty to sue D to establish his lien for the mortgage-debt and interest.—5 Cal. 928.

**20.** If a suit which may be instituted in more than one

Power to stay proceedings where all defendants did not reside within jurisdiction.

Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside,

or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly ;

and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them.

In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings.

Every such application shall be made at the earliest possible opportunity, and in all cases before

Application when to be made.

the issues as settled ; and any defendant not so applying shall be deemed to have acquiesced in the institution of the suit.\*

**Notes.**

This section applies to Provincial S. C. Courts, except para. 4.

The plaintiff brought this suit in the High Court at Bombay against the defendant for defamation alleged to be contained in a notice that appeared in the *Bombay Gazette* on the 9th April 1888. The defendant was the chairman of the Hinganghat Mill Company. The plaintiff had been for some years secretary and manager of that company. In April 1888, he was dismissed from his appointment, and shortly afterwards he filed a suit (No. I of 1888) in the Court of the Deputy Commissioner at Wardha, in the Central Provinces (which was the Court of the district in which Hinganghat is situated), for wrongful dismissal. The present suit was filed in July 1888. The defendant took out a summons calling on the plaintiff to show cause why the suit should not be stayed, and the plaint returned to

\* This para does not extend to Provincial Small Cause Courts.

the plaintiff, in order that, if he thought proper, it might be presented to the Court at Wardha. The defendant relied on the following points :—(1) that neither he nor the plaintiff resided or carried on business at Bombay ; (2) that all the defendant's witnesses resided at Wardha ; (3) that the other suit (No. 1 of 1883) was pending at Wardha, and that the decree of that suit would decide the present case also. *Held* that the plaintiff was entitled to sue in Bombay.—1. L. R., 13 Bom. 178.

A, who was employed by B and Co. as their agent at Calicut, instituted a suit for the balance of an account against his principals in the Court of the Subordinate Judge there in July 1878. In December of the same year, B and Co. instituted the present suit against A for an account and for damages caused by his alleged negligence. *Held* that, as in both suits practically the same issues were triable, A was entitled as having been first to institute his suit to proceed in the Court in which he had chosen to bring his suit, and to have the other suit stayed, but without prejudice to the right of the plaintiffs in the latter suit to institute a cross-claim in the Calicut Court.—4 C. L. R., 282.

**21.** Where the Court, under sec. 20, stays proceedings, and the plaintiff re-institutes his suit in another Court, the plaint shall not be chargeable with any court-fee; provided that the proper fee has been levied on the institution of the suit in the former Court, and that the plaint has been returned by such Court.

Remission of court-fee where suit instituted in another Court.

**Note.**—This section applies to Provincial Small Cause Courts.

**22.** Where a suit may be instituted in more Courts than one, and such Courts are subordinate to the same Appellate Court, any defendant, after giving notice in writing to the other parties of his intention to apply to such Court to transfer the suit to another Court, may apply accordingly; and the Appellate Court, after hearing the other parties, if they desire to be heard, shall determine in which of the Courts having jurisdiction the suit shall proceed.

Procedure where Courts in which suit may be instituted subordinate to same Appellate Court.

**23.** Where such Courts are subordinate to different Appellate Courts, but are subordinate to the same High Court, any defendant, after giving notice in writing to the other parties of his intention to apply to the High Court to transfer the suit to another Court having jurisdiction, may apply accordingly. If the suit is brought in any Court subordinate to a District Court, the application, together with the objections (if any) filed by the other parties, shall be submitted through the District Court to which such Court is subordinate. The High Court may, after considering the objections (if any) of the other parties, deter-

Procedure where they are not so subordinate.

mine in which of the Courts having jurisdiction the suit shall proceed.

**Notes.**

Sec. 23 of Act XIV of 1882 is only intended to provide for those cases where, on the ground of expense or convenience or some other good reason, the Court thinks that the place of trial ought to be changed. Parties desirous of obtaining the transfer of a case from one forum to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and the defence; they should further state what are the issues and the evidence required, and then satisfy the Court that, either on the ground of expense or convenience or otherwise, the place of trial ought to be changed.—I. L. R., 9 Cal. 980.

The fact that portion of the property, the whole of which is sued for in the Court of the Munsif of A, is of less value than the remaining portion, which is within the jurisdiction of the Munsif of B, is no sufficient ground for an application under the Code of Civil Procedure, sec. 23, for a transfer to the latter Court. A party applying under sec. 23, Act X of 1877, must first of all give notice to the other side. The application should then be received by the Munsif, and transmitted to the High Court through the District Court.—2 C. L. R., 352.

Where such Courts are subordinate to different High Courts, any defendant may, after giving notice in writing to the other parties of his intention to apply to the High Court within whose jurisdiction the Court in which the suit is brought is situate, apply accordingly.

Procedure where they are subordinate to different High Courts.

If the suit is brought in any Court subordinate to a District Court, the application, together with the objection (if any) filed by the other parties, shall be submitted through the District Court to which such Court is subordinate;

and such High Court shall, after considering the objections (if any) of the other parties, determine in which of the several Courts having jurisdiction the suit shall proceed.

**Notes.**

Sec. 24 of the Civil Procedure Code does not empower a High Court to transfer a suit instituted within its own jurisdiction to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and, if necessary, to stay all further proceedings within its own jurisdiction. The defendants, in a suit instituted at Mainpuri, who resided and carried on business at Surat, applied under sec. 24 of the Civil Procedure Code that the suit might be tried at Surat, on the ground that it would be tried with greater convenience to them at that place. *Held* that, there being no balance in favour of either justice or convenience on the side of the Surat Court, the suit should proceed at Mainpuri.—I. L. R., 5 Al. 60.

Where a person, being at the time a pauper, petitions, under the provisions of Act VIII of 1859, for leave to sue as a pauper, but subsequently, pending an inquiry into his pauperism, obtains funds which enable him to pay the court-fees, and his petition is allowed upon such payment to be number-



ed and registered as a plaint, his suit shall be deemed to have been instituted from the date when he filed his pauper-petition, and limitation runs against him only up to that time. Sec. 13, Act VIII of 1859, enacts that when a suit is brought for immoveable property situated within districts subject to different Sadr Courts, the Judge in whose Court the suit is brought shall apply to the Sadr Court to which he is subject for authority to proceed, and the Sadr Court to which the application is made, with the concurrence of the other Sadr Court within whose jurisdiction the property is partly situated, may give authority to proceed. But no power is expressly given in the section cited, or elsewhere in the Act, to direct the transfer of a suit brought in a Court subordinate to one Sadr Court to a Court subordinate to another Sadr Court. *Query*.—Whether Sadr Courts acting in concurrence have power to make such a transfer?—2 Al. 241.

**25.** The High Court or District Court may, on the application of any of the parties, after giving notice to the parties, and hearing

Transfer of suits.

such of them as desire to be heard, or of its own motion without giving such notice, withdraw any suit, whether pending in a court of First Instance or in a Court of Appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature, and the amount or value of its subject-matter.

For the purposes of this section, the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

#### Notes.

This section applies to Provincial Small Cause Courts.

The Court refused to transfer a case from the mofussil, where there were, among other alleged reasons, suggestions that the plaintiff's case might be prejudiced by being tried in the mofussil, and that difficult and intricate questions of law would arise in the case, the Court not being satisfied by the evidence that such reasons existed.—9 B. L. R., 10.

On an application under the Letters Patent, 1865, cl. 13, for the removal of a suit, *held* that, having regard to the whole circumstances connected with the case from the beginning, the questions to be disposed of, and the conduct of the Judge before whom the proceedings were, it was proper and necessary for the purposes of justice that the suit should be removed.—10 B. L. R., 168.

Where a suit was originally instituted in the Hooghly Court, and H S, who was a defendant, and not subject to the jurisdiction of that Court, joined in an application to have the case tried by the High Court in the exercise of its extraordinary original civil jurisdiction, which application was granted, *held per* PHEAR, J., that the suit must be treated as if the plaint had been originally filed in the High Court, the proceedings in the Hooghly Court being, without jurisdiction, and the cause of action having arisen

wholly within the jurisdiction of the High Court. *Held* on appeal by PEACOCK, C. J., and MACPHERSON, J., that the defendant H S, by joining in the application to have the suit removed to the High Court, admitted the jurisdiction of that Court to try the suit in the exercise of its extraordinary original civil jurisdiction, and could not afterwards dispute the jurisdiction. The law, therefore, to be administered by the High Court must be the same law and equity which ought to have been applied if the suit had been tried in the Court at Hooghly. *Per* MACPHERSON, J.—The law, which would have been applicable to the case if it had been tried at Hooghly, is practically the same as the English law, whatever may be the nationality of the parties.—4 B. L. R., (O. C.) 1; 12 W. R., (O. C.) 13.

Where, on 3rd March 1870, the Government issued a notification under secs. 4 and 5, Madr. Act IV of 1863, investing the Additional Principal Sudder Ameen of Mangalore with exclusive jurisdiction to try Small Cause suits for sums under Rs. 500 within the jurisdiction of the District Munsif, *held* that the Munsif had no power after the notification to transfer to the Principal Sudder Ameen an application pending before himself at the date of the notification under sec. 6 of the Civil Procedure Code, 1859, the notification not being retrospective in its operation.—6 M. H. C. R., 18.

Where a plaintiff presented a plaint to the District Court, the Subordinate Judge's Court, in which he ought to have presented it, being then temporarily closed, it was *held* that the District Court could not be considered a Court of first instance, competent to receive the plaint. The decision in *In re Ganesh Sadashiv* (5 Bom. A. C. 117) overruled; and *Motilal Ramdas v. Jamnadas Javerdas* (2 Bom. A. C. 42) followed.—10 Bom. H. C. R., 495.

The power given by sec. 6 of Act VIII of 1859 to a Zillah Judge for the withdrawal of suits from subordinate Courts should only be exercised upon cause shown, and ordinarily not without opportunity given to the parties to the suit to be heard upon the question. The terms of sec. 6 were inapplicable to suits which the subordinate Court had received by order of remand from a Court to which the District Court was itself subordinate. A suit sent by the High Court to a subordinate Court under a remand to the High Court by Her Majesty's order in Council, and in which, under the Council's remand order, the plaint has been amended, a new statement filed, and new issues framed, is substantially a new suit.—2 N.-W. P. H. C. R., 481.

Where it is desired to have a number of suits transferred, a separate application should be made in each case for transfer.—2 N.-W. P. H. C. R., 147.

*Held* that, though both suits were properly cognizable by the Court at Cawnpore, yet the Sadr Court's order, which it was competent to pass under sec. 6, Act VIII of 1859, gave jurisdiction to the Principal Sudder Ameen of another district, whose decision was not liable to be set aside for want of jurisdiction, in reference to the provisions of sec. 5 of that enactment.—1 Agra H. C. R., 178.

A suit within the cognisance of the Small Cause Court cannot be lawfully transferred for trial to a Munsif's Court.—13 W. R., 399.

A case remanded to a District Judge for the purpose of a local inquiry cannot be transferred to a Subordinate Judge for disposal.—15 W. R., 574.

A Judge had no authority under Act XVI of 1868 to order a Subordinate Judge to try proceedings in execution of a decree which were a portion of the original civil suit tried by himself.—15 W. R., 48.

Though a Subordinate Judge may very properly, if he find the subject-matter of a suit to be of the value of less than Rs. 1,000, transfer it for trial to a Munsif, yet a Subordinate Judge is empowered under sec. 19, Act VI of 1871, to try causes of any value.—25 W. R., 219.

The Court will order a suit to be removed from the mofussil, and tried in the High Court, when difficult points of English law arise, and when generally it appears to be an unfit case to be tried in the mofussil.—1 Ind. Jur., N. S., 94.

The High Court at Calcutta had no jurisdiction over the Court of the Sessions Judge at Allahabad, such Court not being subject to the superintendence of the High Court under the 13th section of the Charter.—1 Ind. Jur., N. S., 219.

Where a case was originally tried by a Zillah Judge, and on appeal to the High Court on its appellate side, the Judges of that Court remanded it to the Court below for a fresh trial, intimating that it was a proper case to be transferred under cl. 13 of the Letters Patent constituting the High Court; and where it appeared that questions of English law were involved in the case, that the witnesses and parties were chiefly British subjects, and the plaintiff an officer of the High Court and resident in Calcutta, the Court ordered the case to be transferred for trial to the High Court, original jurisdiction.—1 Ind. Jur., N. S., 227.

A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of sec. 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court, having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under sec. 25 of the Civil Procedure Code, and tried it. *Held* in the High Court that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit, had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit.—*Petman v. Bull*, I. L. R., 5 Al. 371. But held by the Privy Council (reversing this decision) that under sec. 25 of the Civil Procedure Code the superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it. *Peary Lall Mozoomdar v. Komal Kishore Dassia* (I. L. R., 6 Cal. 30) approved. A suit having been instituted in the Court of the Subordinate Judge, who has incompetent to try it, the case was transferred by consent of parties to the Court of the District Judge for convenience of trial. *Held* that such transference was incompetent, and that such consent did not operate as a waiver of the plea to the jurisdiction which was taken in the defendant's written statement, and subsequently insisted upon.—L. R., 13 I. A., 134.

Sec. 25 of the Civil Procedure Code (Act XIV of 1882) only enables a District Court to transfer a suit pending in a Court subordinate to itself, and not to transfer a suit which is pending in its own Court. Accordingly, where a District Judge made an order to retransfer to the original Court certain suits pending in his Court which had been previously transferred to his Court from a subordinate Court, *held* that the order of retransfer was *ultra vires*, and should be discharged.—I. L. R., 13 Bom. 654.

In a suit under Reg. IV of 1816, the defendant having objected to the Village Munsif trying the suit on the ground of personal hostility, the Munsif transferred the suit to another Village Munsif. *Held* that this trans-

fer was illegal. *Per HUTCHINS, J.—Semble—*In such a case the Village Munsif should report the facts to the District Court, and the District Judge should transfer the case for trial to another Village Munsif.—8 Madr. 500.

Where the trial of a suit was commenced by a Subordinate Judge, and then transferred by the District Judge to his own file under sec. 25 of the Civil Procedure Code, and the latter did not retake the evidence, but dealt with the case as it came to him from the Subordinate Judge, and dismissed the suit, *held* that the District Judge had not tried the case within the meaning of sec. 25 of the Code.—7 Al. 342.

A suit for land was filed in 1883 in the Subordinate Court of Cochin. In 1884 the Government, by a notification under Act III of 1874, transferred the district where the land was situated from the jurisdiction of that Court to that of the Subordinate Court of Calicut, whereupon the plaintiff applied to the District Court to transfer the case to the file of the first-mentioned Court under sec. 25 of the Code of Civil Procedure. The District Judge granted the application without notice to the defendants. The defendants went to trial, and also preferred an appeal against the decree, which was passed in favour of the plaintiff, without objection to the jurisdiction of the the Court. In execution of the above decree (which was affirmed on appeal), the plaintiff was obstructed. He, therefore, filed the present suit against the obstructors under the provisions of sec. 331 of the Code of Civil Procedure, and they pleaded that the decree sought to be executed had been passed without jurisdiction :—*Held*, (1) that the want of notice to the defendants of the application made under sec. 25 of the Code of Civil Procedure was immaterial ; (2) that the defect, if any, of the jurisdiction of the Court passing the decree had been waived by the defendants, and that the present defendants were precluded from availing themselves of it.—13 Madr. 211.

An order for the transfer of a suit from one Court to another, under sec. 25 of the Code of Civil Procedure, cannot be made unless the suit has been brought in a Court having jurisdiction. The judgment in *Peary Lall Mozoomdar v. Komal Kishore Dassia* (6 Cal. 30.) entirely approved. When a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot, by their mutual consent, convert the proceedings into a judicial process : although, when the merits have been submitted to a Court, it may result that, having themselves constituted it their arbiter, the parties may be bound by its decision. On the other hand, in a suit tried by a competent Court, the parties having, without objection, joined issue, and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. A suit, having been instituted in a Court not of competent jurisdiction, was transferred, with the consent of parties, to a Court which was competent ; but the defence of jurisdiction was set up before the issues were fixed, and was afterwards insisted on throughout. *Held* that in the single fact that the defendant had personally concurred in the transfer, there had been no waiver of the right to maintain in this defence, and that the suit must be dismissed on the ground that it was not competently brought. A Court of appeal, having set aside the whole of the proceedings including the plaint, directed that a new plaint be presented in the proper Court. *Held* that this order, equivalent to directing the plaintiff to institute a new suit, was wrong ; and that, with only the alternative of having leave to withdraw the suit and bring a new , his suit should have been dismissed.—9 Al. 191.

There is nothing in the Indian Companies Act (VI of 1882), or the High Courts Act (24 and 25 Vic., c. 104), or the Letters Patent, which prevents the High Court from calling for the record of the proceedings in the winding up of a company under the Companies Act, and transferring those proceedings to its own file. Such a power is given to the High Court by sec. 647 read with sec. 25 of the Civil Procedure Code. Where, in the proceedings in the winding up of a company under Act VI of 1882, an order was passed admitting the proof of a particular creditor of the company before any liquidator had been appointed,—*held*, that this was an irregularity which by itself would justify the High Court in sending for the record. Where the District Judge conducting the proceedings in the winding up of a company under Act VI of 1882 had, after receiving notice of the admission by the High Court of a petition for transfer of those proceedings to its own file, drafted and placed upon the record an order which it might have been difficult for him to reconsider if the matter again came before him, and where the case appeared to be one in which serious questions of law were likely to arise which it would probably be difficult to discuss adequately in the District Court, in the absence of the authorities upon the subject and of any rules framed by the High Court for dealing with windings up under the Act, and the case was of a kind which would probably come before the High Court in a variety of appeals from orders brought by one side or the other,—*held* that, under these circumstances, the case was a proper one for the exercise of the High Court's jurisdiction by calling up the winding up proceedings to its own file. A person who has been appointed liquidator of a company ought not, after such appointment, to continue to act as vakil of a creditor whose right to prove against the company is in dispute in the liquidation.—9 Al. 180.

The plaintiff brought his suit in a Munsiff's Court to recover a sum of money. The District Judge transferred the suit to a Sub Court and the latter Court passed a decree. The decree-holder applied to the Subordinate Judge's Court for execution of his decree. By an order of the District Court the execution proceedings were transferred to the munsiff's file. The judgment-debtor objected to the jurisdiction of the Munsiff on the ground that the district Court had no power to transfer execution proceedings from one Court to another. *Held*, that the District Court has no power to transfer execution proceedings from one Court to another and that the power is limited only to transfer suits.—15 Cal. 177.

The High Court cannot make an order of transfer of a case under Act X of 1877, sec. 25, unless the Court from which the transfer is sought to be made has jurisdiction to try it.—6 Cal. 30. Also 6 Cal. 60.

A District Court transferred for trial a suit instituted in a Court subordinate to it to another Court subordinate to it. The Court in which the suit was instituted was not the one in which the suit should have been instituted, and consequently the Court to which it was transferred made an order dismissing it, and directing the return of the plaint for presentation to the proper Court. *Held* that such order must be taken to have been made under sec. 57 of the Civil Procedure Code, and was therefore appealable under sec. 588 (6); and that the defect of jurisdiction arising out of institution of the suit in the wrong Court was not cured by the transfer of the suit.—4 Al. 478.

Secs. 25 and 647 of the Civil Procedure Code (Act X of 1877) are both applicable to Courts of Small Causes in the mofussal, and the former section is extended by the latter to execution-proceedings in such Courts. Under

sec. 25 of the Civil Procedure Code, Act X of 1877, the District Judge has power to withdraw an application for execution of a decree from a subordinate Court (such as a mofussal Court of Small Causes), and to dispose of it himself, or to transfer it to another subordinate Court competent to deal with it. The distinction made for the purposes of limitation between suits, appeals, and applications by the Limitation Acts, has no bearing upon a question of jurisdiction.—5 Bom. 680.

A suit of the nature cognizable in a Court of Small Causes was instituted in the Court of a Subordinate Judge—the Judge of which, at the time of the institution of the suit, was personally invested with Small Cause Court jurisdiction. That Judge retired from office without trying the suit, and the District Judge directed his successor, who was not invested with Small Cause Court jurisdiction, to try it, and he did so. *Held* that it must be taken that the suit was transferred under sec. 25 of the Civil Procedure Code to the Court of the Subordinate Judge; and that, therefore, regard being had to the provisions of that section, that the Court trying any suit withdrawn thereunder from a Court of Small Causes shall, for the purposes of such suit, be deemed a Court of Small Causes, no appeal would lie in the case to the District Judge.—5 Al. 274.

A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of sec. 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under sec. 25 of the Civil Procedure Code, and tried it. The plaintiff did not, as required by sec. 34 of Act XV of 1859, deliver with his plaint particulars of the breaches complained of in the suit. In this plaint, after describing his inventions, he alleged generally that the defendant had made and used them at a certain place without his license. *Held* that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit. *Held* also that, as required by sec. 24 of Act XV of 1859, the plaintiff should have delivered with his plaint particulars of the breaches complained of; that the general allegation as to infringement contained in the plaint did not amount to such particulars; and that, under these circumstances, the plaintiff came in to Court with a case which could not be tried.—5 Al. 371.

An officer who exercises executive and judicial functions having himself dealt with a certain matter, and formed and expressed an opinion upon its merits in his executive capacity, and having further advised and directed litigation in support of this view, is, in consequence, disqualified from dealing as a Judge with this same question when it comes into Court and has to be dealt with judicially.—10 Cal. 915.

*Held* that an order under sec. 25 of the Civil Procedure Code, transferring a suit in which an appeal would lie from the decree made there, was not subject to revision by the High Court under sec. 622.—6 Al. 237.

See I. L. R., 4 Al. 437, noted under sec. 215.



## CHAPTER III.

## OF PARTIES, AND THEIR APPEARANCES, APPLICATIONS, AND ACTS.

**26.** All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment.

Persons who may be joined as plaintiffs. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court, in disposing of the costs of the suit, otherwise directs.

## Notes.

This section applies to Provincial Small Cause Courts.

Sec. 26 of the Code of Civil Procedure does not authorize the joinder of plaintiffs with antagonistic claims arising out of distinct causes of action. Where one of two widows of a deceased Hindu and her adopted son sued as co-plaintiffs, claiming in the alternative either to recover the whole family-estate for the latter, if the adoption was valid, or, if the adoption was invalid, one-half of the estate for the former: *Held* that the suit was bad for misjoinder. *Held* also that when such misjoinder had been allowed, and the suit decided, and an appeal brought, the Court of Appeal should dispose of the suit in the mode in which the lower Court ought to have disposed of it by returning the plaint for amendment. *Farzand Ali v. Yusuf Ali* (I. L. R., 2 Al. 669) dissented from.—I. L. R., 6 Madr. 239.

Unless there is a special provision of the law, co-owners are not permitted to sue through some or one of their members, but all co-owners must join in a suit to recover their property. The defendant cannot be deprived of his right to insist on the other co-owners being joined on the record, by the fact that they approve of the suit being brought by the plaintiff alone.—10 Bom. 32.

The plaintiffs were the widow and an alleged adopted son of one Irapa, who was the uncle of the defendant Rudrapa. In execution of a decree against Rudrapa the property in dispute was attached. The plaintiffs intervened and objected to the attachment on the ground that the property belonged to Irapa and not to Rudrapa, the judgment-debtor. This objection was disallowed. Thereupon the plaintiffs filed a regular suit to set aside the attachment. The Court of first instance decided in plaintiffs' favour. The defendants appealed. The lower appellate Court was of opinion that the interests of the two plaintiffs were antagonistic, and following the decision in *Lingummal v. Chinna*, held that the suit was bad for misjoinder of parties. The case was thereupon remanded for an amendment of the plaint. On appeal to the High Court. *Held*, reversing the remand order, that the objection for misjoinder as co-plaintiffs not having been taken by the defendant in the Court of first instance, the appellate Court ought not, under section 34 of the Code of Civil Procedure (Act XIV of 1882), to have allowed the objection. *Held* also that as plaintiff No. 2 admitted the adop-

tion of plaintiff No. 1, their claims were in no way antagonistic. They were both jointly interested in disproving defendant's title. They could therefore sue jointly under section 26 of the Code of Civil Procedure (Act XIV of 1882). *Lingummal v. Chiuna* distinguished.—16 Bom 119.

Suit by six plaintiffs praying for a declaration that certain proceedings of a District Temple Committee removing them from office as trustees of a temple were illegal. Defendants pleaded that the suit would not lie because of misjoinder, and also because further relief might have been sought:—*Held* that, under sec. 26 of the Code of Civil Procedure, the plaintiffs could not sue jointly, and that the plaint should be returned for amendment, one of the plaintiffs to be allowed to use it as his own. *Held* also that, unless there had been an actual ouster from office, a declaratory suit would lie.—8 Madr. 361.

Thirteen persons, who had been committed to jail under one warrant and for the same offence, jointly sued the Superintendent of the Presidency Jail for their wrongful detention in jail after the term of imprisonment to which they had been sentenced had expired, claiming Rs. 2, 600 as damages. The defendant applied to have the plaint taken off the file on the ground that the plaintiffs had improperly joined in one suit several distinct and separate causes of action belonging to them as separate individuals. *Held* that the plaint must be taken off the file.—11 Cal. 524.

The rule of English law that, in trading partnerships, although the right of a deceased partner devolves on his representative, the remedy survives to his co-partner, who alone must enforce the right by action, and is liable on recovery to account to the representative for the deceased's share, should be applied in India, in the absence of statutory authority to the contrary. The effect of sec. 45 of the Contract Act (IX of 1872) is to extend the English law applicable to trading partnerships to all cases of partnership. There is nothing either in that section nor in sec. 26 of the Civil Procedure Code, read with it, to show that the representatives of a deceased partner must be joined in an action for a partnership debt brought by the surviving partner, though it may be that they might be joined in such an action. A Court of Small Causes, without considering the merits, dismissed a suit brought by a sole surviving partner to recover a partnership debt on the ground that the plaintiff was not competent to maintain the suit without joining the representatives of the deceased partner as co-plaintiffs. *Held* that it was the Judge's duty to hear and determine the suit, which was brought by the person legally entitled to bring it alone in his Court, and in declining to entertain it on the merits, he had failed to exercise his jurisdiction, and had acted with material irregularity, within the meaning of sec. 622 of the Civil Procedure Code. *Muhammad Suleman Khan v. Fatima, and Dhan Singh v. Basant Singh* referred to. *Held* also that in such a suit, the plaint, if properly framed, ought to have alleged that the debt of which recovery was a partnership debt, that the deceased partner had died before the suit, and that the suit was brought by the plaintiff as surviving partner for his own benefit and that of the estate; but the suit should not be dismissed merely because the plaint did not contain these averments. *Jell v. Douglas* referred to. A suit should not be dismissed on merely technical grounds when the merits are proved, and no injustice by surprise or otherwise will be done.—9 Al. 486.

No member of an undivided Hindu family, except the manager of the family as such, is entitled to bring a suit to establish a right belong-

the family without making the other members of the family parties to the suit.—6 Madr. 27.

Certain properties were sold to A by private contract. Subsequently the properties were attached in execution of a decree against A's vendors, and sold in execution to various purchasers. A instituted a suit against his vendors, the decree-holders, and the purchasers, to set aside the execution-sale. *Held* that the suit was not defective by reason of misjoinder of parties. *Rajaram Tewari v. Luchman Prasad* (B. L. R., Sup., Vol., 731 ; S. C., 8 W. R. 13) distinguished.—9 Cal. 763.

By the memorandum and Articles of Association of the new Dhurumsey Poonjabhoy Spinning and Weaving Company, the plaintiff's firm of M F and Co., were appointed agents of the Company for twenty-five years, and it was provided that they should have the general control and management of the Company. Clause 98 of the Articles provided that the said firm, as such agents, should have full power and authority (*inter alia*) to to appoint and to employ, in or for the purposes of the transaction and management of the affairs and business of the Company, such solicitors as they should think proper. An agreement, dated 26th August 1874, was also entered into between the Company and the partners in the firm of M F and Co., their executors, administrators, and assigns *for the time being constituting the partnership firm of M F and Co.*, whereby it was agreed that the said firm should be agents to the Company for twenty-five years to buy and sell, &c., and particularly to exercise all the powers contained in clause 98 of the Articles of Association. Messrs. C and B were duly appointed solicitors to the Company, and acted as such for a considerable time. Merwanji Framji, one of the members of the said firm of M F and Co., died in the middle of March, 1876. The plaintiffs complained that G, one of the shareholders in the Company, became desirous of ousting the plaintiffs from the position of agents of the Company, and of becoming the managing director of the Company; that, in July, 1881, he procured his own election, and that of certain nominees of his, as directors of the Company; and, on the 8th August 1881, procured the passing of a resolution at a Board-meeting to the effect that as Messrs. C and B, the Company's solicitors, were also the solicitors of the agents, it was desirable, for the interests of the Company, that a change should be made, and that Messrs. H, C, and L, be appointed solicitors of the Company. The plaintiffs alleged that the only object of passing the said resolution was to facilitate the design of G, of ousting the plaintiffs from their agency, and getting the management of the Company for himself; that Messrs. H, C, and L, had been for a long time the solicitors of G, and had been advising him in his designs upon the Company and upon the plaintiffs, and they contended that the resolution was a breach of the contract between the Company and the plaintiffs, and a violation of the Articles of Association of the Company. The plaintiffs sued G and two other directors of the Company, and the Company itself, and prayed for an injunction against the defendants to restrain them from committing any breach of the agreement of 26th August 1874, and in particular from carrying into effect the resolution appointing Messrs. H, C, and L as solicitors for the Company, and to restrain them from doing any thing inconsistent with the memorandum and Articles of Association. The defendants contended that the contract of the 26th August 1874, had been determined by the death of Merwanji Framji, and that the powers conferred on the agents by clause 98 of the Articles were, subject to the general powers of management, vested in the directors by the Articles, and that the

case was not one in which an injunction could be granted. *Held* that, having regard to the memorandum and Articles of Association, the contract was that the firm of M F & Co. for the time being should be the agents of the Company for twenty-five years, and that the right to sue on the contract by its nature survived to the plaintiffs after the death of Merwanji Framji. *Held* also that there being no provision either in the Articles of Association or the agreement of 26th August 1874, that the power thereby conferred on the agents should be subject to the control or assent of the directors, there was no right in the directors to interfere with the agents in the exercise of their powers otherwise than as representing the Company in virtue of their general powers of management. It being admitted that the conduct of the defendants would be supported by the Company in general meeting owing to their having a preponderance of votes, *held* that, inasmuch as the Court would not, by a decree for specific performance or by injunction, compel the Company to retain the plaintiff's in the confidential position of agents, it would not restrain the defendants or the Company from appointing a solicitor, which was only a violation of what was ancillary or incidental to the principal part of the contract, *viz.*, the agreement that the plaintiffs should be the agents of the Company for twenty-five years; and, further, *semble* that on the merits of the case the Court would not interfere on behalf of the plaintiffs. Counsel on behalf of the plaintiffs sought to obtain the injunction on the ground that the resolution of the 8th August 1881, appointing Messrs. H, C, and L solicitors of the Company, was contrary to the memorandum of Association, and, therefore, *ultra vires*; and, in order that this point might be pressed against the defendants, it was proposed that the plaint should be amended by alleging a cause of action in two of the plaintiffs *as share-holders*, as well as a cause of action in all the plaintiffs *as parties contracting* with the Company. *Held* that, under the provisions of sections 26 and 31 of the Civil Procedure Code (Act X of 1877), the amendment could not be allowed. The plaintiffs, as shareholders and contractors, had not the same cause of action, by which words were meant not only the act complained of, but also the right violated by that act. The rights of the plaintiffs as contractors, alleged to be violated by the resolution, were rights given to them by their agreement; but the rights of the plaintiffs as shareholders were rights secured to them by the Articles of Association.—6 Bom. 266.

The plaintiffs were the hereditary *gors*, or priests, residing at Dakor, who ordinarily conducted their *yajmans*, or patrons, to the temple of Shri Ranchhod Raiji, performed worship there on their behalf, and received remuneration for their services. The defendants were the *shevaks*, or ministers, of the idol; it was their duty to remain in constant attendance on the idol, perform the daily services at the temple, collect the offerings, and apply the same to the purposes of the foundation. On 12th October, 1883, the *shevaks* issued rules prohibiting people from entering the *Nij Mandir* and *Saja Mandir*, which were particularly sacred chambers in the temple, except on payment of certain fees. Every visitor was required to purchase a ticket of admission to the interior parts of the temple. The plaintiffs thereupon sued for a declaration of their right of free access to the *Nij Mandir* and *Saja Mandir* at all times and on all occasions when the temple was open for purposes of public worship. They alleged that the new rules framed by the *shevaks* constituted an infringement of their immemorial rights of going into the said *mandirs* without any let or hindrance, of worshipping the idol there for themselves and their patrons, and of receiving whatever their patrons gave them. They, therefore, sought for a perpetual

injunction restraining the *shevaks* from interfering with their rights. The plaintiffs were 208 in number. They filed the present suit under section 30 of the Code of Civil Procedure (Act XIV of 1882). The defendants contended (*inter alia*) that the plaintiffs had each a separate cause of action; that they had no right to sue jointly; that they were not entitled to a declaratory decree under section 42 of the Specific Relief Act; and that the plaintiffs never having been obstructed in the exercise of their rights, had no cause of action. *Held*, that the suit was rightly constituted under section 30 of the Code of Civil Pro. (Act XIV of 1882). The rules made by the *shevaks* in 1883 interfered with the immemorial rights of the *gors*, and gave a common cause of action to all the plaintiffs. They were, therefore, entitled to sue jointly. *Held*, also, that the plaintiffs were entitled to a declaratory decree under section 42 of the Specific Relief Act (I of 1877), as their title to free access with their patrons to the sacred shrines and to receive presents from their patrons unfettered by the rules of 1883 was denied by these rules. *Held*, also, that the plaintiffs were entitled to further relief by way of perpetual injunction under section 54 of Act I of 1877, as the defendants had threatened to invade their enjoyment of property, and the invasion was such that pecuniary compensation would not afford adequate relief. *Held*, also, that the *shevaks* had no authority to issue the rules of the 12th October, 1883, or to levy fees from worshippers in respect of any public religious services held in the temple.—15 Bc 1. 309.

See I. L. R., 6 Madr. 239, noted under sec. 25.

**27.** Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, “at any stage of the suit,”\* if satisfied that the suit has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons, “with his or their consent,”\* to be substituted or added as plaintiff or plaintiffs upon such terms as the Court thinks just.

**Note.**

This section applies to Provincial Small Cause Courts.

The change of parties as plaintiffs, in conformity with the provisions of sec. 27 of the Code, does not give rise to such a question of limitation as arises upon the addition of a new person as a defendant under sec. 32.—I. L. R., 14 Cal. 400.

**28.** All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same matter.

And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

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\* The words quoted have been inserted by the Civil Procedure Code Act (VII of 1888), sec. 8.



**Notes.**

This section applies to Provincial Small Cause Courts.

A leased certain lands to B for a term of seven years, commencing with the year 1288 Fasli (19th September, 1880). On the 23rd October 1883, A sold the lands to D, who, under his purchase became entitled to the rents of the lands from the commencement of the year 1291 Fasli 17th Sept. 1883). When some of the instalments of the rent for the year 1291 Fasli became due, D applied for payment thereof to B, who informed him that he had paid the whole of the rent for the year 1291 in advance to A on the 21st May 1883. D then sued A and B for the rent due, praying a decree for rent against B, and in the alternative for a decree against A if it should turn out that B's allegation of payment was correct. The lower Courts found that B had paid A in good faith, and they dismissed the suit as against him. They also dismissed the suit as against A, on the ground that the claims against A and B could not be joined in one suit. On appeal to the High Court, *held* that the frame of the suit was unobjectionable, and that, on the facts found by the lower Courts, D was entitled to a decree against A.—I. L. R., 12 Cal. 555.

The plaintiffs having obtained a decree for the possession of certain lands, and having received formal possession thereof, brought a suit against 86 persons holding distinct and separate tenures in those lands, on the allegations that, "on the plaintiffs attempting to measure the lands, and calling on the tenants to pay rent, ten of the defendants, described as *pro-dhans* or headmen, formed a combination, and gained over the other defendants with a view to injure the plaintiffs; that through their help and endeavour the remaining defendants failed to recognize the plaintiffs as landlords, and declined to pay any rent, or to allow them to measure the lands, driving away an amin who went to measure the lands on behalf of the plaintiffs, and thereby preventing the plaintiffs from exercising their proprietary rights; that the plaintiffs brought suits for rent against some of the defendants, and in those suits the defendants denied the plaintiffs' title as landlords, whereupon the plaintiffs, seeing the necessity of instituting a suit for declaring the defendants tenants of the land withdrew the suits for rent." They stated their cause of action to "be the defendants' act of not recognizing us as their landlords, and thereby preventing us exercising our proprietary rights in respect of the land in suit, and not allowing us to make a measurement of that land, and also withholding the payment of rent:" and prayed for a decree establishing their proprietary right, and declaring the defendants to be their tenants. *Held* that there was but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property they had purchased; and that the suit was not multifarious within sec. 28 of the Civil Procedure Code. *Held* also that the declaratory decree prayed for could be made notwithstanding the plaintiffs might have asked for possession of the lands.—13 Cal. 147.

The judgment of the majority of the Full Bench in *Narsingh Das v. Mangal Dubey* (I. L. R., 5 Al. 163), except in its general observations as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action, proceeded upon and had reference to the special circumstances of the case, and to the allegations made by the plaintiff in his plaint, and was not intended to be carried further. In a suit for possession of immoveable property, part of which had been usufructually mortgaged by defendant No. 1 to defendant No. 2, the plaintiff alleged that the first defendant



had no title to make such a mortgage, while both defendants maintained such title. *Held* that, inasmuch as the title of defendant No. 2 was derived from defendant No. 1, and stood or fell with the failure or success of the plaintiff's claim against the latter, there were not two causes of action but one, namely, the infringement of the plaintiff's right by the defendant No. 36 and hence the suit was not bad for misjoinder of causes of action.—11 Al. 3.

A stranger to a contract, of which specific performance is sought, cannot be a party to the suit. Where, therefore, the plaintiff sued as against one defendant for specific performance of a contract to sell land, and as against another for a declaration that he was not entitled to any charge upon the said lands, *held* that the latter defendant was improperly made a party to the suit.—5 Bom. 177.

A suit to have a mukurari patta enforced as against one co-sharer granting it, and other co-sharers who repudiate it, and in the alternative to have the salami paid for the mukurari patta returned, is, in substance, a suit to enforce a contract to place the plaintiff in possession of the land under the patta, and to declare his rights to it as against all the defendants; and under sec. 19 of the Specific Relief Act, the plaintiff is entitled to ask for compensation as against the defendant granting the patta. Under sec. 28 of the Civil Procedure Code, such an alternative claim may be allowed against one or more of the defendants.—8 Cal. 963; 11 C. L. R., 330.

The plaintiffs brought a suit to recover certain sums of money from the defendants, due to them under certain contracts which they alleged had been entered into by themselves, and one A D, as agent of the defendants, and asked for an account. The defendants, in their written statement, contended that there was no privity of contract between themselves and the plaintiffs, and denied the alleged agency of A D. The plaintiffs, before the hearing, applied to the Court to have A D added as a party-defendant under secs. 28 and 32 of Act X of 1877, asking to be allowed to amend their plaint so as to pray for relief in the alternative against the original defendants or the said A D, or both against the original defendants and the said A D: *Held* that, under sec. 28, they were entitled to the order on the authority of the case of *Child v. Stenning* (L. R., 5 Ch. D. 695.)—8 Cal. 170.

*Per FIELD, J.*—Where a person, sued for rent, sets up the title of a third party, and alleges that he holds under, and pays rent to, him, such third party, ought not to be made a party to the suit so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed. Such a suit raises only two issues; viz.: (1) does the relation of landlord and tenant exist between the plaintiff and defendant? (2) are the alleged arrears of rent due and unpaid? and these are questions in which the plaintiff and defendant are alone concerned, and no third party claiming a title adverse to the plaintiff can properly be made a party to the trial of these issues. Sec. 28 of the Civil Procedure Code is not imperative, but allows a discretion to be exercised; and in such a suit it is better, both in the interests of Government and for the proper adjudication of the question of title, that it should be tried by a competent Court in a suit directly framed and brought for that purpose.—8 Cal. 238.

The creditor of an insolvent, who had assigned all his property to trustees for the benefit of all his creditors generally, sued him for his debt, joining the trustees as defendants, on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that the plaintiff had not applied for its registration within the

time notified by them, and that he would not consent to abide by the order which the High Court might make on an application by the trustees for its advice regarding the claims of creditors who, like the plaintiff, had applied for the registration of their claims after such time, but before the assets of the insolvent had been distributed. The deed of trust empowered the trustees to distribute the assets of the insolvent after a certain time among the creditors who had preferred their claims within that time, and declared that they should not be liable for such distribution to creditors who had not preferred their claims within that time; but it did not empower them to refuse to register claims made after that time, but before distribution of the assets. *Held* that the trustees had been properly joined as defendants in such suit; that their refusal to register the plaintiff's claim gave him a cause of action against them; and that, inasmuch as the plaintiff had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it.—3 Al. 799.

Defendant No. 1, the tenant of certain land at fixed rates, on the 12th November 1877, sold his interest in the land to the plaintiff. At the time of the sale the land was in the actual possession of defendant No. 2, defendant No. 1's sub-tenant, against whom, however, defendant No. 1 had obtained an order for ejectment on the 25th June preceding. On the 25th March 1878, defendant No. 1 applied a second time for the ejectment of defendant No. 2, and while this matter was pending the plaintiff endeavoured to obtain possession of the land, but was resisted by defendant No. 2. He thereupon instituted a charge of criminal trespass against the latter. This criminal proceeding was pending when, on the 14th September 1878, defendant No. 1 obtained a second order for defendant No. 2's ejectment. Under this order he obtained possession of the land, and also of the crop planted by defendant No. 2, which he sold to defendant No. 3 on the 22nd September 1878. On the 25th of the same month the plaintiff's charge of criminal trespass against defendant No. 2 was dismissed, on the ground that defendant No. 1 was in possession, and the plaintiff had never obtained possession under his purchase. Defendant No. 1 subsequently let the land to defendant No. 4. The plaintiff, alleging that three causes of action had accrued to him—*viz.*, (i) on the 12th November 1877, the date of the sale to him—(ii) on the 30th March 1878, when defendant No. 1 applied a second time for the ejectment of defendant No. 2—and (iii) on the 22nd September 1878, when defendant No. 1 took possession of the land—sued defendants Nos. 1, 2, 3, and 4, claiming (i.) possession of the land as against them all; (ii.) mesne-profits by way of damages for the year 1285 Fasli (September 1877—September 1878), as against defendants Nos. 1 and 2; (iii.) mesne-profits by way of damages for 1286 Fasli (September 1878—September 1879), against defendants Nos. 1 and 3; and (iv.) mesne-profits by way of damages for 1287 Fasli (September 1879—September 1880), against defendants Nos. 1 and 4. *Held* by the Full Bench (MAHMOOD, J., dissenting) that the Court of first instance had properly rejected the plaint, the suit being open to the objection that different causes of action against different defendants separately had been joined, for which procedure no sanction was to be found in the Code of Civil Procedure.—5 Al. 163.

A, B, C, & D, were the proprietors of a 2a. 13g. share in mauza E, and also of a 2a. 13g. share in mauza F, both in the district of Bhagalpur. On the 19th September 1872, A, B, C, and D, mortgaged their share in E and F, together with property in the district of Tirhut, to the plaintiff. On the 24th March 1873, A mortgaged his share in E and F to J. On the 13th

November 1872, A and B mortgaged their shares in E to K. On the 25th March 1874, J obtained a decree on his mortgage, and the interests of A & B were purchased on the 5th January 1875 by L. On the 17th April 1874, M, to whom the first mortgage had been assigned, obtained a decree, and attached the property mortgaged. L objected that he had already purchased the interests of A, and, on the objection being allowed, M instituted a suit against L for a declaration of priority, and obtained a decree on the 9th August 1876. In execution of this decree the property first mortgaged was sold on the 4th March 1878, and, after satisfying the mortgage, a surplus of Rs. 7,664 remained. After the institution of the first suit, and before L's purchase, the plaintiff instituted a suit upon his mortgage in the Tirhut Court without having obtained leave to include that portion of the mortgaged property situate in the Bhagalpur district. On the 17th July 1874, a decree was made in this suit. On the 17th January 1877, K obtained a decree on his mortgage, and shares of A and B in E were sold, and purchased on the 3rd September 1877 by N. The plaintiff had his decree transferred for execution to the Bhagalpur Court, and he attached the surplus sale-proceeds and a 1a. 9g. share in E. This attachment was withdrawn on the objection of L, who drew out the surplus sale-proceeds. The share purchased by N was also released from attachment. The plaintiff now sued L, N, and the mortgagors for a declaration that his decree of the 17th July 1874 affected the E property, to recover the surplus sale-proceeds from L, and in case the decree should not be valid to the extent mentioned, for a decree declaring his prior lien on the property in E. It was contended for the defendants that the Tirhut Court had no jurisdiction in respect of the Bhagalpur property; that the suit was bad for multifariousness; that certain persons, co-sharers with the plaintiff, should have been made parties; and that the cause of action had been split. *Held* that the Tirhut Court had no jurisdiction in respect of the Bhagalpur property; that the suit was not bad by reason of multifariousness; and that it was not necessary to make the plaintiff's co-sharers parties, as he might be regarded as contracting on behalf of himself and the other members of the family as undisclosed principals. *Held* also that the cause of action had been split.—7 Cal. 739 : See also 10 C. L. R., 263.

**29.** The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis, and promissory notes.

Joinder of parties liable on same contract.

#### Notes.

This section applies to Provincial Small Cause Courts.

The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by the holder of such bills.—I.L.R., 3 Cal. 541.

See I. L. R., 2 Al. 738, noted under sec. 32.

**30.** Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of all parties so interested. But the Court shall in such cases give, at the plaintiff's expense,

One party may sue or defend on behalf of all in same interest.

notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonable practicable) by public advertisement, as the Court in each case may direct.

#### Notes.

This section applies to Provincial Small Cause Courts.

Sec. 30 was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class having special interests to represent the rest of the class.—I. L. R., 9 Madr. 463.

The plaintiff based her right to sue upon the fact that her deceased husband had been *mutwali*, and she prayed that the property in suit might be declared *wugf*, and that certain alienations made by her step-son since her husband's death might be set aside:—*Held* that the trust to which the suit related was one partly for charitable and partly for religious purposes. As far as it related to the former, it was governed by sec. 539 and if viewed in the light of the latter, by Act XX of 1863; and that the suit, not being properly framed in compliance with the provisions of either of those enactments, was not maintainable:—*Held*, further, that even supposing the endowment alleged was neither a public charity within the meaning of sec. 539, nor a religious endowment to which Act XX of 1863 applied, the plaintiff was not entitled to sue alone; as it was clear upon the face of the plaint that she was not alone interested in the subject-matter of the suit, and therefore that she could only sue on behalf of all who were so interested, having first obtained the leave of the Court and otherwise complied with the provisions of sec. 30.—11 Cal. 33.

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. Three suits for money were filed by one of three joint-creditors, the others being named as co-plaintiffs with him in the plaints, which he alone signed and verified. An order was made by the Court after the filing of the plaints that one of these joint-creditors should be added as a co-plaintiff, as if he had not been on the record already. If the date of that order had been the date of suit brought, limitation under Act XV of 1877, sched. II, art. 67, would have applied; but it was *held* that all the joint-creditors became plaintiffs when the plaints were filed, the order adding parties being inoperative, and that the suits when instituted were not defective for want of parties.—17 Cal. 580.

A and B, junior members of a Malabar tarwad, sued to cancel certain mortgages executed by their karnavan and senior anandravan, on the ground that the secured debt was not binding on the tarwad, and to appoint A to the office of karnavan. The last part of the prayer was withdrawn. The mortgages were executed to secure a decree-debt, the decree having been passed *ex parte* against the late karnavan of the tarwad. No fraud was alleged but the Lower Courts found that the karnavan had been guilty of fraud in allowing the decree to be passed *ex parte*. The plaintiffs had not been parties to the decree, and the other junior members of the tarwad who had been joined were exempted from liability:—*Held*, that the nature of the debt was not *res judicata*, and that the plaintiffs were entitled to a declaration that the mortgages in question were invalid as against them:—*Held* further *per cur*.—All the members of the plaintiffs' tarwad should have been joined actually or constructively; but (KERNAN, J., dis-

senting) the objection as to non-joinder is not essential, but merely formal, and weight should not be attached to it when it is first taken on second appeal.—10 Madr. 322.

The plaintiff, as manager of an undivided Hindu family, sued to recover possession of certain lands from the defendant. The defendant contended that the plaintiff's minor brother and uncle, who were his undivided co-parceners, should be made parties to the suit. The Court of first instance held that the plaintiff, as manager, could sue alone, and passed a decree for the plaintiff. The first appellate Court reversed the decree, holding that the plaintiff could not sue alone, except under the provisions of sec. 30 of the Civil Procedure Code, which had not been complied with. On second appeal to the High Court, *held* that the defendant was entitled to have the plaintiff's uncle and minor brother placed on the record either as co-plaintiffs or as defendants. The right of a plaintiff to assume the character of manager, and to sue in that character, raises a question of fact and law which varies as the other members of the family are minors or adults, and, therefore, the defendant is always entitled in such suits, when the objection is taken at an early stage, to have the other members of the family, when they are known, placed on the record, to ensure him against the possibility of the plaintiff's acting without authority. The plaintiff was allowed on second appeal to amend his plaint by making the other members of the family parties to the suit.—12 Bom. 158.

The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built, and the gift made in 1870. The defendants obtained from the revenue authorities mutation of names in the idol's favour, and an acknowledgment of the person whom they nominated as agent or manager. The plaintiff, alleging that they had subsequently repossessed themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple, and professing to sue on behalf of the entire body of the worshippers there at, sued for a declaration that the land was wakf, and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. No sanction to the institution of the suit was obtained under sec. 539 of the Civil Procedure Code. *Held* by the Full Bench that the gift made by the defendants constituted a trust for the purposes of the temple. *Per* EDGE, C. J., and TYRRELL, J., that the defendants before the Court did not constitute themselves trustees in any sense. *Held* also by the Full Bench that the suit was not maintainable as against those defendants. *Per* STRAIGHT, J., that the suit was not maintainable under the Hindu law; that the trust was one for public religious purposes; that such a suit, in which the plaintiff asked to have the trust administered by the Court, could not be maintained without the sanction required by sec. 539 of the Code; that, assuming sec. 539 to be inapplicable, and Act XX of 1863 to apply, the suit could not be maintained without the sanction required by that Act; and that, with reference to sec. 30 of the Code, no cause of action had accrued to the plaintiff alone on which he could maintain the suit. *Per* EDGE, C. J., and TYRRELL, J., that, if the trust were one for public religious purposes, the suit as against the defendants before the Court must fail for non-compliance with the provisions of sec. 539 of the Code, and if for private or *quasi-private* religious purposes, it must also fail, since there was no principle on which the plaintiff, as one



of the public worshipping in the temple, could maintain it against those defendants who were not trustees, but (if they had wrongfully taken possession) trespassers; that Act XX of 1863 could not apply; and that, with reference to sec. 30 of the Code, the plaintiff could not maintain the suit alone on his own behalf, or on behalf of himself and others against those defendants. *Fawahra v. Akbar Husain* (I. L. R., 7 Al. 178) distinguished. *Manohar Ganesh Tambekar v. Lakhmiram Govind Ram* (I. L. R., 12 Bom. 247), *Lutifunissa Bibi v. Nazirun Bibi* (I. L. R., 11 Cal. 33), and *Hira Lal v. Bhairon* (I. L. R., 5 Al. 602), referred to. *Wajid Ali Shah v. Dianat, ullah Beg* (I. L. R., 8 Al. 31) approved.—I. L. R., 11 Al. 18.

A suit by one or more creditors on behalf of other creditors cannot be entertained without the leave of the Court being obtained for its institution. Such leave cannot be granted at the hearing.—9 Cal. 604; 13 C. L. R., 142.

If it is sought to make a decree in a suit binding on a Malabar tarwad, the procedure laid down in sec. 30 of the Code of Civil Procedure, 1877, should be followed if the members are numerous. A decree against a person who happens to be the karnavan of Malabar tarwad is not necessarily binding on the tarwad in the absence of fraud.—5 Madr. 201.

A subordinate Judge having permitted the junior widow of a Hindu to be made a party to the proceedings in execution of a decree obtained by the senior widow against a debtor of their deceased husband, the High Court declined to interfere under sec. 622 of the Code of Civil Procedure. *Quære*.—Whether sec. 32 of the Code of Civil Procedure does not give a Court a discretionary power to add parties after adjudication of the question raised in the suit.—6 Madr. 227.

An order under sec. 14, Act XX of 1863, should be mandatory, and not prohibitory. Where a sacred book was kept at a temple, and was an object of veneration to the members of the sect entitled to worship there, *held* that a suit would lie under sec. 14 of Act XX of 1863, by some of the persons interested in the temple, to restrain the superintendent from removing the book to another place, and that he should be directed to retain it as a portion of the furniture of the temple.—7 Cal. 767.

Four persons of the Chitpavan caste brought a suit in 1876, alleging that they and the members of their caste, in common with certain other castes, possessed the exclusive right of entry and worship in the sanctuary of a temple, and that the defendants, members of the Palshe caste, not being of the privileged castes, infringed that right in 1871 and thereafter by entering the sanctuary and performing worship therein. They prayed for a declaration of their right and an injunction restraining the defendants from interfering with it. *Held* that the plaintiffs could maintain the suit for the personal injury alleged to have been suffered by themselves by the pollution of their sanctuary, whether under the Civil Procedure Code of 1859 or that of 1877, sec. 30 of the latter being merely regulative, not constitutive. Whether or not it could be contended that they and the defendants so represented their respective castes that the decree in this suit should bind all members of the two castes, would be open to argument in any future case; but it might well be consistent with general principles to hold that certain judicial proceedings taken by or against a select number as representing a large class, might, if fairly and honestly conducted, bind or benefit the whole class.—7 Bom. 323.

A shareholder of an undivided piece of land sued three of his co-sharers, who, he alleged, had trespassed on the land by building thereon, for



restoration of the land to its original condition. The Court of first instance tried and determined the suit as brought and framed. The lower Appellate Court dismissed the suit, on the ground that, there being many co-sharers, the plaintiff could not alone sue, and, under sec. 30 of the Civil Procedure Code, the suit was bad. *Per* STUART, C. J.—That the lower Appellate Court was right in holding that sec. 30 of the Civil Procedure Code applied to the case, but that it was not right in dismissing the suit, but should have remanded it for the procedure provided by that section. Also that the permission mentioned in sec. 30 is express, and not constructive. *Per* BRODHURST, J.—That sec. 30 was not applicable to the case, that section contemplating a case in which there are numerous parties, having the same interest in a suit, who are all before the Court, and all anxious to have the matter in dispute disposed of, but, in order to save trouble and expense, are desirous that one or more of them shall sue or defend on behalf of all in the same interest. *Per* STRAIGHT and TYRRELL, JJ.—That sec. 30 was not applicable to the case, the first part of that section implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same.—5 Al. 602.

In a suit by two of the worshippers at a certain mosque, instituted after having obtained the sanction of the Advocate-General under sec. 539 of the Civil Procedure Code, against the mutwalli of the mosque, and two other persons to whom the mutwalli had mortgaged part of the endowed property to secure the repayment of a loan, it appeared that one of the mortgagees had sold some of the wakf property in execution of a decree which he had obtained upon his mortgage, and the property had been purchased by the other mortgagee. The plaintiffs prayed that the property purchased might be declared to be wakf; that the sale in execution might be declared to be invalid; that a mutwalli might be appointed by the Court; and that the costs of doing the acts of the wakf might be defrayed from the profits of the property belonging to the endowment. *Held* that, so far as regarded that portion of the prayer which fell within the provisions of sec. 539 of the Code, the plaintiffs were not entitled to sue, as they were not “persons having a direct interest in the trust” within the meaning of the section, and that the suit should have been instituted under sec. 14 of Act XX of 1863 after sanction obtained under sec. 18. *Held* also that, though the plaintiffs might possibly have obtained leave to sue under sec. 30 of the Code on behalf of themselves and the other persons attending the mosque, they, not having obtained such leave, were not entitled to institute the suit for the purpose of obtaining the relief asked for in the other prayers of the plaint. The words, “trustee, manager, or superintendent of a mosque,” &c., mentioned in Act XX of 1863, mean the trustee, manager, or superintendent of a mosque, &c., to which the provisions of the Act are applicable, not the trustee &c., of any mosque. And such persons are those to whom the provisions of Reg. XIX of 1810 were applicable. The mosques, &c., to which the provisions of that Regulation were applicable, were mosques for the support of which endowments had been granted in land by the Government of the country or by individuals, and the mosques, &c., to which the provisions of Act XX of 1863 apply, are not any mosques, &c., but any mosques for the support of which endowments in land have been made by the Government or private individuals.—8 Cal. 32.

A landlord having obtained a decree against the karnavan and senior anandravans of a Malabar tarwad, for the recovery of certain lands demised on perpetual lease to the tarwad, on the ground that the tenure was

forfeited by the denial of the landlord's title by the karnavan, the junior members of the tarwad sued the parties to that decree to set aside the decree and also the forfeiture of the tenure, on the ground that the karnavan had acted improperly in denying the title of the landlord. It was found that the karnavan acted *bona fide* in denying his landlord's title and in defending the suit.—*Held*, that the plaintiffs could not succeed.—7 Madr. 87.

The "Majlis Islamia" or "Mahomedan Association" of Meerut instituted a suit in its own name, by its Secretary. *Held* that, as such Association had not, *per se*, any status in law so to sue, the suit was not maintainable. *Semble* that, had such Association empowered one or more of its members to act for it in the matter of the suit in the manner provided by sec. 30, Civil Procedure Code, 1882, the permission mentioned in that section might have been granted.—6 Al. 284.

See I. L. R., 2 Madr. 328 & 10 Madr. 79, noted under sec. 13; 17 Cal. 906, noted under sec. 11; 15 Bom. 309, noted under sec. 26.

**31.** No suit shall be defeated by reason of the misjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Suit not to fail by reason of misjoinder.

Nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

#### Notes.

This section applies to Provincial Small Cause Courts.

Two of the sons of a joint Mitakshara family, consisting of the father, three sons, and the widow and sons of a deceased son, and carrying on business in partnership, filed a suit on the 19th July 1880, upon a *hatchitta*, dated the 11th December 1876. No time was fixed for the payment of money, but the last payment made and entered by the defendant on the *hatchitta* was dated 30th July 1877. On the 26th July, when the case came on for hearing, it was objected by the defendant that all the persons who sought to sue were not joined as plaintiffs. Thereupon, on the application of the original plaintiffs, the father and the third son, who were described as the surviving partners of the deceased son, were added as plaintiffs, but not until the suit as against them was barred by limitation. *Held* that the Court had rightly exercised its discretion in adding the 3rd and 4th plaintiffs to the record, although the suit was barred under sec. 22 of the Limitation Act as against them. *Held* also that the claim of the original plaintiffs was likewise, inasmuch as they could only enforce that claim in conjunction with the other plaintiffs whose rights were barred under sec. 22 of the Limitation Act. In actions of contracts it is the right of the defendant, if he takes the objection in proper time, to insist upon all persons with whom he has contracted being joined as plaintiffs, and if, after the objection has been raised, the plaintiff proceeds with the suit without taking proper steps to add the person or persons whose non-joinder has been objected to, and the Court finds that the objection was well-founded, the suit must be dismissed. *Baydonath Bag v. Grish Chunder Roy* (I. L. R., 3 Cal. 26) dissented from. *Held*, further, that the suit would have been in time if all the plaintiffs had joined in the first instance. *Per* CURIAN.—The words "prescribed period" in sec. 20 of the Limitation Act mean, not the period prescribed for the payment of the

debt, but the prescribed period of limitation. *Tarny Churn Nundee v. Shaikh Abdoor Rahman* (2 C. L. R., 346) doubted. There is no equity, but often much injustice, in allowing one joint-contractor out of many to sue the defendant, notwithstanding an objection duly made by the latter, and the Court has no right to allow one co-contractor to recover under such circumstances, though he may, no doubt, adjust the same which he recovers with his co-contractors. As between the members of a joint family any one or more may be authorized by the rest to act as their agent or agents in any business-transaction; but when a joint family or any members of it carry on trade in partnership, and contract with the outside public in the course of that trade, they have no greater privileges than any other traders; if they are really partners, they must be bound by the same rule for enforcing their contracts in Courts of law as the members of any other partnership.—8 C. L. R., 457.

In a suit instituted against six different parties, plaintiff prayed for khas possession of a four-anna share in a certain lot, or, in the alternative, for a decree for arrears of rent against the defendants, or such of the defendants as should, on inquiry, appear to be respectively liable. It appeared that plaintiff had been kept out of possession by one only of the six defendants, and that, if he was entitled to a decree for arrears of rent, another of the defendants was liable for a portion only of such arrears. *Held* (with reference to Act X of 1877, secs. 31 and 45) that the suit was not improperly framed; that there was no objection to the prayer for alternative relief; and that the suit should not have been dismissed for joinder of causes of action.—I. L. R., 4 Cal. 949.

A, as auction-purchaser at a revenue-sale, brought a suit against a number of persons for possession of some *chur* land; the defendants claimed portions of the land under different titles and pleaded misjoinder. The Court upon the Amin's report gave A the option to amend the plaint by withdrawing the suit against any particular sets of defendants. A elected to go to trial on the suit as brought. *Held* that, under the circumstances, it was necessary for the Court to adjudicate on the question of misjoinder. *Held*, also, that the plaintiff was not entitled to join in one suit all the persons, on the ground that they obstructed his possession, unless he was able to show that those persons acted in concert or under some common title. *Held*, further, that, having regard to the provisions of secs. 31 and 53 of the Civil Procedure Code, the proper order of the Court should have been to reject the plaint and not dismiss the suit on the ground of misjoinder.—14 Cal. 435.

A sued for an injunction to restrain interference with his right to graze cattle on the bed of a certain tank. The other raiyats of the village in whom the same right vested were originally joined as plaintiffs, but the plaint was amended under sec. 53 of the Code of Civil Procedure, and their names were struck off the record. A proved no special damage. *Held* (1) that the fact that the other raiyats of the village have similar rights does not make A's right a public right in the sense that no action can be brought upon it unless special damage is proved; (2) that the right claimed vests in A severally as well as jointly with the other raiyats, and the amendment of the plaint was not contrary to the provisions of sec. 31 or 53 of the Code of Civil Procedure.—11 Madr. 42.

See I. L. R., 3 Al. 799 & 7 Cal. 739, noted under sec. 28; 6 Bom. 266 and 16 Bom. 119, noted under sec. 26.

**32.** The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out;

and the Court may, at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Consent of person added as plaintiff or next friend.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Any person on whose behalf a suit is instituted or defended under section 30 may apply to the Court to be made a party to such suit.

Parties to suits instituted or defended under sec. 30.

All parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, 1877, section 22) the proceedings as against them shall be deemed to have begun only on the service of such summons.

Defendants added to be served.

Conduct of suit.

The Court may give the conduct of the suit to such plaintiff as it deems proper.

#### Notes.

This section applies to Provincial Small Cause Courts.

The words in sec. 73 of Act VIII of 1859, "who may be likely to be affected by the result," construed to mean "likely to be affected, if added as parties."—5 B. L. R., 371; 13 W. R., 443.

After a decree has been made, whereby a suit has been referred to the Commissioner's office to have accounts taken and property sold, the Court has still power (if it should be found necessary) to add, as fresh parties to the suit, persons who are interested in its subject-matter, and are likely to be affected by its results.—8 Bom. H. C. R., (O. C.) 96.

No person ought, under sec. 73, to be added as a plaintiff whose right of action is barred by the Law of Limitation.—W. R., 1864, 152; 12 Bom. H. C. R., 17.

In a suit by reversioners to set aside an alienation by the widow, where the Court finds that not the plaintiffs but another reversioner not represented on the suit had such right, it should not adjudicate on the propriety or

otherwise of the alienation, but the suit should be dismissed.—2 Agra H. C. R., 44.

Where a Hindu widow instituted a suit in respect of rights inherited by her from her deceased husband, and then adopted a son, *held* that, under sec. 73 of the Code of Civil Procedure, the adopted son might be made a co-plaintiff.—1 M. H. C. R., 197.

Where the son of a Hindu widow died after her re-marriage, and she sued as guardian of her daughter by her first husband claiming the estate of her son, an application by her to be joined as co-plaintiff in her own right was allowed.—10 W. R., 34.

J M executed in favour of P an instrument (authorizing P to recover, by suit or otherwise, from Messrs. W and N, a sum of Rs. 22,500 or thereabouts) which contained this clause: "From whatever sum P may recover from Messrs. W and N, he is to pay himself the sum of Rs. 8,640, which is due to himself, and also the expenses he may incur in making recovery, and he is to hand over the surplus to me." J M, ignoring the above instrument, sued N for the Rs. 22,500 mentioned in it. P thereupon applied to be made a party to the suit, under sec. 73 of the Code. His application was granted, and he was joined as a co-plaintiff. *Held* that P was properly made a party; but, as the validity of the instrument was disputed by J M, P should rather have been joined as a defendant than as a plaintiff.—7 Bom. H. C. R., (A. C.) 10.

Only persons whose claims must necessarily be taken into consideration before deciding on the plaintiff's title should be joined as defendants in a suit.—9 W. R., 158.

Sec. 73 of the Civil Procedure Code enables the Court to bring in as parties to the suit any person whose rights appear to be involved, and who may be affected by the result of the suit. It does not enable parties who are not liable to be affected by the result, to come in and raise altogether new issues which do not properly arise. Where the parties, however, all acquiesced in the irregularity, and the suit went to trial on the issues raised by the added defendant, the High Court did not think it necessary to quash the proceedings.—1 B. L. R., S. N., 26; 10 W. R., 283.

In a suit to recover possession of a certain mouzah claimed by the plaintiff as a portion of his dur-patni taluk, which was brought against several defendants, four other persons applied to be made defendants, on the ground that they were co-sharers with the defendants on the record in the property in dispute. The application was granted; the added defendants were found to be possessed of the share which they claimed, and on the proofs which they adduced the plaintiff's claim was dismissed. The plaintiff's claim as against the original defendants, who made no opposition, was decreed. In special appeal, on the ground that they should not have been made defendants, and that the plaintiff was not bound to prove his case against anybody else but the person against whom he had brought the suit, *held* that sec. 73, Act VIII of 1859, leaves to the Courts of original jurisdiction a discretion in such cases; that the section is not limited entirely to cases where the suit as framed cannot proceed; that the words "persons who may be likely to be affected by the result" do not mean persons on whom the result would be legally binding.—3 B. L. R., (A. C.) 24; 11 W. R., 361.

The plaintiff claimed to be entitled, as cousin of one M, to 12 annas of the estate left by M, and brought a suit against the two widows of M, to whom a certificate had been granted, under Act XXVII of 1860, to set aside the certificate, and for possession of the estate with mesne-profits from the

death of M to the institution of this suit. N and others, who claimed to be entitled to a portion of the property specified in the plaint, intervened, and asked to be made defendants under sec. 73 of Act VIII of 1859. *Held* that they were not parties likely to be affected by the result, within sec. 73, of the suit, and should not have been made parties to the suit.—3 B. L. R., (A. C.) 28 note; 10 W. R., 369.

In a suit against a co-heir, who had obtained a certificate under Act XXVII of 1860, for an account of the estate of the deceased proprietor, a third party was added as a defendant under sec. 73 of Act VIII of 1859, "it appearing from the accounts put in that a large portion of the assets had been disposed of by him as agent" of the holder of the certificate. On appeal, *held* that a co-heir is entitled to follow property of the deceased into the hands of any person who has misappropriated it, and such right is not taken away by the certificate. Therefore, any person who, with the consent of the holder of the certificate, has improperly possessed himself of property belonging to the deceased, and misappropriated it, may be joined as a co-defendant. The third party was rightly so joined in this case.—5 B. L. R., 371; 13 W. R., 443.

In a suit by a landlord to eject his tenant, persons alleging a title adverse to the landlord should not be made parties under sec. 73, Act VIII of 1859. Their introduction could not change the character of the suit, and if they wish to establish their own title otherwise than through the tenant they should bring a separate suit.—10 Bom. H. C. R., 429; 21 W. R., 51.

Where a plaintiff applied for attachment of certain property before judgment under sec. 81, and a third party intervened, claiming to hold the property by purchase on his own account, *held* that such intervenor ought not to have been made a party under sec. 73 of the Code, but that his objection should have been entertained under secs. 86 and 246 of the Procedure Code.—2 Agra. H. C. R., 141.

Where one of several joint creditors who has no rights separate from that of the others refuses to join in the suit as plaintiff, and there is no averment of collusion on his part with the defendant, he cannot rightly be made a defendant in the suit.—11 Bom. H. C. R., 106; 1 C. L. R., 431.

The official Assignee has no legal right under the Insolvent Act to apply to be made a party to suits against the insolvent pending at the time of a vesting order being made, nor has he the power, after judgment and decree have been pronounced in a suit against the insolvent prior to his vesting order, to get himself made a party to such suit with a view of setting aside the judgment or appealing therefrom.—1 Bom. H. C. R., 251.

An appeal lies under the Civil Procedure Code, sec. 588 (2), against an order under sec. 32 that a plaintiff be made defendant.—I. L. R., 12 Madr. 489.

Persons not parties in the original suit are not entitled to have themselves added as appellants in the Appellate Court.—9 W. R., 259.

After the dismissal of the plaintiffs' suit, and pending a regular appeal to the High Court, the plaintiffs applied for leave to add the name of a party to whom a share of their right in the subject-matter had been assigned subsequently to the dismissal of the suit in the Court below. The Court refused the application.—Marsh. Rep., 251; 2 Hay's Rep., 111.

In a suit for declaration of title to, and for possession of, a share in alleged ancestral property with mesne-profits, the plaintiff obtained a decree



in the lower Appellate Court, from which the defendants appealed to the High Court. Pending the appeal, the plaintiff died childless, and, on her application, his widow was substituted for him as respondent. Subsequently, the defendants-appellants applied to the High Court to have the deceased's father brought upon the record as respondent, alleging that he, and not the widow, was the deceased's legal representative, and solely entitled to be placed on the record as such. The father made no objection to the proposed substitution. It was common ground that either the father alone or the widow alone was the deceased plaintiff-respondent's true legal representative. *Held* by the Full Bench (MAHMOOD, J., dissenting) that, having regard to the words "as nearly as may be" and "as far as may be" in sec. 582 of the Civil Pro. Code, secs. 365, 366, and 367, might be applied, at all events analogically, to the case so as to enable the real legal representative of the deceased plaintiff-respondent to be ascertained and brought upon the record; that the latter portion of sec. 582 did not limit the earlier words of the section so as to make sec. 368 the only provision applicable to the case; that a Court of record must have an inherent power to ascertain whether or not it has before it the proper parties to an appeal if the question be substantially raised; and that, therefore, the Court could and should, either before or at the hearing of the appeal, ascertain and determine, for the purposes of the prosecution of the appeal, the preliminary question whether the father or the widow was the legal representative of the deceased, and should act accordingly. *Held* also by the Full Bench (MAHMOOD, J., dissenting) that sec. 32 of the Code did not apply to the case, and that, if it did apply, it would be the duty of the Court to decide whether the father or the widow was the legal representative of the deceased plaintiff-respondent. *Held* by MAHMOOD, J., *contra*, that the effect of sec. 582 read with sec. 587 was to place the defendants-appellants in the position of plaintiffs, and the deceased respondent in that of a defendant, for the purposes of array of parties; that consequently the provisions of secs. 363, 364, 365, 366, and 367, had no application; that, applying sec. 368, the Court was bound to implead the person named by the defendants-appellants as a respondent to the appeal; that, applying sec. 32, the widow occupied a position which gave her a sufficient *prima facie* status to be impleaded as respondent; and that, as there existed no authority in the Code allowing the Court to hold an enquiry whether the father or the widow was the true legal representative of the deceased plaintiff-respondent, the Court should bring both upon the record as respondents, and proceed to decide the appeal after hearing both. *Narain Das v. Lajja Ram* (I. L. R., 7 Al. 693), *Har Narain Singh v. Kharag Singh* (I. L. R., 9 Al. 447), *Lakshmibai v. Balkrishna* (I. L. R., 4 Bom. 654), *Rajamonee Dabee v. Chunder Kant Sandel* (I. L. R., 8 Cal. 440; 10 C. L. R., 437), *Naraini Kuar v. Durjan Kuar* (I. L. R., 2 Al. 738), and *Athiappa v. Ayanna* (I. L. R., 8 Madr. 300), referred to.—I. L. R., 10 Al. 223.

Suit upon a bond of which the obligor was therein described as the manager of a certain mutt. The defendants, who were the sons of the obligor (since deceased), pleaded that the debt was contracted by their father for the benefit of the mutt and as manager of the mutt. The Judge ordered that the representative of the mutt be joined as defendant in the suit under sec. 32, and subsequently a decree was passed against him:—*Held*, that the order under sec. 32 was right, although the plaint had prayed for no relief against the mutt.—13 Madr. 32.

No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit.—11 Cal. 642.

In a suit for possession of immoveable property brought by three Muhammadan brothers, their three sisters were impleaded as defendants under sec. 32 and two of the latter subsequently filed a written statement in which, after stating that they were on good terms with their brothers the plaintiffs, and that the suit had been instituted with their knowledge and permission, they prayed that the suit might be decreed, subject to the condition that they would on some future occasion "settle with their own brothers as to their right and costs." The third sister did not appear to defend the suit :—*Held*, that the lower Courts were wrong in treating this admission as sufficient to entitle the plaintiffs to a decree for possession, not only of their own share, but also of the shares of their three sisters, it being a fundamental proposition connected with the administration of justice that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission on consent of this kind, convey the right or delegate the authority to one for more than his own share in property. *Lachman Singh v. Tansukh* referred to.—7 Al. 353.

Where property belonging to an endowment is sought to be recovered from a third party, who asserts that he is the owner thereof, all the mutwallis of the endowment should be made parties ; Such of the mutwallis as refuse to join as plaintiffs should be made defendants.—11 Cal. 338.

Unless there is a special provision of the law, co-owners are not permitted to sue through some or one of their members, but all co-owners must join in a suit to recover their property. The defendant cannot be deprived of his right to insist on the other co owners being joined on the record by the fact that they approve of the suit being brought by the plaintiff alone.—10 Bom. 32.

There is no power in the Code to make a party to the suit a co-appellant. Secs. 32 and 582 of the Code give to an Appellate Court power only to strike out the name of a party, or to direct new parties to be added to the suit, whether as plaintiffs or defendants.—10 Bom. 227.

An order rejecting an application under sec. 32 to be made a party to a suit is not appealable under cl. 2, sec. 588.—13 Cal. 100.

The parties to the suit, the heirs and representatives of the original parties, a family carrying on a banking business, made and acted upon a new arrangement of their shares, the amounts of which were found in the First Court, and affirmed on appeal. A decree for an account and an award of interest at twelve per cent on the amounts found to be due upon the shares from the date of the closing of the business was maintained.—18 Cal. 616.

A mita held by tenants in common was sold for arrears of revenue at a time when the owners of a moiety thereof were minors. In a suit brought by the mother of these minors on their behalf against the Collector to set aside the sale, the District Court held that Regulation X of 1831, sec. 2, absolutely debarred the Collector from selling the estate of the minors during their minority and set aside the sale so far as their interests were concerned :—*Held*, on appeal, that the minors not being sole proprietors, their estate was not one of which the Court of Wards could assume the management, and, therefore, sec. 2 of Regulation X of 1831 did not affect the sale. In the abovementioned suit the plaintiffs impleaded also the other previous owners, of whom one was the purchaser at the sale. Two others, in their written statement, pleaded that the purchase had been made in fraud of their rights, and claimed to be still entitled to their shares in the mita on the ground that the purchaser must be held to have purchased

for their benefit (Indian Trusts Act, 1882, sec. 90). They further claimed that should the sale be set aside so far as the plaintiffs' interests were concerned, the sale of their interests also should be held to be null and void. Before the suit came on for hearing the District Judge *suo motu* ordered that these two defendants should be made plaintiffs in the suit under sec. 32 of the Code of Civil Procedure. At the date when this order was made, the claim of these defendants, had they sued to set aside the sale in their own interest, was barred by limitation:—*Held*, that the order was illegal.—10 Madr. 44.

The "questions involved in the suit" referred to in the second paragraph of sec. 32 of the Civil Procedure Code, are questions between the plaintiff and the defendant, and not questions which may arise between co-defendants or co-plaintiffs, *inter se*. The section does not apply to questions which are not involved in the suit, but crop up incidentally during the pendency of an appeal, such as the question whether one person or another is the legal representative of a deceased plaintiff-respondent. Sec. 591 of the Code enables the Court, when dealing with an appeal from a decree, to deal with any question which may arise as to any error, defect, or irregularity in any order affecting the decision of the case, though an appeal from such order might have been and has not been preferred. *Googlee Sahoo v. Premalal Sahoo* referred to. During the pendency of an appeal, the plaintiff-respondent died, and, on the application of the appellant, the name of H was entered on the record as respondent in place of the deceased. Subsequently K applied to be substituted as respondent, alleging that he and not H was the legal representative of the plaintiff. The Court passed an order making K a joint respondent with H. To this H objected, but he did not appeal from the order. Ultimately the Court dismissed the appeal, and passed a decree that the money claimed in the suit was payable to the two respondents. *Held* that sec. 32 of the Civil Procedure Code did not apply to the case so as to authorize the Court below to add K as a respondent; that the only other section under which he might possibly have been brought in was sec. 365; that even assuming sec. 365 to apply to such a case, the Court had no power to make K a respondent jointly with H, but should have taken one or the other of the courses specified in sec. 367, so as to determine who was the legal representative of the deceased plaintiff; and that the course adopted by the Court was an exceedingly inconvenient one, which ought not to have been taken, even if the Court had power under the Code to take it. *Held* also that, on appeal from the decree of the Court below, H was entitled to object to the order adding K as a respondent, though he had not appealed from the order itself.—9 Al. 447.

An order refusing an application under Act X of 1877, sec. 32, by a person to be added as a defendant in a suit, is not applicable.—2 Al. 904.

This section does not contemplate any application to the Court by the person proposed to be added.—5 Cal. 882.

V sued his brothers for his share of the estate of their deceased father, the father and sons being divided. V having been transported for life, his sons applied to be made plaintiffs in the suit on the ground that they had a joint interest with their father in their grandfather's estate: *Held* that under the circumstances, the application was properly granted.—6 Madr. 331.

The Secretary of State is not a necessary party to a suit to set aside a sale for arrears of revenue, but the Government have such interest as would, on their application, entitle them to be made a party. Sec. 424 of

the Civil Procedure Code does not preclude a Court from adding the Secretary of State as a necessary party under sec. 32 of the Code.—9 Cal. 271.

A person alleged to be a lunatic, though not found so under Act XXV of 1858, may appear either by vakil or in person. Under sec. 32 of the Code of Civil Procedure no person can be added as a plaintiff unless he has previously consented thereto; and if a person objects to be added, as a plaintiff, the proper course is to make him a defendant.—7 Cal. 242.

In a suit for the partition of joint family property, the mortgagees of the right, title, and interest of the plaintiff applied under Act X of 1877, sec. 32, to be added as parties: *Held* that their presence was not necessary in order “to enable the Court effectually and completely to adjudicate and settle all the questions involved in the suit” within the meaning of section —5 Cal. 882.

The object of sec. 32 which enables a Court to add parties whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, is, to enable the Court to try and determine, once for all, material questions common to the parties and to third parties, and not merely questions between the parties to the suit.—5 Madr. 52.

*Held*, reading secs. 28, 29, and 32 of Act X of 1877 together, that, where an application is made under sec. 32 for the addition of a person, whether as plaintiff or defendant, such person should, as a general rule, be added only where there are questions directly arising out of and incidental to the original cause of action, in which such person has an identity of community of interest with the original plaintiff or defendant. Two suits against K for possession of the property of B, deceased, were instituted in the Court of the Subordinate Judge by parties claiming adversely to one another as heirs to B. The Subordinate Judge, on the applications of the plaintiffs in these suits, under sec. 32 of Act X of 1877, added the plaintiffs in the first suit as defendants in the second, and the plaintiffs in the second suit as defendants in the first. *Held* on appeal by the defendant K from the orders of the Subordinate Judge, applying the rule stated above, that such addition of parties, not being necessary to enable the Subordinate Judge “effectually and completely to adjudicate upon and settle all the questions involved in the suit,” were not proper. The principles on which sec. 73 of Act VIII of 1859 should be interpreted enunciated by Sir Barnes Peacock in *Jaygobind Dass v. Gauri Pershad Shaha*, 7 W. R., 222; *Raja Ram Tewari v. Lachman Pershad*, 8 W. R., 15; and *Ahmed Hussain v. Khodeja*, 10 W. R., 316; 3 B. L. R., A. C., 28; and the remarks of PONTIFEX, J., in *Muhammad Badshah v. Nicol Fleming*, I. L. R., 4 Cal. 355; followed and applied.—2 Al. 738.

Plaintiff sued defendant for damages for slander of plaintiff's sister. The Court, regarding the suit as defective for want of parties, made plaintiff's sister a co-plaintiff under sec. 73 of Act VIII of 1859. *Held* that the defect was one not to be remedied under that section, and that as there was no right of suit in the plaintiff, the suit should have been dismissed.—1 Madr. 383.

The plaintiff in a partnership-suit to which there were twenty-one defendants applied to the Court for leave to withdraw the suit, or that the suit might be dismissed. Ten of the defendants supported the plaintiff's application. Two of the defendants objected, and applied, under sec. 32 of the Civil Procedure Code (Act X of 1877), that they might be made

plaintiffs, and that the plaintiff might be made a defendant. The Court granted their application.—7 Bom. 167.

In a suit for rent, where the defendant alleged that a person not on the record had a joint interest with the plaintiff in the property in respect of which the rent was due: *Held*, where the plaintiff disputed this, and objected to such course being taken, that it was improper to add such person as co-plaintiff, and that, if added at all, it should be as defendant, in order that the issue between him and the plaintiff might be properly tried. *Held* also that in such a case an appeal lies under sec. 591 of the Civil Procedure Code.—7 Cal. 148.

S sued N and R jointly and severally for certain monies. The Court of first instance gave S a decree for such monies against N, and dismissed the suit against R. N appealed from the decree of the Court of the first instance, but S did not appeal from it. The Appellate Court, at the first hearing of N's appeal, made R a respondent, the period allowed by law for S to have preferred an appeal having then expired, and eventually reversed the decree of the Court of first instance, dismissing the suit as against N, and giving S a decree against R. *Held* that, although the Appellate Court was competent to make R a party to the appeal, under secs. 32 and 582 of Act X of 1877, yet it was not competent, with reference to sec. 22 of Act XV of 1877, to give S a decree against R, the former not having appealed from the decree of the Court of first instance within the time allowed by law.—2 Al. 487.

Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm. *Dular Chand v. Balram Das and Gobind Prasad v. Chandar Sekhar* referred to. A Court may, under sec. 32 of the Code of Civil Procedure, add a party necessary to a suit, although it may be obliged by the Indian Limitation Act, 1877, to dismiss the suit after such party has been added. *Ramsebuk v. Ram Lall Koondoo and Kalidas Keval Das v. Nathu Bhagwan* referred to. *The Oriental Bank Corporation v. Charriol* discussed.—14 Al. 524.

B and N, the mortgagees of a mehal, granted the mortgagors a lease of the mehal, the mortgagors agreeing to pay the mortgagees a certain rent half-yearly on account of the right they held in equal shares, and that, in default of payment of such rent, "the mortgagees" should be entitled to sue for payment. The mortgagors having made default in payment of the rent, and N refusing to join in a suit against the mortgagors to enforce payment, B sued them alone for a moiety of the rent due. The Revenue Court of first instance held, with reference to Act XVIII of 1873, sec. 106, that B could not sue separately. *Held* by the High Court that the order of the Revenue Court of first appeal, directing, *inter alia*, that the Court of first instance should re-try the suit after making N a defendant in the suit, was not illegal, notwithstanding that the provisions of Act X of 1877, sec. 32, were not made applicable to the procedure of the Revenue Courts by Act XVIII of 1873.—2 Al. 264.

During the hearing of a suit for recovery of immoveable property it appeared from the evidence and certain documents put in, that the plaintiff had mortgaged his right, title, and interest to a third person, by whom the suit was practically being carried on. On an application by the defendant for the mortgagee to be added as a party-defendant, under the provisions of sec. 32 of the Civil Procedure Code, the Court directed a rule to issue calling on him to show cause why he should not be added as a party-



defendant or give security for costs. The rule was not applied for on petition or affidavit, and set out no grounds for the application at all. On an objection taken by the mortgagee at the hearing of the rule: *Held* that the grounds should have been stated on affidavit or have appeared on the face of the rule, and that the mortgagee was entitled to know what he had to answer, and consequently, the rule being informal, it was discharged with costs.—9 Cal. 735.

A sued as only son and heir of his father B. C, the widow of B, having, with the concurrence of A, taken out letters of administration of B's estate, was on the application of A at the hearing of the suit, made a co-plaintiff under sec. 32 of the Civil Procedure Code. *Held* that C ought not to have been joined as a plaintiff in the suit, inasmuch as A has no right at all to sue. Sec. 32, as far as the addition of plaintiffs is concerned only applies to those cases in which the original party who brought the suit has some title to sue. *Per* PONTIFEX, J.—The power given by sec. 27 of the Code ought to be exercised before the first hearing of the case. *Held* also that sec. 2 of Act XXVII of 1860 prohibited A from suing alone, for although he was, no doubt, beneficially entitled to recover it, yet there was no vexatious or fraudulent withholding of the debt within the meaning of that section. *Per* GARTH, C. J.,—A debt cannot be said to be "vexatiously withheld" within the meaning of that section simply because the debtor omits to pay it.—6 Cal. 370.

Where a member of a Malabar tarwad sued the karnavan for an increased rate of maintenance:—*Held*, that all the members of the tarwad were necessary parties to the suit. *Held*, also, the Appellate Court having reversed the decree on the ground of non-joinder of such persons and directed the plaint to be returned for amendment, that the proper course was for the Appellate Court to have added the necessary parties.—7 Madr. 428.

C. sued P. to recover possession of certain lands. The plaintiff and defendant were members of the same family, and at the hearing of the suit the appellants, who were also members of the family, applied to be made parties, alleging that the suit was collusive, and that they were in possession of some of the lands which the plaintiff sought to recover, and wished to defend their possession. The Subordinate Judge granted their application, and made them co-defendants in the suit. The filed written statements setting forth their right, and time was allowed in order that the plaintiff might put in a counter statement. Before the case came on again, the Subordinate Judge had been removed, and his successor was of opinion that the causes of action, as against the original defendant P. and as against the new defendants (the appellants), were different, and ought to be the object of different suits. He accordingly dismissed the appellants from the suit under sec. 45 of the Civil Procedure Code (XIV of 1882), and ordered that they should bear their own costs. *Held*, on appeal to the High Court, that the order dismissing the appellants from the suit should be reversed, and that sec. 45 did not apply. When the parties concerned, though in different relation, in a particular litigation are all before the Court, and their cases have been stated, the Court, if it finds the several causes as between plaintiff and the several defendants cannot properly or conveniently be tried together, should deal with them separately as subsuits under the title and number of the principal suit from which they spring. The dismissal of defendants added without objection, or the addition of whom has been submitted to, is not contemplated, and would tend to further needless expense.—8 Bom. 616.



A sued V and S to establish his right to attach a certain house in execution of a decree obtained by him in a previous suit. In their written statement the defendants alleged that A had obtained the decree in question by fraud. Shortly before the present suit, V had mortgaged the house to H for Rs. 33,000. About three weeks after the suit had been filed, H advanced a further sum of Rs. 5,000 to V on the same security, and on the same day (12th December, 1881,) entered into an agreement with V by which he agreed to buy the house for Rs. 45,000, the sale to be completed immediately after the decision of the present suit. The agreement provided that V should defend the suit; but, if the result of the suit should be to establish the plaintiff's right to seize the house in execution, then that H should be at liberty to cancel the contract of sale. Subsequently V wrote to H, declaring his intention of abandoning his defence. H thereupon applied to be made a defendant to the suit, in order to protect the house from the plaintiff. *Held* that H was entitled to be made a party under secs. 32 and 372 of the Civil Procedure Code (Act XIV of 1882.) *Held* also, that the agreement of 12th December amounted to an absolute sale, by V to H, of the equity of redemption of the house in question, and that it was not champertous.—8 Bom. 323.

See I. L. R., 8 Cal. 170, noted under sec. 28; 5 Bom. 609, noted under sec. 34; 14 Cal. 400, noted under sec. 27.

**33.** Where a defendant is added, the plaint, if previously filed, shall unless the Court direct otherwise, be amended in such manner as may be necessary, and an amended copy of the summons shall be served on the new defendant and the original defendants.

Where defendant added, plaintiff to amend.

**Note.**—This section applies to Provincial Small Cause Courts.

**34.** All objections for want of parties, or for joinder of parties who have no interest in the suit, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the first hearing; and any such objection not so taken shall be deemed to have been waived by the defendant.

Time for taking objections as to non-joinder or mis-joinder.

#### Notes.

This section applies to Provincial Small Cause Courts.

The words in para. 1 of sec. 53 of the Code of Civil Procedure (Act X of 1877), "at or before the first hearing," are merely directory and not mandatory, and therefore a plaintiff may, subsequently to the "first hearing," amend his plaint, provided such amendment does not alter the original character of his suit. The plaintiffs (mortgagors) in a suit against their mortgagees sought only for production of the mortgage-deed or for an account, although the averments in the plaint warranted a prayer for redemption. Subsequently to the first hearing of the suit they applied to be allowed to amend the plaint by adding a prayer for redemption. *Held* that the provisions of sec. 53 of the Civil Procedure Code (Act X of 1877) did not preclude the Court from permitting the amendment to be made. It is

competent to a Court, at any time before passing a decree, to frame an additional issue embracing a matter not included in the plaint (provided it be not inconsistent with it), or in the written statement, but which may appear upon the allegations made on oath by the parties, or by any person present on their behalf, or made by the pleaders of such parties or persons. Sec. 34 of the Civil Procedure Code (Act X of 1877) limits the time within which a defendant may object for want of parties, but it does not so limit the right of the plaintiff to add parties. In some cases sec. 34 would not prevent even a defendant from objecting to the want of a party after the first hearing, *e. g.*, where after the first hearing and before decree a coparcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing, and therefore could not have been made or waived by the defendant; and if he made it at the earliest opportunity after it came into existence he would have satisfied the spirit of sec. 34.—I. L. R., 5 Bom. 609.

See I. L. R., 17 Cal. 580, noted under sec. 30, 16 Bom. 119, noted under sec. 26.

**35.** When there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead, or act for such other in any proceeding under this Code: and in like manner, when there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead, or act for such other in any such proceeding.

Each of several plaintiffs or defendants may authorize any other to appear, &c., for him.

The authority shall be in writing signed by the party giving it, and shall be filed in Court.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where one of several representatives of a deceased judgment-creditor applies for the execution of a decree, the general powers of attorney contemplated by sec. 17, cl. I, of Act VIII of 1859, are not necessary, but it is sufficient if the applicant is authorized under sec. 115 to act for the other representatives.—2 Bom. H. C. R., 109.

#### *Recognized Agents and Pleaders.*

**36.** Any appearance, application, or act in or to any Court required, or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when therewith expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf:

Appearances, &c, may be in person, by recognized agent, or by pleader.

Provided that any such appearance shall be made by the party in person, if the Court so direct.

**Notes.**

This section applies to Provincial Small Cause Courts.

The Rule of Court, dated the 22nd May 1883, and authorizing legal practitioners in certain cases to appoint other legal practitioners to hold their briefs and appear in their place, was passed to facilitate the work of the Court and for the convenience of the pleaders practising before it, and was fully within the powers conferred upon the High Court by sec. 635 of the Civil Procedure Code.—I. L. R., 9 Al. 613.

See I. L. R., 8 Bom. 105 and 16 Bom. 23, noted under sec. 2; 9 Al. 617, noted under sec. 635; 15 Cal. 800, noted under sec. 13.

**37.** The recognized agents of parties by whom such appearances, applications, and acts, may be made or done, are—

Recognized agents.

(a) persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application, or act, is made or done, authorizing them to make and do such appearances, applications, and acts on behalf of such parties;

Persons holding powers-of-attorney from parties out of jurisdiction.

Certificated mukhtars.

(b) mukhtars duly certificated under any law for the time being in force, and holding special powers-of-attorney authorizing them to do, on behalf of their principals, such acts as may legally be done by mukhtars;

(c) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application, or act, is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications, and acts.

Persons carrying on trade or business for parties out of jurisdiction.

Nothing in the former part of this section applies to the territories now administered respectively by the Lieutenant-Governor of the Panjab and the Chief Commissioners of Oudh and the Central Provinces; but in those territories the recognized agents of parties by whom such appearances, applications, and acts, may be made and done, shall be such persons as the Local Government may, from time to time, by notification in the official Gazette, declare in this behalf.

Recognized agents in Panjab, Oudh, and Central Provinces.

**Notes.**

This section applies to Provincial Small Cause Courts.

A recognized agent, under cl. 2, sec. 17, Act VIII of 1859, cannot prosecute or defend a suit in his own name. A gomasta of a firm ceases to be a recognized agent under cl. 2, sec. 17, Act VIII of 1859, when the business of the firm ceased before the institution of the suit.—5 B. L. R., (App.) 11; 13 W. R., 344.

The munim of a firm is not, for the purpose of presenting a plaint, the recognized agent (under sec. 17 of the Civil Procedure Code) of a partner who is present within the jurisdiction. The munim and such partner should join in presenting the plaint or appointing a pleader. The partners not so joining is not a ground on which an Appellate Court should reverse the decree of a lower Court, unless the irregularity affects the merits of the case or the jurisdiction of the Court.—6 Bom. H. C. R., (A. C.) 150.

The munim of a firm which has ceased to carry on business, who is engaged in collecting the assets of such firm, and otherwise winding up its affairs, is a recognized owner of such firm within the meaning of sec. 17, cl. 2, of the Civil Procedure Code, and can, on behalf of his absent principal, maintain or defend a suit brought in respect of the business of the firm whose affairs he is engaged in winding up.—9 Bom. H. C. R., 427.

An agent of a party, residing within the jurisdiction of the Court, not being an authorized agent as contemplated by cl. 1, sec. 17, Act VIII of 1859, was not competent to appear as plaintiff on behalf of his principal, and to file and verify the plaint as required by sec. 27 of that enactment.—1 Agra H. C. R., 115.

A mere mukhtar, unless specially authorized, is not the recognized agent of the judgment-debtor on whom notice can be rightly served within the meaning of the Civil Procedure Code.—17 W. R., 389.

P filed a suit in the Second-class Subordinate Judge's Court at Mahad. As P resided at Thana, outside the jurisdiction of the Court of Mahad, she authorized her agent, under a general power of attorney, to conduct the suit on her behalf. The agent carried on the litigation up to the final decree passed by the High Court on appeal in P's favour. The agent then sought to execute the decree. The Court at Mahad passed an order upon his *darkhast* granting only partial execution. Against this order the agent filed an appeal in the District Court at Thana. Then, for the first time, the judgment-debtors challenged the agent's right to represent P, who was residing within the District Court's jurisdiction. This objection prevailed, and the appeal was dismissed. *Held* that the agent could not be prevented from executing the decree which he had obtained as agent. No objection had been taken to the agent's right to represent P at any stage of the litigation prior to the final decree. That objection must, therefore, be deemed to have been virtually waived, and could not be raised after the defendants had had their chance of success in the litigation.—I. L. R., 12 Bom. 68.

A mere power to sue does not authorize an agent to do more than employ a Vakil on the terms of paying him a reasonable remuneration.—10 Bom. 18.

Act XVIII of 1879 is an amending as well as a consolidating Act, and one of the respects in which it amended the old law was the conferring upon the High Court power "to make rules declaring what shall be deemed to be the functions, powers, and duties of the mukhtears practising in the

**Subordinate Courts.** When a person other than a duly certificated and enrolled mukhtear constantly and as a means of livelihood, performs any of the functions or powers which the rule framed by the High Court in accordance with the provisions of the Legal Practitioners Act says are the functions and powers of a mukhtear, he practises as a mukhtear, and is liable to a penalty under sec. 32 of the Act. The words "any person" in sec. 32 embrace pure outsiders as well as duly qualified and enrolled mukhteers who have failed to take out their certificates. G. N., though not a certificated mukhtear, was in the habit of appointing and instructing pleaders in the Civil Courts on account of certain persons who paid him a regular monthly salary for so doing. In a proceeding against him under the Legal Practitioners Act, G. N. made this statement: "I receive a letter from the mofussil from a person and act for him, he sending the *vakalatnama* with his letter. I receive monthly wages from each of the persons who employ me. Each of the employers I have mentioned belongs to a distinct family, and lives in a separate village." *Held* that G. N. was neither a private servant nor a recognized agent of any of his employers within the meaning of sec. 37 of the Civil Procedure Code, and was liable to a penalty under sec. 32 of the Legal Practitioners Act for having practised as a mukhtear. *Held* also that, having regard to the Court in which G. N. practised, the words in sec. 32, "to a fine not exceeding ten times the amount of the stamp required by this Act for a certificate authorizing him so to practise in such Court," were equivalent to the words "to a fine not exceeding Rs. 250."—14 Cal. 556.

The term 'non-resident' in sec. 37, cl. a, of the Code of Civil Procedure (Act X of 1877), covers every absence which may reasonably be supposed to have been within the contemplation of the Legislature in using that term; thus, where, a Marwadi had resided for forty years at Pen, and had also a place of business there, but who had gone to his native country to get his sisters married, and had been absent upwards of four months, it was *held* that he was 'non-resident' within the local limits of the jurisdiction of the Pen Court, and that a person holding a general power-of-attorney from him was a recognized agent within the meaning of the section.—6 Bom. 100.

A suit was brought by the Political Agent, Southern Maratha Country, as administrator of the estate of the Chief of Mudhol, who was described in the plaint as being nineteen years of age, to eject the defendants from certain lands, belonging to the Chief, situated in the Satara District. The defendants raised a preliminary objection to the institution of the suit by the Political Agent, on the ground that he was neither a certificated guardian of the Chief under the Bombay Minor's Act XX of 1864, nor a *recognized agent* within the meaning of sec. 37 of the Civil Procedure Code. *Held*, that the appointment, by Government, of the Political Agent to manage the estate of the Chief of Mudhol during a certain period could not give him the position contemplated by the Bombay Minor's Act XX of 1864. With regard to property in British India, he had no authority to sue on behalf of the minor, without obtaining a certificate of administration under the Act. *Held*, also, that the Political Agent was not a "recognized agent" of the Chief of Mudhol within the meaning of sec. 37, clause a, of the Code of Civil Procedure. *Held*, also, that the irregularity of the Political Agent's suing for the Chief, without authority, was one affecting the merits of the case, though not the jurisdiction of the Court. If the Political Agent was not properly representing the Chief, he had no *merits*, no right as against the defendants. The District Judge was, therefore, right in revers-

ing the decrees of the first Court,—Sec. 578 of the Code of Civil Procedure having no application to the present case.—11 Bom. 53.

To satisfy the conditions of sec. 76 of the Civil Procedure Code (Act X of 1877) as to service of summons on an agent, there must be a person residing without the local jurisdiction, but carrying on business or work within those limits by a manager or agent, and sued on account of such work—that is, business either actually itself carried on by the agent or manager, or forming part of the business in the sense of a connected course of transactions to the management of which he has been duly appointed. Secs. 76 and 37, clause (c), are to be construed together, and are intended to carry out the same scheme, of relief, which rests upon the idea that, where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he should take the place of such principal (at the option of any person who has dealt with him) in any legal proceedings that may arise out of the business or work in which the agent has been virtually a local principal. The manager or agent contemplated by the Code is one who has an initiative and independent discretion, albeit subject possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute a particular commission, or a factor or common agent who is not identified with the firm for which he acts, is not such an agent. The firm of Ganesh Lall Soonder Lall carried on business at Agra. It had no place of business in Bombay, but it employed G as its agent in Bombay in certain dealings which it had with the plaintiff. The letters and telegrams of the firm to G were sent to the plaintiff's place of business, or addressed to G as an individual, not in the name of the firm. G did not himself initiate any business, or in any way stand between his employer's firm and the plaintiff. *Held* that G was not the defendant's manager or agent within the meaning of the Civil Procedure Code, sec. 76, and that, in an action against the defendants, service of summons upon him was not due service. G in particular instances drew hundis on the firm of Ganesh Lall Soonder Lall, which that firm duly accepted and paid. *Held* that he might reasonably be deemed their agent or manager for this particular kind of business if for no other; and service on him might probably suffice in the case of a plaintiff suing on hundi transactions as with the firm through him. Service unduly made under sec. 76 does not become effectual by reason of the fact of such service being subsequently notified to the parties really interested as defendants. *Semble*.—Service duly effected under sec. 76 is effectual without reference to the circumstance of its being or not being communicated to the real defendants.—4 Bom. 416.

See I. L. R., 9 Al. 613, noted under sec. 36.

**38.** Processes served on the recognized agent of a party to a suit or appeal shall be as effectual as if the same been served on the party in person, unless the Court otherwise directs.

Service of process on recognized agent.

The provisions of this Code for the service of process on a party to a suit shall apply to the service of process on recognized agent.

**Note.**—This section applies to Provincial Small Cause Courts.



**39.** The appointment of a pleader to make or do any appearance, application, or act as aforesaid, shall be in writing, and such appointment shall be filed in Court.

Appointment of pleader.

When so filed, it shall be considered to be in force until revoked with the leave of the Court, by a writing signed by the client and filed in Court, or until the client or the pleader dies, or all proceedings in the suit are ended so far as regards the client.

No advocate of any High Court established by Royal Charter shall be required to present any document empowering him to act.

#### Notes.

This section applies to Provincial Small Cause Courts.

The Collector of a district, who was Agent for the Court of Wards, filed a suit on behalf of a ward of the Court of Wards and executed a vakalatnama to a Pleader whom he retained to conduct it. The Collector died before the suit was determined:—*Held*, that it was not necessary for a new vakalatnama to be executed to enable the pleader to proceed with the conduct of the suit.—I. L. R., 15 Madr. 135.

See I. L. R., 9 Al. 617, noted under sec. 635; 9 Al. 618, noted under sec. 36.

**40.** Processes served on the pleader of any party, or left at the office or ordinary residence of such pleader, relative to a suit or appeal, and whether the same be for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents; and, unless the Court otherwise directs, shall be as effectual for all purposes in relation to the suit or appeal as if the same had been given to or served on the party in person.

Service of process on pleader.

**Note.**—This section applies to Provincial Small Cause Courts.

**41.** Besides the recognized agents described in Section 37, any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

Agent to receive process.

Such appointment may be special or general, and shall be made by an instrument in writing, signed by the principal; and such instrument, or, if the appointment be general, a duly attested copy thereof, shall be filed in Court.

His appointment to be in writing, and to be filed in Court.

**Note.**—This section applies to Provincial Small Cause Courts.

## CHAPTER IV.

## OF THE FRAME OF THE SUIT.

Every suit shall, as far as practicable, be so framed  
 as to afford ground for a final decision  
 upon the subjects in dispute, and so to  
 prevent further litigation concerning them.

Suit how to be framed.

## Notes.

In disposing of a second appeal, the High Court is competent, under Act X of 1877, sec. 42, to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal.—I. L. R., 2 Al. 884.

Under secs. 42 and 43 of the Civil Procedure Code, plaintiffs must bring their entire claim and every remedy enforceable in respect of that claim into Court at once; and, if they fail to do that in any suit, they cannot afterwards avail themselves of any remedy on which they have not chosen to insist in the first suit. Suits for enhanced rent, and suits for rent, are claims arising in respect of the same subject-matter, and a plaintiff cannot be allowed, after having unsuccessfully sued for rent at an enhanced rate, to sue for the original rent for previous years.—9 Cal. 919.

R purchased two houses under the same sale-deed. Four years afterwards he sued for possession of one of the houses, alleging that he had been dispossessed by the ancestor of the defendant. Subsequently he sued the same defendant for possession of the other, alleging that, at the time when he instituted the former suit, he had already been dispossessed of the house now in question, and by the same person. *Held* that, although the plaintiff's title to both houses rested on the title acquired by him under one and the same sale-deed, yet the cause of action, *viz.*, his ouster from the two houses on different occasions, gave rise to two separate causes of action, which we has not bound to join in the former suit, there being nothing in the Civil Procedure Code to compel him to do so. *Jardine Skinner and Co. v. Rance Shama Soonduree Debia* (13 W. R., 196) and *Ram Sunder Saha v. Delanney* (20 W. R., 103) referred to.—6 Al. 616.

See I. L. R., 19 Cal. 159, noted under sec. 13.

**43.** Every suit shall include the whole of the claim  
 which the plaintiff is entitled to make  
 in respect of the cause of action; but a  
 plaintiff may relinquish any portion of his claim in order to  
 bring the suit within the jurisdiction of any Court.

Suit to include whole claim.

If a plaintiff omit to sue in respect of, or intentionally  
 Relinquishment of part of claim. relinquish, any portion of his claim, he  
 shall not afterwards sue in respect of the  
 portion so omitted or relinquished.

A person entitled to more than one remedy in respect of  
 the same cause of action may sue for all  
 or any of his remedies; but if he omits  
 Omission to sue for one of several remedies.

(except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

For the purpose of this section, an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action.

*Illustration.*

A lets a house to B at a yearly rent of Rupees 1,200. The rent for the whole of the years 1881 and 1882 is due and unpaid. A sues B only for the rent due for 1882. A shall not afterwards sue B for the rent due for 1881.

**Notes.**

This section applies to Provincial Small Cause Courts.

A plaintiff is bound to include in his plaint all the grounds upon which his suit is based. A second suit upon a different ground, which existed before the commencement of the first suit, would not be allowed, as it would be splitting the cause of action.—3 B. L. R., (A. C.) 421; 12 W. R., 336; 20 W. R., 482.

The plaintiff sued for a certain specified quantity of land as being between specified boundaries. On measurement, however, it was found there was more land within those boundaries than the plaintiff claimed. He obtained only a decree for what he claimed, though he had claimed all the land up to the boundary (the river) on one side: the excess was deducted on that side. *Held*, reversing the decision of the High Court, that a subsequent suit in which he claimed land which had accreted to the excess portion which was not decreed to him in the former suit was not barred by section 7, Act VIII of 1859.—9 B. L. R., 150; 16 W. R., (P. C.) 5; W. R., 211.

A recovered from B, under the terms of his lease, a refund of the excess of rent paid by him in respect of the years 1861, 1862 and 1863. While that suit was pending, B recovered from A rent at the same rate in respect of the three succeeding years. *Held* that A was entitled to bring another suit against B for damages in respect of the excess of rent paid by him during the years subsequent to the institution of the prior suit.—1 B. L. R., (F. B.) 97; 10 W. R., (F. B.) 41.

The plaintiff brought a suit for possession of land with mesne-profits. The suit was dismissed. He appealed on the question of possession only, and obtained a decree for possession without any mention of mesne-profits, and in execution of the decree he obtained possession. *Held* that a subsequent suit to recover mesne-profits from the date of the decree for the period of six years next before the commencement of the suit, exclusive of the period the plaintiff was in possession, was not barred by sec. 7 of Act VIII of 1859.—4 B. L. R., (F. B.) 113; 13 W., (F. B.) 15.

At a sale for arrears of rent, A became the purchaser of a certain putni talook. B, whose putni right had been sold, sued for and obtained a decree for reversal of the sale on the ground of irregularity. In the meantime, A had committed default, and the putni was again sold for arrears of rent. The zemindar drew out from the Collectorate the amount due to him. C, who had bought B's right, title, and interest in his decree, now sued for recovery of the surplus proceeds of sale in the hands of the Collector,

and obtained a decree. He afterwards sued A for mesne-profits for the time during which he was in possession of the putni talook. This was a suit by C against A for recovery of the amount drawn out by the zemindar, on the ground that, in consequence of A having collected the rents from the talook, which were to go towards payment of the rent due to the zemindar, and having fraudulently withheld such payment, he had sustained damage to the extent of the amount taken by the zemindar. *Held* that the suit was barred by sec. 7, Act VIII of 1859.—5 B. L. R., 184; 13 W. R., 261; 5 B. L. R., 187 note; 13 W. R., 205.

In a suit by members of a Hindu family which had become separate in 1862, to recover certain moneys said to have been misappropriated by the defendant while manager of the joint-estate, it appeared that the plaintiffs had previously sued him since the separation to recover certain other moneys belonging to the said joint-estate, also said to have been misappropriated by him while manager, and obtained a decree. *Held* that the present claim should have been included in the former suit; and, whether the omission was by mistake or not, it must be taken to have been relinquished, and under sec. 7 of Act VIII of 1859 could not now be entertained.—3 B. L. R., (A. C.) 265; 12 W. R., 79.

Sec. 7 of Act VIII of 1859 does not bar a suit for a declaration that property in the defendant's possession is subject to the mortgagee's lien, on the ground that such property was part of the property mortgaged, and was not included in a previous suit against other parties for other portions of the property.—14 B. L. R., 418, note; 15 W. R., 486.

A Hindu widow executed deeds of gift in which her late husband's mother, the nearest reversioner, concurred. After the death of the widow, but in the lifetime of the mother, the next presumable reversioner sued to set aside the deeds and for possession. Such suit was held to be no bar to a second suit by the same plaintiff to set aside a mortgage by the widow and the mother of the deceased of a portion of the property which was the subject of the first suit, although in that suit the property was described as subject to the mortgage, and the name of the mortgagee was mentioned. The true test of the application of sec. 7 of Act VIII of 1859 is, whether there has been a splitting of the cause of action.—10 B. L. R., (P. C.) I; 14 Moore's I. A. 176, 187.

When two or more instalments of a promissory note, payable on the face of it by instalments, are due, the holder of the note is not at liberty to sue separately for each instalment or for some of them; he must sue for all the instalments due in one action. A judgment recovered in a suit for one instalment when others are due is a bar to a suit subsequently brought for the latter.—12 B. L. R., 37; 20 W. R. 358.

Where a suit for possession would be met by a plea in bar, the plaintiff cannot be permitted to have the question of title tried under colour of a rent suit, such a proceeding being opposed to the principle laid down in Act VIII of 1859, sec. 7.—19 W. R., 91; 8 B. L. R., 180; 16 W. R., 235.

A party is bound to bring forward his whole case in respect of the matter in litigation and open to him upon the points for decision in the suit. He cannot abstain from relying upon nor abandon a ground of claim which is in question and proper for consideration and decision in the suit, and afterwards make it a cause of fresh suit in respect of the same subject-matter.—2 M. H. C. R., 131.

The plaintiff brought a suit in 1860 against the defendants to recover his share in the joint family property. The present claim, which was for

a share in the rents of certain inam lands, also joint family property, was not included in the suit of 1860. At the date of the former suit the land in respect to which the present suit was brought was subject to the provisions of Reg. IV of 1831, and the Civil Courts had no jurisdiction to try the suit in respect to such land without the permission of the Government. It did not appear that the plaintiff had applied to the Government for permission to sue. *Held* that the plaintiff was not precluded by sec. 7 of the Civil Procedure Code from maintaining the present suit. Meaning of the words "cause of action" discussed.—5 M. H. C. R., 419.

A Hindu, whose share in an ancestral estate had been alienated by a co-proprietor, instituted simultaneously three different actions against the co-proprietor, and the persons to whom the alienations had respectively been made, to recover several distinct parcels of land which constituted his share. *Held* that, as the plaintiff had but one single cause of action against the co-proprietor, he ought to have brought but one suit against him, and either included all the alienees in this suit, or brought separate actions against the alienees for the several pieces of land in their possession, and caused the proceedings in these suits to be stayed till the suit against the co-proprietor was determined. The course of procedure last indicated is the more correct course.—5 Bom. H. C. R., (A. C.) 30.

In applying the provisions of sec. 7 of the Code of Civil Procedure, 1859, the first thing to be considered is whether the cause of action in the second suit is the same as the cause of action in the first. If the cause of action be the same, the second suit is barred in respect of any portion of the claim omitted from the first suit, but not otherwise. Accordingly, where the plaintiff, as a member of an undivided Hindu family, sued for a share of a particular portion of the family-property leaving the rest undivided, and his suit was rejected, as it had not been brought for his whole share, it was held that the suit was no bar to a second suit to have the whole property divided, as the causes of action in the two suits were entirely distinct.—8 Bom. H. C. R., (A. C.) 205.

The plaintiffs in 1863 sued the defendants for the plaintiff's share in certain undivided family-property, and did not include in their claim certain lands then in the possession of mortgagees, which lands had been mortgaged by one of the defendants as manager of the family. The defendants subsequently redeemed the mortgaged lands. The plaintiffs then filed a suit to recover their share of the lands so redeemed. *Held* that they were entitled to maintain such suit, as the mortgaged lands had not been available for an actual partition at the time of the former suit.—8 Bom. H. C. R., (A. C.) 64.

In 1869 P brought a suit against his grandmother K and another person for possession of a piece of land which P alleged had descended to him from his grandfather. In 1870 P sued the said K and one E for some trees which he also claimed by right of inheritance from his grandfather. *Held* that the causes of action in the two suits by P were different—viz., unlawful alienations by K of the respective properties, the subject-matter of the different suits. Sec. 7, Civil Procedure Code, requires that every suit should include the whole of the claim arising from the same cause of action; but, although the Civil Procedure allows of claims arising from different causes of action being included in the same plaint, there is no provision of law which makes it obligatory on the plaintiff to do so.—9 Bom. H. C. R., 257.

Where a mortgagor filed a suit to redeem mortgaged lands, alleging

that the mortgagees in possession had been overpaid, but did not, in that suit, claim to recover the overpayments, which were therefore not awarded to him, it was held that he could not recover such overpayments in a fresh suit brought for that purpose, as his claim was barred by sec. 7 of the Code of Civil Procedure.—6 Bom. H. C. R., (A. C.) 97.

A suit for redemption of land, without specification of details, includes a claim for restoration of all accretions and improvements which it may have received while in the hands of the mortgagee; and if the Court omits to adjudicate upon part of the claim, the mortgagor is not precluded, by sec. 7, Act VIII of 1859, from bringing a second suit in respect of that part.—10 Bom. H. C. R., 369.

In 1861 the plaintiff brought a general partition-suit (No. 1363) to recover his share of the family-property in the possession of the first defendant, and did not include in that claim a field then in the possession of a mortgagee. The field was subsequently redeemed by the first defendant, who again mortgaged it to the second defendant. The plaintiff then filed the present suit to recover his share in the field. The first Court allowed the plaintiff's claim, but the District Judge on appeal threw it out, on the ground that it was barred both by sec. 7 of the Civil Procedure Code, 1859, and by the "law of limitation." The Judge based the latter finding on certain allegations made by the plaintiff in suit No. 1363, and in another suit brought by him against the first defendant and the then mortgagee of the field, from which allegations the Judge inferred a separation between the plaintiff and the first defendant. *Held* in special appeal that the claim was not barred by sec. 7 of the Civil Procedure Code, because the mortgaged field was not available for an actual partition at the time of the former suit, No. 1363 of 1861. The true question for consideration in cases of this kind is whether the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second, and, where the former suit is one for an actual division of property, the plaintiff is not bound in it to ask for a declaration defining his right in property not then capable of division. *Vithal v. Hari Shankar* (8 Bom. H. C. R., A. C., 64) followed.—12 Bom. H. C. R., 148.

The words of sec. 7 of the Civil Procedure Code were imperative against the splitting of a claim into parts. The consequences of an infringement of that direction were not, that the suit which does not include the whole claim shall for this reason be barred. The words "in bar of suit" referred to any subsequent suit brought for the portion of the claim omitted in the previous suit, and not to such previous suit itself. A plaintiff who omits to sue for a portion of his claim, stating that he does not relinquish it, but means to sue again for it, can again nothing by such a statement. Neither can such a statement furnish a reason for holding the first suit to be barred.—2 N.-W. P. H. C. R., 90.

Sec. 7, Act VIII of 1859, did not require a plaintiff having several distinct causes of action against one defendant to comprise them all in one suit subject to the hazard of forfeiting all those not included in the first suit. The object of the clause was only to provide against splitting a cause of action.—2 W. R., Act X., 31; 3 N.-W. P. H. C. R., 20.

The 7th sec. of the Civil Procedure Code, 1859, prohibits the splitting of a claim, but does not require that all remedies by suit on all the securities which a creditor may hold, be enforced together. If a plaintiff, from negligence or other cause, omits to prefer a portion of his claim which seeks to charge the land, or, having preferred it, is content to accept an imperfect



adjudication, or one which awards him only a portion of the relief claimed he cannot afterwards bring forward in a fresh suit matter which might well have been then disposed of.—2 N.-W. P. H. C. R., 29.

Sec. 7 of Act VIII of 1859 applied whether the omission to sue had been the result of knowledge and intention or not. The test as to whether a suit was barred by sec. 7 of Act VIII of 1859 was, whether the claim in the new suit was in fact founded on a cause of action distinct from that which was the foundation of the former suit.—3 N.-W. P. H. C. R., 27.

Where a plaintiff had sued for and obtained damages against one of several persons who had joined together in defaming his character, *held* (PEARSON, J., dissenting) that a similar suit by the plaintiff against another of such wrong-doers would not lie; and that the cause of action in both suits being identical, and satisfaction having been obtained in one, the other was barred by virtue of sec. 7, Act VIII of 1859.—4 N.-W. P. H. C. R., 142.

S, the plaintiff's guardian, and D, the husband of M, one of the defendants in the suit, held a mouzah in equal shares. S sold the half share held by her to M; some portion of the mouzah being in the possession of the other defendants, S and D sued them to recover it and also for mesne-profits, and obtained a decree. The defendants appealed, whereupon S filed a solehnamah. The decree was upheld, however, by the lower Appellate Court. In special appeal the Sudder Court refused to give the renouncing plaintiff any decree for mesne-profits of a share. The plaintiff, who had then come of age, was not represented in the litigation in the Court. Shortly afterwards, he sued S and M to set aside the sale to M, and obtained a decree. On D's death, M obtained possession of the land which had been the subject of the suit by S and D. The plaintiff now sued to recover a half share of the land sued for by S and D, and of the mesne-profits recovered or recoverable by M under the decrees of the Sudder Court and the lower Courts, and to set aside the solehnamah. *Held* that as to M the suit was not barred by sec. 7, Act VIII of 1859.—5 N.-W. P. H. C. R., 172.

A plaintiff suing for the recovery of land is bound to put forward his whole case at once, and cannot be allowed to maintain a second suit for the same cause of action, merely by alleging that the Collector's order sought to be set aside is of a different date and description from that which was sought to be set aside in the former suit.—2 Agra H. C. R., 305.

Where the plaintiff claimed by right of inheritance for partition of one out of a number of villages left by his ancestor, and the lower Court dismissed the claim as untenable under sec. 7, Act VIII of 1859, *held* that that section, though it might operate as a bar to any future claim by plaintiff for partition of the remaining villages by right of inheritance, could not be held to bar the present claim.—1 Agra H. C. R., 55.

A suit having been brought in a Small Cause Court for damages laid at Rs. 400 for wrongful dismissal, a decree was given for Rs. 75 per mensem, the amount of wages which had been agreed on, up to the filing of the plaint, the Judge intimating that for damages accruing after the filing of the plaint further suits month by month might be brought. Two suits were accordingly brought for the two months next succeeding the date of the first suit and decrees were obtained. The High Court upon an application made by the defendant set aside these decrees, on the ground that after the first suit no further suits could lie.—6 C. L., R., 91.

Whether a relinquishment or omission under sec. 7, Act VIII of 1859,

extended to cases of omission to ask for any particular description of relief which a plaintiff might intend to seek against the parties to the suit in respect of his cause of action.—1 W. R., 199.

The fact that a defendant's title rests upon different and distinct transactions, supported by distinct and separate evidence, does not necessarily imply that to a party contesting their title, there are different causes of action warranting separate suits.—20 W. R., 103.

In a suit for demurrage, the cause of action being the detention of a boat, plaintiff is bound to sue for the whole of the demurrage due; failing to claim a portion, he is barred by sec. 7, Act VIII of 1859, from suing subsequently for such portion.—14 W. R., 253.

A suit for damages for wrongful detention of property (in this case a cart and bullocks seized in execution of decree against another party) is barred under sec. 7, Act VIII of 1859, after a decree in a former suit for the recovery or value of the same property.—18 W. R., 337.

A suit by an heir on the same cause of action on which a suit was previously brought by his father, and for property which, though different, might have been included in that suit, is barred by sec. 7, Act VIII of 1859.—3 W. R., 25.

A former suit for a share of property purchased in the name of G, one of the members of a joint-family which claimed it to be joint-property does not bar the plaintiff from suing for other of the family-property which was bought in the name of M, another of the members, at another time, the latter claim being no part of the claim arising out of the cause of action in respect of the property first mentioned so as to come within the meaning of Act VIII of 1859, sec. 7.—20 W. R., (P. C.) 450.

Where a lease in one case, after resuming certain rent-free lands on behalf of his landlord, retained them in his own possession, and, in another case, retained portions of land which he had obtained by way of lease, *held* that, though the lessor's title to recover was the same, the causes of action were entirely distinct.—24 W. R., 212.

A suit for arrears of rent was not barred under Act VIII of 1859, sec. 7, by the fact that the plaintiff had split his claim—*i. e.*, the jumma; but the circumstance that a part of the jumma had been omitted would be a bar to the plaintiff suing subsequently for such part.—21 W. R., 272.

Petitioners filed two suits in a Small Cause Court on the same day to recover rent due for two successive years under the same lease. The sum of the two claims exceeded the pecuniary limits of the Court's jurisdiction. The suit for the rent of the first year was dismissed under sec. 43 on the ground that the claim ought to have been included in the suit for the second year's rent:—*Held* that, as the petitioners had no intention of abandoning either claim, the proper course was to allow them to withdraw both suits and file a fresh suit in a competent Court.—I. L. R., 8 Madr. 147.

A leased certain land to B. The lease expired in 1877. B continued to hold over and refused to accept a fresh lease from A. A sued B in 1882 for mesne-profits for three years, but did not claim possession of the land. The suit was dismissed on a preliminary point. A then sued B to recover possession of the land and mesne-profits. It was argued that A's claim to the land was barred by sec. 43 of the Code of Civil Procedure, because he omitted to claim the land in the former suit for mesne-profits. *Held* that the suit was not barred.—11 Madr. 210.

The plaintiff, having obtained a decree against the defendants for the

payment to her of a monthly sum for her maintenance, subsequently sued to have it constituted a charge on certain land. *Held* that the claim in both suits arose out of the same cause of action, and, therefore, the plaintiff was precluded by sec. 43 of the Code of Civil Procedure from asserting in the second suit the claim which she might have asserted in the first.—11 *Madr.* 127.

A filed a suit against B to redeem the land in dispute, alleging that it had been mortgaged to B, and that the mortgage-debt had been more than paid off. He, therefore, prayed for an account and restoration of the land on payment of the sum that might be found due. The Court found that the alleged mortgage was not proved, and dismissed the suit. Thereupon A filed a suit in ejectment against B. *Held* that the ejectment-suit was not barred under sec. 43 of the Code of Civil Procedure (Act XIV of 1882). Failure in a redemption-suit does not bar a subsequent suit in ejectment, the causes of action in the two suits being essentially different.—13 *Bom.* 326.

Upon a settlement of accounts between plaintiff and defendants, Rs. 3,985-6-9 was found due by the defendants, who agreed to pay the same. They gave to plaintiff an order on their agents to pay Rs. 2,500 from the profits of certain land, and promised to pay the balance within a month. Plaintiff filed two suits, one for Rs. 2,500 and the other for the balance of the debt. Defendants pleaded that both suits should be dismissed, as brought in contravention of the requirements of sec. 43. The lower Courts held that there were two distinct causes of action, and decreed both claims :—*Held*, on second appeal, that plaintiff had only one cause of action, and that the decree in one of the suits must be reversed.—9 *Madr.* 279.

A claim for the price of goods sold is a cause of action of a different nature from a claim for damages for non-acceptance of goods pursuant to a contract. Such claims therefore, although arising under one and the same contract, may be sued upon separately, sec. 43 notwithstanding. *Per WILSON, J.*—Where there is one contract for the purchase of goods and the purchaser takes some of the goods, but breaks his contract in part by not paying for the goods he takes, and in part by not taking and paying for the remainder, and both breaches occur before any suit is brought, the claim of the person suing is one arising out of one cause of action; and the whole claim must be included in one suit.—12 *Cal.* 339.

When a suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession of the land at the time of instituting the suit, a subsequent suit on the same title to recover possession is not barred under sec. 43. A cause of action consists of the circumstances and acts which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint. *Jibanti Nath Khan v. Shib Nath Chuckerbutty*, 8 *Cal.* 819, followed.—12 *Cal.* 291.

A testator bequeathed all his property to his nephew, in which he included the share of his brother's widow in the ancestral property; but at the same time made a suitable provision for her maintenance and worship. The widow at first sued for and obtained the allowance allotted to her under the will, and afterwards brought a suit for a share in the ancestral property. *Held* that, although having regard to the doctrine of election (Succession Act, sec. 172), the widow was precluded from again bringing a suit for a share of the ancestral property, it could not be said that the suit was barred under the provisions of sec. 43 of the Code of Civil Procedure, inasmuch

as the two claims were distinct and indeed inconsistent, and did not arise out of the same cause of action.—12 Cal. 60.

Act VIII of 1859 required that every suit should include the whole of the claim arising out of the cause of action, meaning the whole of the claim arising out of the cause of action upon which the suit was brought, not that every suit should include every cause of action, or every claim, which the plaintiff had against the defendant. Accordingly, where a plaintiff had sued to obtain his share of an estate in land, in consequence of having been wrongfully dispossessed by the defendant, {whom he afterwards in the present suit sued for his share of personal property, being entitled to both under a will, it was *held* that the subsequent suit was not barred by reason of the non-claim in the prior one. The claim in respect of the personalty had not arisen out of the cause of action which existed in consequence of the wrongful dispossession; the case was not like one of the conversion of several things; and causes of action were distinct. *Moonshee Buzloor Raheem v. Shumsoonissa Begum* (11 M. I. A. 553) referred to.—8 Madr. 520.

N, being mortgagee in possession of five-eighths of a pangu (share) of certain land—security for a debt of Rs. 400—hypothecated his rights to M in 1876. In 1878 K bought two-eighths of the said five-eighths from the mortgagor. In 1879, K sued N, claiming possession of his two-eighths on payment of Rs. 400, and obtained a decree and possession thereof. Pending this suit, N assigned his mortgage to M. M was aware of the suit, and K was aware of the assignment when he paid Rs. 400 into Court for N. In 1883, K bought the remaining three-eighths from the mortgagor, and sued N and M to recover possession thereof. M pleaded that the suit was barred by sec. 43 of the Code of Civil Procedure, inasmuch as K might have recovered the five-eighths in the suit against H. *Held* that this plea was bad. M also pleaded that he had a valid mortgage over three-eighths *Held*, by Muttusami Ayyar, J., that, if the assignment of the mortgage by N to M was a real transaction, this plea was good. *Per* MUTTUSAMI AYYAR, J.—The doctrine of *lis pendens* can only be relied on as a protection of the plaintiff's right to property actually sought to be recovered in the suit.—9 Madr. 92.

The plaintiff sued under the provisions of Act X of 1859 to recover arrears of rent for the years 1287, 1288, and 1289 (1880—1882), after having obtained a decree for the rent due for the year 1286 (1879) in a suit instituted after the rent for the year 1289 (1882) had become due. *Held* that the provisions of sec. 43 of the Civil Procedure Code applied, and that the second suit was consequently barred. *Madho Prakash Singh v. Murli Manohar* (I. L. R., 5 Al. 405,) cited and approved; *Taruck Chunder Mookerjee v. Panchu Mohiny Debya* (I. L. R., 6 Cal. 791) cited.—12 Cal. 50.

A decree for damages in a suit instituted on 2nd June 1879 (27th Joist 1286 F.) on a breach of contract for not having given possession of land according to the terms of a zar-i-peshgi patta, awarded the profits of the land for 1283 F., which would have been received by the plaintiff had the contract been performed. The decree-holder then brought the present suit (14th June 1880 or 21st Joist 1287 F.) for damages for the breach of the same contract, claiming the profits accrued during 1284, 1285 and 1286 F. (1876-77 to 1878-79). *Held* that the High Court had rightly decided that, in regard to Act X of 1877, sec. 43, the plaintiff could not recover so much of the profits as had already accrued at the date of the institution of the prior suit, inasmuch as the claim in respect of such profits might have been included therein, *viz.*, the profits for the two years 1284 and 1285 F., which had expired when that suit was brought.—12 Cal. 482.

In 1874 the plaintiff leased certain immoveable property to the defendant, and the latter executed a deed which he covenanted to pay the annual rent and fulfil other conditions of the lease, and gave security in Rs. 3,000 by mortgage of landed property. In 1874 the plaintiff obtained decree in the Revenue Court for arrears of rent, and the decrees were partially satisfied and then became barred by limitation. In 1884 the plaintiff brought a suit to recover the balance due by enforcement of the mortgage security against the purchasers of the mortgaged property. *Held* that the plaintiff had two separate rights of action, one on the contract to pay rent, and the other on the mortgage security; that he could only enforce the first by a suit in the Revenue Court for arrears of rent, and the second by suit in the Civil Court; and consequently there could be no bar to the latter suit by reason of the suit instituted in the Revenue Court, with reference to sec. 43 of the Civil Procedure Code. *Held* also that when the plaintiff obtained his decrees for rent the mortgage security did not merge in the judgment-debts, nor did he lose his remedy on it; that the two rights were distinct, and the right of action on the mortgage security was not lost because the execution of the decrees for rent was time-barred, the only effect of which was that the debt was not recoverable in execution, but the debt existed nevertheless so far as to enable the amount secured by mortgage to be recovered by suit in the Civil Court, so long as such suits were not barred by limitation. *Emam Mumtazood-deen Mahomed v. Rajcoomar Dass* (15 B. L. R., 408), referred to. *Held* also that the amount which the plaintiff could recover by enforcement of the mortgage security was limited to Rs. 3,000.—9 Al. 23.

Where a previous suit for a declaration of title to immoveable property has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the land is not barred under sec. 43 of the Code of Civil Procedure. *Jibunti Nath Khan v. Shib Nath Chuckerbutty* followed.—14 Al. 512.

A deed of mortgage executed in 1879 for a consideration of Rs. 300 provided that the term of the mortgage should be four years certain; that certain interest should be payable; that the mortgagee should have possession; that the profits should be appropriated first in lieu of yearly interest and any balance appropriated in payment of the principal debt; and that the mortgagor should be entitled to redeem if the principal and interest were paid at the expiration of the four years. The mortgagee never obtained possession; and in 1882 he brought a suit against the mortgagor to recover the unpaid interest then due, and obtained a decree, which was satisfied by the sale of property belonging to the judgment-debtor. In 1886 he brought another suit for recovery of the principal, together with the residue of interest up to the date of suit. *Held* that the cause of action in the suit of 1882 was the mortgagor's non-delivery of possession of the mortgaged property, by reason of which the mortgagee had been unable to realize his interest from the usufruct; that the cause of action accrued to the mortgagee from the moment the instrument came into operation and possession was not delivered; that the cause of action to recover the principal accrued at the same time and was the same cause of action; that the plaintiff was therefore bound in the suit of 1882 to sue for the principal; and that the present suit was consequently barred by sec. 43 of the Civil Procedure Code.—12 Al. 203.

The plaintiffs, having obtained a declaration of title to continue to enjoy separate possession of certain lands, sued the former defendants again for partition of the same lands. *Held* that the suit was unnecessary and



should be dismissed, *Per cur.*—The claim and the remedy mentioned in sec. 43 of the Code of Civil Procedure have reference to the cause of action litigated in the previous suit.—10 Madr. 347.

On the 5th September 1874, R., a Hindu, and his sons, borrowed Rs. 5,000 from V, and mortgaged to him certain land, items 1, 2, and 3. On the 7th September 1874, V, borrowed Rs. 5,000 from R. N., and mortgaged his rights in items 1 and 2 and land of his own to R. N. In 1877 R. N. bought, at a sale in execution of a decree against R, the share of R. in the said items 1 and 2 subject to the mortgage created by R on 5th September 1874, and to another mortgage created by R. on 11th January 1875. In 1880, R. N. sued V. and the sons of R., for arrears of interest due under his mortgage-bond. This suit was withdrawn with liberty to bring a fresh suit for the principal and interest due under the bond. In 1885, R. N. sued the sons of R. and V. to recover principal and interest due under his mortgage-bond. V. pleaded that, as R. N. had bought R's share in items 1 and 2 subject to the mortgages created by him, R. N's rights as mortgagee were merged in his rights as purchaser. R's sons pleaded, *inter alia*, that the suit was barred by the provisions of secs. 43 and 373 of the Code of Civil Procedure. *Held* that the claim of R. N. was neither merged nor barred.—10 Madr. 160.

The plaintiff, having previously obtained against his brother, defendant No. 1, who had been the managing member of their family a decree for partition of the family property including certain debts scheduled in the plaint therein, now sued to recover his share of certain other family debts collected by defendant No. 1 without the plaintiff's knowledge:—*Held*, that the claim was not barred by Civil Procedure Code, sec. 43.—15 Madr 296.

The question for decision in this case was whether a plaintiff, who sued for possession of land only without suing for mesne-profits in respect of the same land, which he could have done in the same suit, is entitled to bring another suit to recover the said mesne-profits. *Held*, that the subsequent suit for mesne-profits was barred by sec. 43.—11 Madr. 151.

In this suit plaintiffs claimed rent for the year 1289. Previous to this another suit had been brought by the same plaintiffs for enhancement of rent for the same year. That suit was dismissed on the ground that service of notice of enhancement was not proved by the plaintiffs. It was contended for the defence in this suit that it was barred by sec. 43 of the Code, as the plaintiffs failed to claim, as they ought have done, rent at the original rate in the former suit. *Held*, that the dismissal of a suit for enhancement is no bar to a subsequent suit for the original rate of rent and that the two sorts of suits, are founded on distinct causes of action.—15 Cal. 145.

The Code of Civil Procedure does not prevent a person from making separate and successive applications for execution of a decree, giving reliefs of different characters, in respect to each such relief. Sec. 43, 373 and 374 do not apply to proceedings for execution of decree. *Radha Charan v. Man Singh*, I. L. R., 12 Al. 392, dissented from. *Wajihan v. Biswanath Pershad*, I. L. R., 18 Cal. 462, followed.—18 Cal. 515.

Where a contract for the sale and purchase of goods is broken by the purchaser, in part by refusal to take delivery, and in part by refusal to pay for goods delivered, both breaches having occurred before any suit is brought, the vendor is debarred by section 43 of the Code of Civil Procedure from bringing two suits against such purchaser, his claim being one arising out of one cause of action and based on one and the same contract. The view



taken by WILSON, J., in *Anderson. Wright & Co. v. Kalagarla Surjinarain*, approved. PETHERAM, C.J.—“The whole of the claim which the plaintiff is entitled to make in respect of the cause of action” in section 43 means, in the above case, the entire claim which the plaintiff has against the defendant at the time the action is brought in respect of any failure or failures to accept and pay for goods purchased of him by the defendant under one contract, and the whole of such claim must be included in one action PRINSEP, J.—The expression “cause of action” is to be construed with reference to the substance rather than the form of the action. The claim in both the above cases being for damages on account of breaches of the same contract, sec. 43 read with the Illustration debars the plaintiff from bringing two suits.—19 Cal 372.

Under sec. 7, read with secs. 8, 9, & 10 of Act VIII of 1859, a plaintiff suing for mesne-profits of land is not precluded from afterwards maintaining a suit for possession of such land. *Pratap Chandra Burna v. Rani Swarnamayi* (4 B. L. R., F. B. 113) commented on.—9 Cal. 283.

A bond provided for the repayment of a loan with interest by a stated time. In default of payment by that time it was provided that the loan might be added to an existing mortgage for a term of years, and repaid at the end of the term, together with the mortgage-debt. After the expiration of the time fixed for the repayment of the loan, the obligee sued and obtained a decree for the interest which had accrued due at the date of the suit. He now sued for the further interest which had since become due. *Held* that the second suit was not barred by sec. 43 of the Code of Civil Procedure, for that the first suit being for interest merely, and not for principal and interest, which were then both due, the plaintiff must be taken to have elected, under the bond, to add the principal sum to the previously existing mortgage-debt, in which case he forfeited nothing by suing merely for arrears of interest as they became due.—7 Bom. 446.

In 1868 B made, it was alleged, a gift of a zemindari estate to K. In 1869 B died, and K's name was recorded in the revenue-registers in the place of B's name in respect of the estate. In 1870 K died, and her daughter S applied to have her name recorded in the revenue-registers in respect of the estate. M, the illegitimate son of B, objected, claiming to have his name recorded. His objection having been disallowed, and S's name having been recorded, M, in 1876, sued S for a declaration of his proprietary right to the estate, and, on the 29th June 1878, obtained such declaration. In January 1880, M sold a moiety of the estate, and, in December 1880, S sold the entire estate. In February 1881, M's transferees sued S and her transferee for possession of the moiety of the estate transferred to them by M. *Held* by the Full Bench (STUART, C. J., dissenting). That such suit was not barred by the provisions of sec. 7 of Act VIII of 1859, by reason that M had omitted to claim in the suit of 1876 possession of the estate. *Darbo v. Kesho Rai* (I. L. R., 2 Al., 356), and *Kalidhun Chutturpadhya v. Shiba Nath Chutturpadhya* (I. L. R., 8 Cal. 483), followed. *Held* also that the possession of S and her transferee could be considered adverse only from the date of the decree of the 29th June 1878, declaring M's proprietary title to the estate. *Radha Gobind Roy v. Inglis* (7 C. L. R. 364; 3 Suth P. C. C. 809) referred to. *Held* by STUART, C. J.—That such suit was barred by the provisions of sec. 7 of Act VIII of 1859, by reason of such omission. *Darbo v. Kesho Rai* (I. L. R., 2 Al. 356) distinguished. The meaning of the term “relief” explained, and the distinction between it and the term “cause of action” pointed out.—5 Al. 345.

In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected, under sec. 244 of the Code of Civil Procedure, to the attachment of certain lands to which she set up independent title. The objection was disallowed and the land was sold. She then sued the execution purchaser to set aside the Court-sale and obtained a decree against which no appeal was preferred. She now sued for possession, and it was found that at the date of the previous suit she was not aware that the execution purchaser had obtained possession :—*Held*, that the suit was not barred by Civil Procedure Code, sec. 43.—14 Madr. 23.

In 1876, K sued M on a bond, dated 25th December 1869, for Rs. 5,000, by which certain land in the district of South Tanjore was hypothecated as security for the debt, and obtained a decree on the 6th of April 1876 for the sale of the lands, which he purchased on the 17th August 1876 for Rs. 6,000. K then discovered that part of the land hypothecated, situated within the jurisdiction of the Subordinate Court at Kumbakonam, had been acquired by a railway company under the Land Acquisition Act in 1874, and that the compensation, Rs. 560 (claimed by M's mother, who sold the land to the company), was lodged in the treasury of Kumbakonam in the name of M's mother. K having applied to the Subordinate Court for an order for payment out of this sum, the Court, by order dated 28th February, 1880, directed that the question of title to the money should be decided by suit. K then sued M as the sole heir of his deceased mother in the District Munsif's Court of Tiruvadi (where M resided) for a declaration of right to, and to recover, the said sum of Rs. 460. The suit was filed on the 4th September, 1880. On the 16th April, 1880, M assigned his interest in the money sued for to V, who was made defendant in the suit on his own application, and pleaded (1) that the Court had no jurisdiction, as both the money and the land which it represented were, and he (V) resided, without the Munsif's Court's jurisdiction; (2) that the land having been acquired by the railway company in 1874, before the suit upon the bond was filed, this suit was barred by sec. 43 of the Code of Civil Procedure; (3) that this suit was barred by limitation, inasmuch as more than three years had elapsed since the money was paid by the railway company. *Held* (1) that the suit was for money, and that V, not having applied to stay proceedings under sec. 20 of the Code of Civil Procedure, must be held to have acquiesced in the jurisdiction of the Court; (2) that K not having known, at the date of his suit on the bond of the acquisition of the land by the railway company, this suit is not barred by sec. 43 of the Code of Civil Procedure; (3) that the suit was not barred by limitation, as the compensation was awarded to M's mother either through fraud on her part or mistake on the part of the Collector, and K did not become aware of the fraud or mistake until within six years of the suit (arts. 95, & 96, of sch. 2 of the Indian Limitation Act).—6 Madr. 344.

*Held*, where two suits were instituted simultaneously and one of such suits had been determined, that, assuming that the claims in such suits arose out of the same cause of action, and should have been included in one suit, the provisions of sec. 7 of Act VIII of 1859 were no bar to the entertainment of the second suit.—1 Al. 650.

Where a previous suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit on the same title for recovery of possession of the land is not barred under sec. 43. *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (11 Moore's I. A. 551) discussed.—8 Cal. 819.

D, being able to sue for the possession of certain property, omitted to do so, and sued in the first instance only for a declaration of her right to such property. The Court refusing to make any such declaration on the ground that she could sue for possession, D then sued for possession. *Held* that the second suit was not barred by sec. 7 of Act VIII of 1859. See also *Tulsiram v. Gungaram* (I. L. R., 1 Al. 252).—2 Al. 356.

The obligee of a bond for the payment of money, hypothecating immoveable property as a collateral security for such payment, sued for the monies due on the bond, but omitted to claim the enforcement of his lien, and obtained a decree only for the payment of the amount of the bond-debt. He subsequently sued to enforce his lien. *Held* that, under Act X of 1877, sec. 43, as amended by Act XII of 1879, sec. 7, he could not be permitted to sue to enforce his lien.—2 Al. 838.

If a person intentionally omit to sue for any portion of his claim, the provisions of sec. 43 of Act X of 1877, as well as the provisions of sec. 7 of Act VIII of 1859, bar the institution of a second suit for the portion so omitted. So that, where a family property consisted of lands as well as debts, and the plaintiff at first sued for a partition of debts only, and then compromised and withdrew the suit without the permission of the Court, it was held that his second suit to demand a partition of the whole property was not maintainable.—7 Bom. 182.

The usufructuary mortgagee of certain land gave a lease of it to the mortgagor, the latter hypothecating the land as security for the payment of the rent. Arrears of rent accruing, the mortgagee sued the mortgagor for the same in the Revenue Court, and obtained a decree. Subsequently the mortgagee sued the mortgagor in the Civil Court to recover the amount of such decree by the sale of the land, claiming under the hypothecation. *Held* that the second suit was not barred by the provisions of sec. 43 of Act X of 1877.—4 Al. 180.

*Held* by the Full Bench (STUART, C. J., dissenting).—That the Courts of Revenue in the North-Western Provinces, in those matters of procedure upon which the Rent Act (XII of 1881) of those Provinces is silent, are governed by the provisions of the Civil Procedure Code. The principle of decision in *Nilmoni Singh Deo v. Taranath Mukerjee* (I. L. R., 9 Cal. 295) followed. *Held*, therefore, that the procedure provided by secs. 43 and 373 of the Civil Procedure Code is applicable to suits tried under the N.-W. P., Rent Act, 1881.—5 Al. 406.

J had a right to share in a certain estate, as an heir to her father, and also as an heir to her brother. She transferred such right by sale to H. H sued S, who had acquired the whole estate by purchase at sales in execution of decrees against the other heirs of J's brother, for J's share as one of her brother's heirs in such estate, and obtained a decree. H then sued S for J's share as one of the father's heirs in such estate. *Held* that H was debarred from bringing the second suit by the provision of sec. 43 of Act X of 1877.—4 Al. 171.

The plaintiffs brought a suit to have themselves declared entitled to an account, and obtained such a declaratory decree without asking for, or obtaining, any consequential relief. The defendants took no steps to render an account, and the plaintiffs brought another suit against them "for the amount of such Company's papers and other debts that might be found due by the defendant on an adjustment of accounts." *Held* that the plaintiffs were not barred from bringing such suit, sec. 15 of Act VIII of 1859 being

intended to modify the provisions of sec. 7 of the same Act.—*Tulsi Ram v. Gunga Ram* (I. L. R., 1 Al. 252) followed and approved.—8 Cal. 483.

Where a plaintiff originally sued for a certain sum upon his khatta-books, and an objection was taken by the defendant that he ought to have sued upon a hatchitta, whereupon the plaintiff amended his plaint by suing for the amount admittedly due upon the hatchitta, in addition to the amount he claimed upon his khatta-books. *Held* that, when the plaintiff amended his plaint by suing upon the hatchitta, his causes of action which, when the suit was originally framed, were distinct, became united; that there was no *relinquishment* in the original suit within the terms of Act VIII of 1859, sec. 7 (corresponding with Act X of 1877, sec. 43): and that the plaint was rightly amended.—3 Cal. 785.

The plaintiffs sued the defendants for possession of the land upon which certain trees stood, and for such trees, stating that on the 19th June, 1879, the defendants had interfered with their possession of such trees, and had wrongfully taken the fruit thereof. The plaintiffs subsequently sued the defendants for the value of the fruit upon such trees, alleging that on the 19th June 1879, the defendants had wrongfully taken such fruits. *Held* that, as the cause of action *i. e.*, the taking of such fruit, was in both suits identical, and the plaintiffs not having claimed the value of such fruit as mesne-profits in the first suit, the second suit was barred by the provisions of sec. 43 of Act X of 1877.—3 Al. 543.

When money is due on two or more bonds at the time of the institution of a suit, and the bonds appear to have been originally passed in respect of one claim, it is not incumbent upon the plaintiff to sue upon both bonds in one action. There is nothing in sec. 43 of the Code of Civil Procedure which would justify the Court in going behind the bonds to consider the circumstances out of which they sprung, albeit those circumstances might themselves at the time have constituted a cause of action. There is no provision in the Mofussil Small Cause Courts Act (XI of 1865), similar to sec. 34 of the Presidency Small Cause Court Act (IX of 1850), which forbids a plaintiff's dividing any cause of action for the sake of bringing two or more suits in the Small Cause Courts of the Presidency.—7 Bom. 134.

At the close of the Bengali year 1283, which was on the 11th April, 1877, the defendant owed to the plaintiff, his landlord, the rents of his holding for the years 1281, 1282, and 1283. The plaintiff, in the month of April 1878, before the close of the year 1284, instituted a suit for the rent for 1281 only, and obtained a decree. On the 10th April 1879, he instituted another suit for recovery of the rents for the years 1282, 1283, & 1284. *Held* that the claim for the years 1282 and 1283 was barred under sec. 43 of the Code of Civil Procedure. The cases of *Raja Sutto Churn Ghosal v. Obhoy Nund Das*, (2 W. R., Act X, Rul., 31), *Ram Soondar Sein v. Krishno Chander Goopto* (17 W. R., 380), and *Kristo Kinker Puramanick v. Ramdhan Chattangia* (24 W. R., 326), are overruled by sec. 43 of Act of X 1877.—6 Cal. 791.

Claims for the recovery of possession of immoveable property and for mesne profits are distinct claims, and separate suits will lie in respect of each claim. Sec. 44 of the Code of Civil Procedure merely permits the joinder in one suit of a claim for recovery of immoveable property with one for mesne profits in regard to the same property. *Kishori Lal Roy v. Sharut Chunder Mozumdar Mon Mohun Sirkar v. The Secretary of State for India in Council*, and *Madan Mohun Lal v. Lala Sheosanker Sahai*, referred to. *Venkoba v. Subbanna* dissented from.—19 Cal. 615.

A mortgagee had two remedies in respect of the mortgagor's breach to pay the stipulated interest at the time fixed by the contract of mortgage, one being a suit on foreclosure-proceedings to convert the mortgage into a sale, and the other a suit to recover his money against his debtor by enforcement of his lien against the mortgaged property. He sued for the first remedy in respect of such breach, omitting the second. His suit was dismissed on the ground that he was not entitled to such remedy until the expiration of the mortgage-term. He afterwards sued for the second remedy. *Held* that inasmuch as the mortgagee was not, at the time of his suing for the first remedy, "a person entitled to more than one remedy," not being "entitled" to the first, but only to the second, his omission at that time to sue for the second remedy was not, under sec. 43 of Act X of 1877, a bar to his afterwards suing for it.—3 Al. 857.

S, as one of the heirs of his brother, sued the sons of M, the other heirs of M, for, amongst other things, a declaration of his right to share in the rights and interests of M as the mortgagee under a deed of mortgage, which he valued at the principal sum advanced under the mortgage, viz., Rs. 5,600, stating his cause of action to be the obstruction caused by the sons of M to his sharing in M's estate. He obtained a decree declaring his title to the share claimed. L, one of the sons of M, had fraudulently concealed from, and kept S in ignorance of, the fact that previously to the suit he had realized Rs. 8,624 under the mortgage. On this fact coming to S's knowledge, he sued the sons of M to recover his share of that sum. *Held* that the second suit was not barred by section 7 of Act VIII of 1859. *Bulwant Singh v. Chittan Singh* (H. C. R., N.-W. P., 1871, p. 27), followed and observed on.—1 Al. 543.

According to the terms of a mortgage, possession of the mortgaged property was to be delivered to the mortgagee, and he was to take the mesne-profits. The mortgagor refused to deliver possession of the property, and the mortgagee sued him to enforce specific performance of the contract to deliver possession, and obtained a decree. At the time this suit was brought, the mortgagee had been kept out of possession of the property for two years, during which time the mortgagor had taken the mesne-profits. The mortgagee subsequently sued the mortgagor to recover the mesne-profits of the mortgaged property for those two years. *Held* that, as the mortgagee might in the former suit, in addition to seeking the specific performance of the mortgage-contract, have asked for such mesne-profits by way of compensation for the breach of it, and as the claim for possession and mesne-profits was in respect of the same cause of action, viz., the breach of the contract to give possession, the second suit was barred by the provisions of sec. 43 of Act X of 1877.—3 Al. 660.

On the 27th Joist 1286 F. S. (2nd June 1879), the plaintiff brought a suit to recover damages for the breach of a contract on the part of the defendant, for not having made over possession to him of certain leasehold properties, the damages claimed being for the profits accrued due for the year 1283 F. S. (1875-6). In this suit he obtained a decree. On the 21st Joist 1287 F. S. (14th June 1880), the plaintiff brought another suit against the defendant to recover damages for the profits accrued for the years 1284, 1285, and 1286 F. S. (1876-7 to 1878-9). *Held* that the plaintiff should have included the damages for the years 1284 and 1285 (1876-7 and 1877-8) in his former suit, and that he was debarred by sec. 43 of Act X of 1877 from including in his second suit any portion of his claim for damages which had accrued due at the time of his first suit, and for which he had omitted to



sue ; but that he was entitled to recover damages for the year 1286 (1878-9). *Taruck Chunder Mookerjee v. Panchu Mohini Debya* (I. L. R., 6 Cal. 791) followed.—9 Cal. 143.

The plaintiff held a mortgage of certain immoveable property given to him by the defendant to secure the repayment of a loan of money with interest. The plaint stated the fact of the mortgage, but prayed only for a money-decree. The mortgage contained a personal undertaking to repay. Plaintiff's counsel, directly upon the case being called on for hearing, and before the case had in any way been gone into, applied (under sec. 43 of Act X of 1877, Civil Procedure Code) for leave to reserve his remedies under the mortgage, taking then only a money-decree—an application which, it is provided by that section, must be made "before the first hearing." *Held* that the application was, not too late. The said mortgage was dated 16th February, 1870, and the plaint in this suit was filed on the 28th April, 1881. The plaintiff maintained that he was not time-barred, as he had twelve years within which to bring the suit under article 132 of sch. 2 of Act XV of 1877. *Held* that the plaintiff was too late in bringing a suit for a money-decree on the promise to pay in the mortgage, inasmuch as the article referred to was meant to apply to suits brought to enforce against the property payment of "money charged upon immoveable property." and not, under any circumstances whatever, to a suit for a mere money-decree.—5 Bom. 463.

On the 1st July 1878, there was a settlement of accounts between the plaintiff and defendants, and a debt was acknowledged due by the latter to the former ; and, on the same day, the plaintiff and defendants entered into a trading partnership, which was carried on till August. On the 30th September the defendants extorted a release from the plaintiff, whereby the plaintiff's claims against them, arising out of the two transactions mentioned, and all other transactions between them, were released. On the 23rd November the plaintiff brought a suit against the defendants, and, in the plaint, after stating the fact of the settlement of 1st July 1878, the balance found due therein to the plaintiff, the extortion of the release, and the misappropriation of the sums due to the plaintiff by the defendants as the cause of action, prayed for cancellation of the release, and for recovery of the amount due to the plaintiff by the defendants under the settlement of 1st July 1878. *Held*, in a suit to wind up the partnership of July and August, 1878, that the plaintiff was not bound by sec. 43 of the Code of Civil Procedure to have included in his former suit his claim arising out of that partnership, and that the former suit, being in substance a suit upon the account stated on 1st July 1878, and not for damages for extorting the release, was no bar to the present suit.—6 Madr. 49.

A mortgagee brought a suit against the mortgagor to have a declaration of his lien over the mortgaged properties, and obtained a decree. He afterwards brought another suit against certain attaching creditors of his mortgagor, to have a declaration of his lien over certain surplus monies in the hands of the Collector, who, previous to the institution of the first suit, had sold certain of the mortgaged properties free of all incumbrances for arrears of Government revenue. *Held* that the second suit was not barred under Act VIII of 1859, sec. 7. *Held* also that the mortgage-decree declaring the lien over all the mortgaged properties covered the surplus sale-proceeds then in the hands of the Collector, because these monies must, as between the mortgagee and attaching creditors of the mortgagor, be taken to represent the mortgaged properties. *Heera Lall Chowdhry v. Jankee Nath*



**Mookerjee** (16 W. R. 222) followed. The doctrine of marshalling does not apply as between a mortgagee and attaching creditors of the mortgagor who hold mere money-decrees. The period of limitation prescribed by art. 15, sch. 2 Act IX., of 1871, for a suit to set aside an order of a Civil Court, does not apply where the order simply amounts to a declaration that the Court considers it has no jurisdiction to act in the proceeding before it.—6 Cal. 142.

A, a Hindu widow, granted, without legal necessity, a mukurari lease of certain mauzas, portion of her husband's estate, to B. During B's possession part of the lands comprised in the granted mauzas were taken up by Government, and the compensation-money was lodged in the collectorate. A having afterwards died, the next heirs of A's husband, on the 7th October 1871, sued B to recover possession of the mauzas, but, not being aware of the facts, did not, in that suit, claim the compensation-money lying in the collectorate. While this suit was still pending, B, in March 1872, drew the compensation-money out of the collectorate. The heirs, after obtaining a decree against B for possession of the mauzas, on the 13th September 1875, instituted a fresh suit against him to recover compensation-money wrongfully drawn out by him from the collectorate. *Held*, first, that the suit was not barred by sec. 7 of Act VIII of 1859. *Held* also that it was not barred by limitation, although more than three years had elapsed since the money had been drawn out by B, art. 118, (and not art. 60) of sch. 2 of the Limitation Act (IX of 1871) applying to the case. *Held*, further, that the claim of the heirs was a proper subject for a regular suit, and could not have been heard and determined in the course of the proceedings in execution of the decree which they had obtained against B for possession of the mauzas.—5 Cal. 597.

In 1876 accounts were stated between B and D, and a balance of Rs. 800 was found to be due from D to B. D gave B an instrument whereby he agreed to pay the amount of such balance in four annual instalments of Rs. 200. B at the same time noted in his account-book that such balance was "payable in four instalments of Rs. 200 yearly." In July 1879, B sued D upon such instrument for the balance of the first instalment. The Court trying this refused to receive such instrument in evidence on the ground that it was a promissory note, and as such was improperly stamped. Thereupon B applied for, and obtained, permission to withdraw from the suit with liberty to bring a fresh one for the original debt. In October 1879, B again sued D, claiming the balance of the first and second instalments, basing his claim upon the note made by him in his account-book. He obtained a decree in this suit for the amount claimed by him. In 1880, B again sued D, claiming the amount of the third instalment, again basing his claim upon such note. *Held* by SPANKIE, J., that the suit last-mentioned was barred by the provisions of sec. 43 of Act X of 1877, inasmuch as B should, in the second suit brought by him against D, have claimed the balance of the money found due from D to him upon the accounts stated between them, instead of claiming the balance of the instalment due. *Held* by OLDFIELD, J., that such suit was not so barred, the cause of action therein and in the former suit being different. *Held* by the Court that the agreement by D to pay the balance found due from him to B on accounts stated between them in instalments of Rs. 200 annually could not be proved by the note made by B in his account-book, but could only be proved by the promissory note.—3 Al. 717.

See I. L. R., 5 Madr. 1, 6 Al. 70, 13 Al. 53, 13 Bom. 45, 10 Cal. 424, 15 Cal. 800 & 19 Cal. 159, noted under sec. 13; 12 Madr. 228, noted under

sec. 244; 6 Al. 616, noted under sec. 42; 12 Al. 203, noted under sec. 58 of Act IV of 1882; 14 Madr. 1, noted under sec. 14 of the Religious Endowments Act.

*Rule a.*—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—

Only certain claims to be joined with suit for recovery of land.

(a) claims in respect of mesne-profits or arrears of rent in respect of the property claimed,

(b) damages for breach of any contract under which the property or any part thereof is held, and

(c) claims by a mortgagee to enforce any of his remedies under the mortgage.

*Rule b.*—No claim by or against an executor, administrator, or heir as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator, or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

Claims by or against executor, administrator, or heir.

#### Notes.

This section applies to Provincial Small Cause Courts, except rule *v*.

A suit for possession of his house and for rent were held to be causes of action properly joined by a plaintiff in one suit.—3 B.L.R., (App.) 77; 11 W. R., 542.

Under five different pattas, A granted to B patni leases of five different mehals. The rents of the mehals falling into arrears, the mehals were sold on two different dates. A purchased two of the mehals, C purchased two of the mehals, and D purchased one of the mehals. In a suit brought by B against A, C, and D, to set aside the sales on the ground of irregularity, *held* that the suit was bad for multifariousness, and must be dismissed.—9 B. L. R., 241; 18 W. R., 288.

The dismissal of a suit for multifariousness is not a hearing and determination of the suit within the meaning of sec. 2, Act VIII of 1859.—13 B. L. R., (App.) 37.

Sec. 7 of Act VIII of 1859 does not bar a suit for a declaration that property in the defendant's possession is subject to the mortgagee's lien, on the ground that such property was part of the property mortgaged, and was not included in a previous suit against other parties for other portions of the property mortgaged.—14 B. L. R., 418N.

An action for slander cannot be brought jointly against several defendants: separate actions should be brought against each. *Quære*.—Whether words simplifying, "You are a drunkard, thief, cheat, and the paramour of

your sister in-law, you bastard," applied to a Brahmin, and actionable *per se*, without allegation of special damage.—15 B. L. R., 161.

An action for slander may be brought against several defendants where the words spoken are not actionable *per se*, but only become so by reason of the special damage, which is the result of the conjoint action of all the defendants.—15 B. L. R., 166n.

Under sec. 8 of the Code of 1859, it was decided that the words, "cognizable by the same Court," referred to the nature of the suit, and not to its value. Therefore, a Principal Sadr Amin was held to have jurisdiction under that section to try a suit for land and for mesne-profits, the entire claim not exceeding his jurisdiction, although the value of the suit, so far as the claim was for land, was below the value cognizable by him.—*Luchmee Pershad Doobey v. Kallasoo*, B. L. R., Sup. Vol. 620; 2 Ind. Jur., N. S., 89; 7 W. R., 175. Overruling *Dhurum Rawoot v. Ramnath Sahoo*, 2 Hay's Rep., 585.

A plaint against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned, should be rejected. *Rajaram Tewar v. Luchmun Prasad*, B. L. R., Sup. Vol. 731; 2 Ind. Jur., N. S., 216; 8 W. R., 15; 9 W. R., 490; 18 W. R., 464.

When a plaint discloses different causes of action against different parties, it is bad in law, and the suit is not maintainable.—2 B.L.R., (App.) 53; 11 W. R., 397; 2 Ind. Jur., N. S., 245.

A suit against five defendants, including claims of the most miscellaneous character against each defendant, was dismissed by the first Court, on the ground of multifariousness. The Subordinate Judge, on appeal, held that plaintiff was in any case entitled to a decision on one of his claims; and further held that the suit was not multifarious. *Held* on special appeal that the Court could not select one claim on which to proceed, when plaintiff insisted on pressing all. *Held* further that the plaint was multifarious; and, though it would not be permissible for defendant to take that objection for the first time after the case had been fully gone into on the merits, yet, as the objection had been taken originally, the suit was properly dismissed by the first Court.—2 B. L. R., (A. C.) 341; 11 W. R., 273.

One of three widows of a Mahomedan sued the other two, together with her deceased husband's sons and other heirs, for possession of 18 out of 96 sehams of property left by the deceased, to which she was entitled by right of inheritance under the Mahomedan law; and to set aside two deeds of bi-mukasa, or gift in lieu of dower, one dated 28th July 1842, granted in favour of one widow over a part of the property in suit, and the other dated 14th March 1847, in favour of the other widow, over other portions of the same property. The lower Appellate Court dismissed the suit, on the ground of a misjoinder of causes of action; and that there were two causes of action which could not be tried together under Act VIII of 1859, sec. 8. *Held, per KEMP, J.* (whose opinion as senior Judge prevailed), that there was no misjoinder of causes of action; that the case must be remanded to the Judge for trial on the merits. *Held per GLOVER, J.*—This was such a misjoinder as was provided against by sec. 8 of Act VIII of 1859, and that the Judge was right in dismissing the suit.—3 B. L. R., (A. C.) 190; 12 R., 11.

The owner of a share in a taluk granted a se-patni patta thereof to the plaintiff, but before registration granted a se-patni to the Bengal Coal

Company. In a suit against the owner and the company for possession of the se-patni taluk for damages caused by the refusal to register, and also for compelling registration of the se-patni patta, *held* that three distinct causes of action were improperly joined; that the suit was not maintainable in a Civil Court, as the plaintiff's title rested upon an unregistered deed; that there was no cause of action as against the company to enforce registration of the patta; and that a distinct stipulation is not necessary to bind a person to cause registration of a deed required by law to be registered, but he virtually agrees to do so when he executes a contract, which by the law in force requires registration.—3 B. L. R., (App.) 49; 11 W. R., 398.

The principle of the rules that the creditor of a deceased person suing for administration is in the same situation with regard to all other persons as if he were bringing an action at law against the administrator, and that a debtor to the estate of a deceased person can only be made answerable as such debtor by the representative of the deceased's estate, is to be adhered to in this country, where there is a different procedure. Therefore, where a suit brought against the Administrator-General as administrator of the estate of one W B by a creditor of the deceased, other persons who also had a claim against the estate were made defendants on the allegation that they had realized and were in possession of assets of the estate of the deceased, *held* that, there being nothing to show that such persons were in the position of an executor or administrator *de son tort*, or that they had been partners with the deceased, or that they could not be sued, if necessary, by the legal representative himself, and there being no other circumstances which would make it equitable that they should be sued jointly with the legal representative, they were wrongly made parties, and the suit ought to be dismissed as against them for misjoinder. Even assuming the facts were such that the plaintiff was entitled to sue them as legal representatives of the estate, he should not mix his own claim with that which the Administrator-General might have against them.—15 B. L. R., 296.

In a case, however, where the plaintiff was the lessor, and the defendant the lessee, of certain land under an agreement whereby the defendant agreed to occupy the land for two years, and to deliver a certain quantity of paddy at four specified periods, defendant failed to deliver the paddy. In a suit for rent, *held* that, although the plaintiff might have sued for each instalment of rent as it fell due, the aggregate of such unpaid instalments should be deemed one cause of action.—4 M. H. C. R., 234.

Plaintiffs, members of a Pagoda Committee appointed under Act XX of 1863, sued defendants for the recovery of Rs. 4,480-2. The plaint alleged that, in October 1865, the 1st defendant and another agreed to travel and collect subscriptions for the purpose of erecting a tower at the entrance of the pagoda in question, paying to the pagoda Rs. 130 a month during the period they should be engaged in the work, irrespective of the actual collections. That an agreement to this effect was executed, and 1st and 2nd defendants deputed to collect subscriptions. That both were engaged in the work until November 1869. That under the terms of the said agreement a sum of Rs. 6,500 was due, of which only Rs. 2,019-14 were credited in the accounts of the pagoda. That 1st and 2nd defendants, when required to account for the balance, informed the plaintiffs that they had paid to the 3rd defendant, the then manager of the said temple, Rs. 5,330, and that only Rs. 1,170 was due by them. The present suit was accordingly filed against the defendants for the sum of money due by them. The Court of first instance decreed against 3rd defendant alone. On appeal, the Civil Judge dismissed the suit as against the 3rd defendant on the

ground of multifariousness, he having been sued on the ground of misappropriation, while the cause of action against the 1st defendant was breach of contract. *Held* on special appeal that the suit was not multifarious. That the 3rd defendant was properly included in the suit as a defendant, and did not appear to have been prejudiced in his defence by the course of the proceedings.—7 M. H. C. R., 123.

Plaintiff alleged that, his father having died while he was a young child, during his minority his father's widows (defendants 1, 2, & 3) alienated the whole of the estate, in portions, to different people at different times. He, therefore, brought this suit against all alienees to recover the estate as a whole. The District Judge dismissed the suit on the ground of misjoinder of causes of action. Upon appeal, *held* that the Judge was wrong. That plaintiff's cause of action, the right, was his relation to the family to which the property appertained, and on this right, if established, and if he be not otherwise barred, he would be entitled to recover. The fact that various persons, during his minority, affected to purchase portions of the property, did not destroy the unity of his ground of action.—7 M. H. C. R., 260.

A suit brought against a number of alienees of a deceased member of an undivided family, for the recovery of family-property illegally alienated by him, is not such a suit as ought to be dismissed on the ground of multifariousness. It is most desirable that the whole of the alienation should be at once before the Court called upon to decide the question, in order to secure the soundness of the particular decision, and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same.—7 M. H. C. R., 290.

A minor interested in contesting the execution and validity of an alleged will by her father having been improperly joined with the alleged executors of the said will as co-plaintiff, the decrees of the Courts below were reversed, in order that the minor might be made a defendant, and a guardian *ad litem* appointed to protect her interests.—2 Bom. H. C. R., (A. C.) 310.

The misjoinder of plaintiffs, which does not produce error in the decision of the case on its merits, is not a ground for the reversal of a decree on special appeal. *Semble*.—That such misjoinder is not a ground for the reversal of a decree in regular appeal. Where the widow of H, a Muhammadan, and his two daughters, brought a joint suit for their respective shares of the estate of H which were awarded to them jointly, *held* that this was an error of procedure which did not affect the merits of the case.—6 Bom. H. C. R., (A. C.) 177.

A suit was brought against six defendants, the cause of action against five of them being unconnected with the cause of action against the sixth. The Assistant Judge, in whose Court the suit was brought, tried one of the causes of action over which he had jurisdiction, but refused to try the other over which he had no jurisdiction. In appeal, the District Judge refused to enter into the merits of either on the ground of the misjoinder of the causes of action. *Held* that the District Judge was bound to enter into the merits of the claim over which the Court of first instance had jurisdiction, it not being affected by the error in the misjoinder of the two claims.—7 Bom. H. C. R., (A. C.) 19; 23 W. R., 408.

Several causes of action against different defendants cannot be joined in one suit. Therefore, where a suit was brought to set aside several transactions entered into by a guardian with different persons, and no relief

was sought against the guardian, it was held that the suit was bad by reason of misjoinder.—1 N.-W. P. H. C. R., 75; 2 N.-W. P. H. C. R., 153; 8 W. R., 364; 10 W. R., 187; 8 W. R., 461.

Misjoinder of causes of action is not alone a valid ground of special appeal.—2 N.-W. P. H. C. R., 443; Agra H. C. R., (F B.) Ed. 1874, 238.

A suit to set aside two sale-transactions of different dates, and made to different vendees, will be dismissed for misjoinder.—2 N.-W. P. H. C. R., 221.

A suit to recover possession as cultivators, brought by two plaintiffs, whose holdings, although originally one, have, for a long time, been separated and held separately, will be dismissed for misjoinder.—2 N.-W. P. H. C. R., 306.

Plaintiff, having obtained a decree establishing his title to a number of villages constituting one taluqa, subsequently brought one suit against all the persons severally in possession of several estates constituting the taluqa for mesne-profits during their wrongful possession. *Held* that there being no common liability, the suit must be dismissed for misjoinder.—3 N.-W. P. H. C. R., 86.

Sec 9 applied to a suit of the nature described in sec. 8, and not to a suit in which distinct causes of action against distinct defendants were improperly joined.—4 N.-W. P. H. C. R., 40; 12 W. R. 70.

A plaintiff cannot bring, in one suit, a claim for a declaration of his right to redeem, and also a claim to a declaration of his right to damages.—4 N.-W. P. H. C. R., 70.

Where a plaintiff sued to recover an estate in the possession of several persons, who held, not collectively, but in different portions, by virtue of several auction and private sales and mortgages, *held* that the Court of first instance should have dismissed the plaint for misjoinder, leaving the plaintiff to bring separate suits in respect of the several pieces of property in possession of each defendant, or set of defendants.—4 N.-W. P. H. C. R., 108.

The legal result, when a suit is dismissed for misjoinder, is that the plaintiff pays the defendant's costs.—5 N.-W. P. H. C. R., 20.

Where a plaintiff originally filed a plaint against the defendant and several other persons to invalidate a number of conveyances and sales, of which some had been confirmed by decrees, or had been made in execution of decrees, and which related to land in two different zillahs, and the Subordinate Judge passed an order purporting to be an order, under sec. 9 of the Civil Procedure Code, for the trial of the several causes of action separately, and directed the plaintiff to file several plaints, and there being no difficulty in respect of the stamp-duty chargeable on the institution of the suits, from plaintiff suing *in forma pauperis*, and the appellants having paid the proper stamp-duty on the appeals:—*Held* that the result of such order and direction might be regarded as the institution of new suits and that, so far as the suits were cognizable by the Court of the Subordinate Judge, or by the High Court in appeal, the High Court might, in the absence of any objection on the part of the parties, proceed to dispose of them. The High Court accordingly dismissed the suits relating to property in a district not cognizable in the Court of first instance; and in those appeals in which, by reason of the amount being less than Rs. 5,000, the appeal lay to the District Judge, returned such appeals to the appellant, for presentation in the proper Court. A direction in such a case to file separate plaints is not within the scope of sec. 9 of the Civil Procedure Code. That section



does not require the plaintiff to file separate complaints, but provides for the separate trial of the several causes of action contained in the one complaint filed on the institution of a suit. Where several causes of action have been improperly joined in one suit, the complaint should be rejected on the ground of misjoinder.—2 N.-W. P. H. C. R., 153.

The plaintiff alleged in his complaint that R had agreed in a bond to borrow from him Rs. 5,000 in order to institute a suit against D as to his share in certain joint ancestral property; that R consequently borrowed Rs. 3,000 from him, and that, while the suit was pending, R and D, in collusion with each other and their mother, in order to deprive the plaintiff of his money, agreed to refer the suit to their mother, who, by reason of their collusion, made a statement, which resulted in a smaller sum being decreed to R than was claimed by him, and in the property in suit remaining in the possession of D; and that, as both R and D had taken collusive proceedings, with intent to obstruct the plaintiff's realization of his money, they were both liable for the said sum of Rs. 3,000 and he therefore brought this suit to recover Rs. 3,000 principal, and Rs. 3,000 an equivalent of that sum, under the terms of the bond; and that the cause of action arose on the day on which R and D agreed to refer their suit to their mother. *Held* (PEARSON, J., dissenting) that the suit was bad for misjoinder of parties.—5 N.-W. P. H. C. R., 25.

They did not allege, however, that the fields in question, or any of them, had been recorded as jointly belonging to the defendants, nor was such the case. *Held* that under such circumstances the plaintiffs had no such common cause of action in the matter of the suit against the defendants as would justify the course taken in suing them all together. *Held* also that the irregularity of that course, by which the matter of the suit was brought before another Court than that which would otherwise have had cognizance of it, was calculated to produce error or defect in the decision on the merits.—5 N.-W. P. H. C. R., 72.

Though a Revenue Court had, under Act X of 1859, no jurisdiction to take cognizance of a suit against the sureties of a lessee, a suit brought against the lessees and their sureties was not bad for misjoinder.—5 N.-W. P. H. C. R., 222.

K was in possession of mouzah Dharmapore as usufructuary mortgagee. A share in the mouzah was sold in the execution of a decree against the shareholder. It was afterwards transferred by private sale to S by the auction-purchaser. S, alleging that the mortgage-debt had been satisfied out of the usufruct, sued to recover possession of the share, and impleaded not only K, but also the heirs of the mortgagors and his vendee, the auction-purchaser, but no cause of action was declared against those parties, nor did they resist the suit. The lower Courts dismissed the suit on the ground that separate causes of action, now between the same parties, had been included in one suit. The High Court reversed the decrees of the lower Courts so far as they dismissed the suit against the heirs of the mortgagors and the mortgagee, and remanded the suit for trial, as since the heirs of the mortgagors were interested in the account which must have been taken in the suit, it was necessary to make them parties in order that they might be bound by it.—6 N.-W. P. H. C. R., 208.

The holder of a bond hypothecating property who seeks to recover the debt due under the bond from his debtor, and to bring to sale the hypothecated property which is in the hands of a purchaser, is at liberty to implead the debtor and the purchaser in the same suit, and there is no objec-

tion to such an action on the ground of misjoinder.—6 N.-W. P. H. C. R., 323. Distinguishing *Makund Ram Debi Das*. 6 N.-W. P. 324, note.

The ancestor of the defendants held as mortgagee a ten biswas share of a mouzah. Of this share 5 biswas were recovered and held by the plaintiffs as proprietors. Of the remaining 5 biswas, 3 biswas  $6\frac{3}{4}$  biswanees belonged to D, and 1 biswa  $13\frac{1}{4}$  biswanees to H. These 5 biswas were in the defendants' possession. The plaintiffs sued to recover possession of them, alleging that the mortgage had been redeemed out of the usufruct, and that they had acquired D's right by auction-purchase in the year 1848, and H's rights by private purchase from his sons in 1873. They also sued for mesne-profits. The defendants pleaded that they held the 5 biswas in suit as proprietors, having acquired D's rights by private purchase in 1847, and H's rights similarly in 1851. They also pleaded that, inasmuch as the plaintiffs had brought a suit to establish the sale alleged to have been made to them by H's sons, and that suit was still pending, the claim for possession of H's share could not be maintained, and they lastly pleaded that, inasmuch as the plaintiffs admitted that the rights of D and H were acquired by them under separate sales, their claims to those rights could not be joined in one suit. The plaintiffs replied that, assuming the claim to H's share could not be maintained on the basis of the alleged sale to them, they were nevertheless entitled to possession of H's share in virtue of their right to D's share, both shares having been jointly mortgaged. *Held* that the plaintiffs were entitled to ask in one suit for a determination of their claim to the possession of the shares, and to any surplus mesne-profits which might be found to be due in respect of them on taking account, and that the pendency of the suit to establish their purchase of H's share did not deprive them of the right to sue to recover possession from the mortgagees, although it might have been necessary to determine incidentally in the suit the question at issue in the suit respecting the purchase. *Held* also that, if the plaintiffs established their right to the share of D, but failed to prove their title as purchasers of H's share, they could not obtain possession of the share on the ground that it was mortgaged jointly with the shares which they already held, and with the share of D, for, according to their own allegation, the mortgage-debt had been redeemed, and there was no longer any common liability which they were required to discharge.—6 N.-W. P. H. C. R., 246.

The lessor sued, under Act X of 1859 (sec. 23, cl. 4, and sec. 78), to recover an alleged balance of rent and cesses due under two leases, and interest, and claimed the ejectment of the lessees from the possession of the properties comprised in both leases, and (by an additional statement of claim) for the amount of arrears due by asamis at the commencement of the leases, basing the latter claim on a stipulation contained in the leases that, whatever arrears should, at the date of the execution of the leases, be shown to be due from the asamis in a list prepared by the patwari, such arrears should be paid by the lessees, either by instalments or in one payment, as the lessors should think fit, that the lessees should make no objection to the payment of such arrears, and that, if the lessees failed to pay such arrears, they should pay the expenses of the servants of the lessors who might proceed to the villages for the purpose of realizing the arrears, *Held* that this latter claim could only be brought in a Civil Court. The Court refused to admit in special appeal the plea that the lessor should have instituted separate suits to recover the arrears of rent due on each lease, as it allowed the objection that the leases could not be declared forfeited for the aggregate of the arrears of rent and cesses due on both leases, but that

the forfeiture of each lease was incurred in respect of the arrears due on it, and that the lower Courts should have therefore determined and declared in their decrees what was the amount of arrears due in respect of rent and cesses on each lease separately.—6 N.-W. P. H. C. R., 342.

The plaintiff was compelled to pay the whole costs of a suit, in which there was a misjoinder of causes of action, and which resulted in his and his co-defendants being charged with costs relating to causes of action with which they had no concern. The plaintiff sued, after deducting Rs. 71 as his own proper share, to recover the balance from his co-defendants. The plea of misjoinder was allowed.—7 N.-W. P. H. C. R., 82.

A registering officer having refused to register a deed of sale of certain property executed by S in favour of B, B sued S and K, claiming the completion of the sale with delivery of the sale-deed duly-executed, and possession of the property by cancelment of a deed of mortgage of the same executed in K's favour by S. *Held* that the suit was bad for misjoinder.—7 N.-W. P. H. C. R., 103.

Three several sales of separate shares in the same mahal were the subject-matter of the deed of sale in a suit for pre-emption, and the purchasers of one of the shares and the purchaser of the other two shares were different persons, and the plaintiff claimed the right of pre-emption in respect of all three shares, and indiscriminately impleaded all the several vendors and vendees who had no community of interest in the subject-matter of the suit. The Court, allowing the plea of misjoinder, which both the lower Courts had overruled, remanded the case to the Court of first instance, in order that the plaint might be returned to the plaintiff for amendment, and the suit tried and decided afresh after amendment.—7 N.-W. P. H. C. R., 188.

Where the plaintiff claims to recover possession of two distinct portions of a property from which he has been dispossessed at different periods and under different circumstances, and claims them under the same title and from the same party, there is no impropriety in the two claims being joined in one suit.—1 Hay's Rep., 555.

A claim for rent in arrear and a claim to remove clouds on the title to demise raised by the tenant are not objectionable on the ground of multifariousness, and may, therefore, be included in the same plaint.—1 Ind. Jur., N. S., 273; 5 W. R., (P. C.), 65; 10 Moore's I. A., 438.

Installments of rent were held to form different causes of action.—17 W. R., 380; 2 W. R., Act X., 31.

A village had been divided into four separate portions, with four different parties, who were afterwards dispossessed under one and the same survey-award, which demarcated the village as appertaining to the defendant's estate. *Held* that the four parties could sue jointly.—2 W. R., 219.

In a suit by a son against a father and certain purchasers to obtain a declaratory decree in respect to certain property, the fact of each purchaser being concerned only in a portion of the case does not render the suit multifarious.—3 W. R., 102.

The claims of different parties setting up different leases from A, and thus opposing the purchaser of the estate from A in obtaining possession, may be joined in one suit brought to set aside their leases, and to recover the profits which they had misappropriated.—4 W. R., 109.

It was held that a claim for a hundi may be joined in one suit with a claim for the return of money paid in excess of rent due.—7 W. R., 409; 3 W. R., 128.

Where the payee of a hundi, in a suit to recover the amount of the same, made four persons defendants—*viz.*, the drawer and the acceptor of the hundi, his own endorsee, and a party whom plaintiff alleged to be the principal, whose agent was the drawer—the suit was held to be a combination of four suits in one, not allowed by the Civil Courts.—10 W. R., 263.

It is too late for defendants to object with effect to a suit on the ground of multifariousness after it has been fully tried and decided on the merits ; but the objection is one which a defendant has a right to raise on the settlement of issues, or on a motion to take the plaint off the file.—11 W. R., 273.

In trying two distinct suits turning upon entirely separate documents, a lower Appellate Court was held to have reversed the procedure indicated in sec. 9 of the Code of Civil Procedure, 1859.—11 W. R., 280.

Where a plaint had been rejected as having been filed against several persons who had different defences, it was held to be within the discretion of the Judge, in appeal, to dismiss the suit, and saddle the plaintiff with the costs of all the defendants, notwithstanding that all the latter, except one set, admitted the claim, and retired from the contest.—12 W. R., 76.

A lower Appellate Court has no power to reverse the decree of a Court of first instance on the ground of misjoinder of parties. After a Court of competent jurisdiction has exercised its discretion under sec. 15, Act VIII of 1859, and passed a declaratory decree, it does not lie within the power of a Court of Appeal, under sec. 350 of that Act, to set aside the decree upon an objection which does not affect the merits, and which was not taken at the time when the decree of the first Court was passed.—13 W. R., 176.

It is not the title, but the infringement of it, which constitutes the cause of action ; and two suits are not necessarily brought upon the same cause of action merely because the title relied upon in both cases is one and the same.—13 W. R., 196.

In a suit for rent as of a single howala, where the defendants pleaded, and the Court found, that the lands constituted two howalas, it was held not to be necessary to dismiss the suit, if justice could be done between the parties on the other issues.—13 W. R., 284.

*Held* that there was no misjoinder of different causes in a suit including plaintiff's whole claim, where his cause of action was that the Revenue Commissioners had taken possession of his lands and given it in patta to other people.—14 W. R., 381.

The auction-purchaser of a taluq seeking to obtain possession against the former proprietors, many of whom are cultivators holding separate possession of specific portions, and having their houses on the land, must sue them specially for those portions to which they lay claim. He cannot sue the whole community in the aggregate for all the lands of the village.—16 W. R., 155.

It is illegal to join different causes of action in the same suit against different parties where each has a distinct and separate interest—*e. g.* to a joint action for the price of timber against defendants who purchased each one pair of timber from the plaintiff separately from the other.—21 W. R., 206.

Where a single suit for rent against the holders of several tenures is objected to on the ground of misjoinder, the mere fact of non-registration as separate holdings is no answer to the objection. The Court should be

enquire whether the tenants have not, in fact, been dealt with as holders of separate tenures.—22 W. R., 334.

In a suit by a mortgagee for possession of the mortgaged property, on the allegation that some of the defendants under subsequent mortgages and purchases had opposed him in obtaining possession; and to have it declared that the said mortgages and purchases were inoperative, *held* that the plaintiff had but one cause of action upon his mortgage-deed, and was right in joining all the defendants in the suit.—22 W. R., 532.

Sec. 8 of the old Code of 1859 prohibited by implication the joinder of divers causes of action against divers persons.—4 N.-W. P. H. C. R., 40; 23 W. R., 389.

In a suit to recover possession on the ground of dispossession by all the defendants in consequence of certain Act X decisions, *held* that there was but one cause of action, and that the fact that the defendants each claimed to hold portions of the property under different titles could not make the suit bad for misjoinder.—23 W. R., 400.

In a suit against A K for contribution of monies paid in satisfaction of two decrees under which the present plaintiffs and defendants were jointly liable, and one of which decrees was founded on an ikrar executed by the parties to the present suit and by one F, not a party, who was expressly excluded from liability in the decree last mentioned, the Judge considering that F was liable under the ikrar, but not liable under the bond on which the other decree was founded, decided that there were two distinct causes of action, and dismissed the suit. *Held* that the cause of action on which plaintiffs relied was simply the joint liability of the parties under the decree, and the suit was not multifarious.—25 W. R., 41.

In a plaint filed in the Court of a Subordinate Judge the plaintiff claimed to recover possession of a house, together with some grain which was stored in it. The plaintiff applied to the Subordinate Judge for leave under sec. 44, Rule a, to join the claim for grain with the claim for possession of the house. The Subordinate Judge refused leave, and returned the plaint, with directions that the plaintiff should institute two suits, for recovery of the house and the grain respectively, in the Court of the Munsif:—*Held* that the Subordinate Judge's order was substantially an order rejecting the plaint, on the ground that the plaintiff had joined a cause of action with a suit for recovery of immoveable property; that, although this might have been a misapplication of sec. 44, Rule a, of the Code, its effect was to reject the plaint; that such an order was a decree with reference to the definition in sec. 2, and was appealable as such to the District Judge; and that, therefore, a second appeal lay in the case to the High Court, and that Court was not competent to interfere in revision under sec. 622.—I. L. R., 8 Al. 191.

An objection to the attachment and sale of certain immoveable property, raised by one who claimed to have purchased the same at a sale in execution of a prior decree, was disallowed on the ground that, under the prior decree, the rights of one only of the present judgment-debtors had been sold and purchased by the objector. In accordance with this order, two-thirds of the property under attachment were sold; and the objector thereupon brought a regular suit for a declaration of his right as a purchaser of the whole property in execution of the prior decree. To this suit he impleaded as defendants the decree-holder and the judgment-debtors. The suit was decreed, and in the result the decree-holder alone was compelled to pay the whole of the costs. Subsequently he brought a suit for contribu-

tion in respect of these costs, making defendants to the suit (i) R, one of his co-defendants in the previous suit, personally and as heir of A, who was another of those co-defendants; (ii) N; and (iii) S: these two being sued in the character of heirs of A. *Held*, with reference to a plea of misjoinder within the terms of rule *b* of sec. 44 of the Civil Procedure Code, that even if there were misjoinder of parties, the first Court, having proceeded to trial of the suit, and not having rejected the plaint or returned it for amendment or amended it, should have disposed of it upon the merits, and found what A's share in the amount paid by the plaintiff was, and whether assets to that amount had come to the hands of the defendants as her heirs.—9 Al. 221.

Sec. 44 of the Code of Civil Procedure, 1877, does not forbid the joinder of several causes of action entitling the plaintiff to the recovery of immoveable property, but a joinder with such causes of action of other causes of action of a different character except in the cases therein specified.—5 Madr. 161.

The plaintiff sued for specific performance of an agreement in writing, which set forth *inter alia*, that the defendants had agreed to sell, &c., under certain conditions as agreed upon. The defendants alleged that the written agreement did not contain the whole of the agreement between the parties, and offered parol evidence in support of their contention. *Held* (reversing the judgment of WILSON, J.) that the parol evidence was admissible to show what was meant by the clause "certain conditions as agreed upon." *Per* PONTIFEX, J. (GARTH, C. J., dissenting).—The evidence was admissible under proviso 1, sec. 92 of the Evidence Act (I of 1872). Discussion as to the meaning of sec. 92 of the Evidence Act and of secs. 17, 22, and 26 of the Specific Relief Act. *Per* PONTIFEX, J.—It is of the essence of specific performance that part only of an agreement should not be performed. Part of the purchase-money had been advanced by the plaintiffs to the defendants, for which the defendants had given their promissory notes; and the plaint contained a prayer that the defendants be ordered to pay over the amount of the notes. *Held* (affirming the decision of WILSON, J.) that there was no misjoinder of causes of action within the meaning of sec. 44, rule *a*, of the Code of Civil Procedure (Act X of 1877).—6 Cal. 328.

In the mofusil of this Presidency the transfer of the ownership of immoveable property to a vendee who has obtained a decree ordering the specific performance of the contract of sale to himself does not wait for the execution of a conveyance—even if the vendor is required, as he seldom is, to execute such a conveyance—but is affected by the passing of the decree itself, coupled with the payment of the purchase-money. A entered into an agreement with B for the purchase of moveable and immoveable property, and paid a deposit. Under such an agreement, by sec. 85 of the Indian Contract Act, the ownership of the moveable property would not pass before the transfer of the immoveable property. B, instead of conveying to A the property agreed to be conveyed to him, conveyed it to C, and put him, C, in possession. A brought a suit against C and B, and obtained a decree, setting aside the conveyance to C, and ordering B specifically to perform his contract and execute a conveyance of the property to himself, A. This decree was confirmed on appeal. B refusing to execute the conveyance to A, the conveyance was executed by the Court under the provisions of sec. 202 of Act VIII of 1859, C still detaining possession of the moveable and immoveable property in question, A brought this suit against him to recover possession of the same. The suit was brought within three years



of the final decree of the Court of Appeal in the former suit, ordering a conveyance of the property to be executed to A, but not within three years of the date of agreement to purchase, and it was contended that as to the 'moveable' property the suit was time-barred. *Held* that the suit for the possession of the moveable property was not time-barred, as the right to possession of both moveable and immovable property accrued to A, at the earliest, on the date of the final decree for specific performance of the agreement of sale, and it was from that time that the "detainer's possession" first became unlawful under art. 49, schedule ii of Act XV of 1877. An objection that the plaintiff has joined together causes of action which, by sec. 44 of the Civil Procedure Code, may not be joined together without leave first obtained, is taken too late if it is taken for the first time in the Court of Appeal after the case has been already heard on its merits.—5 Bom. 554.

A plaintiff sued on the 28th February 1881 for specific performance of a contract entered into on the 1st March 1878 by defendant No. 1, and joined in that suit as a defendant a third person, who alleged that he was the owner of the property, the subject of the contract, seeking to obtain possession and other relief as against such third person, stating that he was a benamidar of defendant No. 1. Such third person contended in his written statement that the suit was multifarious, but the point was not decided in the lower Courts. On second appeal, such third person contended that the discretion given to the Court under sec. 22 of the Specific Relief Act ought not to be exercised, as the plaintiff had slept on his rights for nearly three years; and also contended that the suit was multifarious, and that he ought not to have been made a party thereto. *Held*, that although the principle of the objection, as to the delay of the plaintiff in bringing his suit, was an important one, and one which ought to be considered by the Courts in the exercise of their judicial discretion under sec. 22 of the Specific Relief Act, yet the point not having been taken in the Courts below, and there being nothing on the record to lead the Court to presume that the ordinary rule applicable to suits of this nature had been disregarded in the Courts below, the objection ought not, under the circumstances, to be allowed to prevail in second appeal. *Held also, per* MITTER, J. (PIGOT, J., dissenting), that as regards the objection to the suit for misjoinder, and under sec. 44 of the Code of Civil Procedure, that the Appeal Court was precluded by sec. 578 of the Code from reversing the decree of the lower Court, as the error (if an error at all) could not affect the merits of the decision. *Held also*, that the principle laid down in the cases of *De Houghton v. Money*, L. R., 2 Ch. App., 166, and *Luckumsey Ookerda v. Fazulla Cassumbhoy*, I. L. R., 5 Bom. 177, is only applicable where, from the plaintiff's case, it appears that a third party, not a party to the contract, has a distinct interest from that of the other parties to the contract, which interest is sought to be declared null and void.—10 Cal. 1061.

See I. L. R., 3 Al. 660, 19 Cal. 615, noted under sec. 43; 6 Al. 358, noted under sec. 13.

**45.** Subject to the rules contained in Chapter II and in section 44, the plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly

Plaintiff may join several causes of action.

interested against the same defendant, or the same defendants jointly, may unite such causes of action in the same suit.

But if it appear to the Court that any such causes of action cannot be conveniently tried or disposed of together, the Court may, at any time before the first hearing, of its own motion, or on the application of any defendant, or at any subsequent stage of the suit, if the parties agree, order separate trials of any such causes of action to be had, or make such other order as may be necessary or expedient for the separate disposal thereof.

When causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit, whether or not an order has been made under the second paragraph of this section.

#### Notes.

This section applies to Provincial Small Cause Courts.

Suit by some of the junior members of a Malabar tarwad against the karnavan and the other members of the tarwad, and certain persons to whom some of the tarwad property had been alienated by the karnavan, for a declaration that the alienations were not binding on the tarwad. *Held* that the suit was not bad for multifariousness. *Vasudeva Shanbhaga v. Kuleadi Narnapai* (7 Madr. H. O. R., 290) followed.—I. L. R., 12 Madr. 234.

The judgment of the majority of the Full Bench in *Narsingh Das v. Mangal Dubey* (I. L. R., 5 Al. 163), except in its general observations as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action, proceeded upon and had reference to the special circumstances of the case, and to the allegations made by the plaintiff in his plaint, and was not intended to be carried further. In a suit for possession of immoveable property, part of which had been usufructually mortgaged by defendant No. 1 to defendant No. 2, the plaintiff alleged that the first defendant had no title to make such a mortgage, while both defendants maintained such title. *Held* that, inasmuch as the title of defendant No. 2 was derived from defendant No. 1, and stood or fell with the failure or success of the plaintiff's claim against the latter, there were not two causes of action but one, namely, infringement of the plaintiff's right by the defendant No. 1, and hence the suit was not bad for misjoinder of causes of action.—11 Al. 33.

A stranger to a contract of which specific performance is sought cannot be a party to the suit. Where, therefore, the plaintiff, sued as against one defendant for specific performance of a contract to sell land, and as against another for a declaration that he was not entitled to any charge upon the said lands, *held* that the latter defendant was improperly made a party to the suit.—5 Bom. 177.

The plaintiffs sued for a declaration that the several alienations made by defendant No. 1 (a Hindu widow) to the other defendants were void, and that they (the plaintiffs,) were entitled to the several properties after her death; also for an injunction, restraining her from making similar unlawful alienations in the future. *Held* that the suit as framed was not

maintainable, inasmuch as it included within it several distinct causes of action, which, under sec. 45 of Act X of 1877, could not be joined together in the same suit. The course which should be adopted by a Court or Judge, where there has been such a misjoinder of causes of action, discussed.—7 Bom. 289.

The sons of R and of K and of S possessed proprietary rights in two mahals of a certain mauza. P possessed proprietary rights in one of those mahals. In April, 1879, the sons of R sold their proprietary rights in both mahals to G. In August, 1879, the sons of K sold their proprietary rights in both mahals to G. Later in the same month the sons of S sold their proprietary rights in both mahals to N. G sued N to enforce a right of pre-emption in respect of the sale to the latter, and obtained a decree. P then sued to enforce a right of pre-emption in respect of the three sales mentioned above, so far as they related to the mahal of which he was a co-sharer, joining as defendants G and N and the vendors to them. G alone objected in the Court of first instance to the frame of the suit. That Court overruled the objection, and gave P a decree. The lower Appellate Court reversed this decree on the ground of misjoinder. *Held* that in respect of G there was no misjoinder, but that in respect of the other defendant there was misjoinder, of both causes of action and parties. Inasmuch as, however, G alone objected to the frame of the suit, and the defect did not affect the merits of the case or the jurisdiction of the Court, the lower Appellate Court ought not, regard being had to sec. 578 of Act X of 1877, to have reversed the decree of the Court of first instance by reason of such defect.—4 Al. 163.

The power given by sec. 45 does not extend to an order for the dismissal of defendants, and that a fresh suit should be brought against them. Such an order would not be one for the “separate disposal” of the several causes of action; it would be an order preventing the disposal of them in the suit before the Court.—8 Bom. 616.

Sec. 45 is meant to apply to cases in which questions arise as to the joinder or severance of several causes of action against the same defendant. For non-joinder or misjoinder of parties provision is made in sec. 32, and the plaintiff had not resisted the joinder of the appellants as defendants. The Subordinate Judge could only strike out the name of a party upon an application being made, and no such application had been made.—8 Bom. 616.

Two co-sharers of a village, holding separate shares, sold their shares separately to the same person, upon which a third co-sharer of the village sued them and the vendor jointly to enforce his right of pre-emption in respect of the sales. *Held* that the frame of the suit was bad by reason of misjoinder of defendants and causes of action, and the suit had been properly dismissed on that ground.—6 Al. 106.

See I. L. R., 6 Madr. 239, noted under sec. 26; 4 Cal. 949, noted under sec. 31; 5 Al. 163, noted under sec. 28.

**46.** Any defendant, alleging that the plaintiff has united in the same suit several causes of action which cannot be conveniently disposed of in one suit, may, at any time before the first hearing, or, where issues are settled, before any evidence is recorded, apply to the Court for an order confining the suit to such

Defendant may apply to confine suit.

of the causes of action as may be conveniently disposed of in one suit.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 8 Bom. 616, noted under secs. 32 and 45.

**47.** If, on the hearing of such application, it appears to the Court that the causes of action are such as cannot all be conveniently disposed of in one suit, the Court may order any of such causes of action to be excluded, and may direct the plaint to be amended accordingly, and may make such order as to costs as may be just.

Court, on hearing application, may exclude some causes, and order amendment.

Every amendment made under this section shall be attested by the signature of the Judge.

**Note.**—This section applies to Provincial Small Cause Courts.

## CHAPTER V.

### OF THE INSTITUTION OF SUITS.

**48.** Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

Suits to be commenced plaint.

**Notes.**

This section applies to Provincial Small Cause Courts.

When a plaint discloses different causes of action against different parties, it is bad in law, and the suit is not maintainable.—2 B. L. R., (App.) 53 ; 11 W. R., 397 ; 2 Ind. Jur., N. S., 245 ; 8 W. R., 64.

A suit against five defendants, including claims of the most miscellaneous character against each defendant, was dismissed by the first Court, on the ground of multifariousness. The Subordinate Judge, on appeal, held that plaintiff was in any case entitled to a decision on one of his claims ; and further held that the suit was not multifarious. *Held* on special appeal that the Court could not select one claim on which to proceed, when plaintiff insisted on pressing all. *Held* further that the plaint was multifarious ; and though it would not be permissible for defendant to take that objection for the first time after the case had been fully gone into on the merits, yet, as the objection had been taken originally, the suit was properly dismissed by the first Court.—2 B. L. R., (A. C.) 341.

The presentation of a plaint at the private residence of the Munsif was held not a sufficient institution of the suit.—7 N.-W. P. H. C. R., 5.

An appeal must be presented to the Judge, and not to the Moonserim. The placing of a petition on a table when the officer is not present is not a presentation to him.—3 N.-W. P. H. C. R., 341.

**49.** The plaint must be distinctly written in the language of the Court ; provided that, if such language is not English, the plaint may

Language of plaint.

(with the permission of the Court) be written in English ; but in such case, if the defendant so require, a translation of the plaint into the language of the Court shall be filed in Court.

**Notes.**

This section applies to Provincial Small Cause Courts.

Pleadings in Indian Courts should not be construed with the same strictness as they are in the English Courts.—21 W. R., 59 ; 6 W. R., (P. C.) 1 ; 2 Moore's I. A. 344 ; 7 W. R., (P. C.) 8 ; 3 Moore's I. A., 383 ; 13 W. R., 248.

Particulars to be contained in plaint.

**50.** The plaint must contain the following particulars :—

(a) the name of the Court in which the suit is brought ;  
(b) the name, description, and place of residence of the plaintiff;

(c) the name, description, and place of residence of the defendant, so far as they can be ascertained ;

(d) a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose ;

(e) a demand of the relief which the plaintiff claims ; and

(f) if the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished.

If the plaintiff seeks the recovery of money, the plaint must state the precise amount so far as the case admits.

In money-suits.

In a suit for mesne-profits, and in a suit for the amount which will be found due to the plaintiff on taking unsettled accounts between him and the defendant, the plaint need only state approximately the amount sued for.

When the plaintiff sues in a representative character, the plaint should shew, not only that he has an actual existing interest in the subject-matter, but that he has taken the steps necessary to enable him to institute a suit concerning it.

Where plaintiff sues as representative.

*Illustrations.*

(a) A sues as B's executor. The plaint must state that A has proved B's will.

(b) B sues as C's administrator. The plaint must state that A has taken out administration to C's estate.

(c) A sues as guardian of D, a Muhammadan minor. A is not D's guardian according to Muhammadan law and usage. The plaint must state that A has been specially appointed D's guardian.

Defendant's interest and liability to be shewn.

The plaint must shew that the defendant is, or claims to be, interest in

the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

*Illustration.*

A dies, leaving D his executor, C his legatee, and B a debtor to A's estate. C sues D to compel him to pay his debt in satisfaction of C's legacy. The plaint must shew that B has causelessly refused to sue D, or that B and D have colluded for the purpose of defrauding C, or other such circumstances rendering D liable to C.

If the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the plaint must shew the ground upon which exemption from such law is claimed.

Grounds of exemption  
from limitation-law.

**Notes.**

This section applies to Provincial Small Cause Courts.

The prayer in the plaint ran shortly thus: "To adjudicate prescriptive right to irrigate the lands of certain mauzas; to remove two *bunds* on the named river at specified places; and to obtain an order for the flow of water of the said river as far as the villages comprising the Pergunna of Havelli Kharrakpore." *Held* that, as there was no evidence as to how much the volume of water was diminished, no conclusion could be arrived at as to whether the plaintiff's right had been infringed or not, and that therefore the suit had been properly dismissed.—4 B. L. R., (App.) 30; 13 W. R., 48.

A suit cannot be dismissed merely on the grounds that the plaint did not contain a specification of the land in the defendant's possession, and that there was an error in the plaint in the description of the defendant's residence.—6 B. L. R., (App.) 84; 14 W. R., 174.

An application was made to take a plaint off the file on the grounds, 1st, of indefiniteness; and, 2nd, that the plaintiff had not deposited security in accordance with sec. 34 of Act VIII of 1859. The plaint, which was filed on 12th December 1870, stated that the cause of action arose "previous to 21st August 1869," but did not show that the suit was not barred. PHEAR, J.—I think I must order the plaint to be taken off the file. If the plaintiff's amendment is correct, he will not be damaged by this course; if incorrect, the suit cannot be maintained. The plaintiff will pay the costs. If necessary, leave will be given now to bring a fresh suit.—7 B. L. R., (App.) 23.

The plaintiff sued the defendant for a kobala. The defendant took an objection to the wording of the summons, in which his proper title, "Roy Bahadur," was not mentioned. The Munsif ordered the plaintiff to amend his plaint in five days, and, on his failure to do so, rejected his plaint under sec. 29 of the Code of Civil Procedure. On appeal the Judge upheld the Munsif's order. The High Court set aside the Munsif's order, observing that the object of the law, which was to properly identify the defendant, had been fully carried out, and remanded the case for trial on its merits.—12 B. L. R., 445 note; 12 W. R., 450.

In a suit by the plaintiffs to recover damages from the defendant, a surety, upon a contract to deliver coffee to the plaintiffs, the plaint did not allege the willingness of the plaintiffs to pay on delivery. *Held* on special appeal that such allegation was not necessary, its absence not having pre-



judged the defendant. The plaintiff alleged a contract to deliver on the 2nd March, and the evidence showed an extension of the time to the 31st March, but the pleadings alleged that the breach was on the 2nd March. *Held* that this objection was not tenable, the defendant having been perfectly aware of the case he had to meet on this point. The surety had begun to perform the duty which the principal had contracted to perform. *Held* that this circumstance did not preclude the plaintiffs from suing the defendant as surety.—7 M. H. C. R., 364.

Where a defendant admits the execution of a document upon which he is sued, the *onus* lies on him to get rid of the effect of such admission. A defendant must be taken to admit all material allegations in the plaintiff which he does not traverse. In an action against a firm, the names of the partners should be specified in the plaintiff, and a summons served on one or more of its members if resident within its jurisdiction.—1 Bom. H. C. R., (A. C.) 85.

In every such plaintiff, plaintiff should name the amount of damages which he seeks to recover as compensation for the injury of which he complains.—10 Bom. H. C. R., 182.

A plaintiff under Act XX of 1864, by a relative of a minor against his administrator, must specify one or more acts of misconduct, or assign some satisfactory reason for apprehending an injury to the estate of the minor by the administrator.—10 Bom. H. C. R., (A. C.) 414.

A suit, in which the plaintiff discloses a cause of action falling within the period of limitation, should not be dismissed after the framing of issues, merely because the Court considers that an erroneous date has been assigned in the plaintiff as the cause of action. The plaintiff should be amended.—7 N.-W. P. H. C. R., 354.

A suit should not be dismissed for what is obviously a mere mistake in the plaintiff, *viz.*, the erroneous statement of the date of a mortgage made many years before the plaintiff acquired an interest in the property, where all the parties to it were dead, and the deed itself lost.—3 Agra H. C. R., 33; 3 Agra H. C. R., 218.

A suit should not be dismissed at the last stage of the proceedings in regular appeal for want of sufficient distinctness in the plaintiff, but such defect may be cured by examining the plaintiff or his pleader on that point.—3 Agra H. C. R., 162; 15 W. R., 286.

If a plaintiff discloses a cause of action, a judge on appeal ought not to dismiss the suit, on the ground merely of defect in the allegations in the plaintiff.—Marshall's Rep., 198; 1 Hay's Rep., 467.

The indistinctness of boundaries is, under Act VIII of 1859, not a cause of non-suit.—1 Hay's Rep., 555.

In a suit to recover possession, plaintiff is bound, under sec. 26, Act VIII of 1859, to give the date on which he was dispossessed as accurately as possible, especially where one of the issues is whether he has been in occupation of the land within twelve years of suit.—11 W. R., 238.

A suit should not be dismissed for mere defects in the plaintiff, if the evidence shows there is a good cause of action.—10 W. R., 460.

A claim for contribution should distinctly set forth the amounts due by each party sued, failing which the plaintiff should be rejected.—14 W. R., 373.

Plaintiffs must state the relief sought for, the subject of the claim, the cause of action, and when it accrued; and in suits for damages for injury

done, the nature of the injury ought to be set out. The strict rules of English law do not necessarily apply to plaints in this country.—13 W. R., 248.

It is not absolutely necessary for the mother to describe herself as guardian in the plaint, when the suit is evidently brought by her as mother of her minor son.—17 W. R., 144.

Under Act VIII of 1859, sec. 26, cl. 5, all that it is necessary for plaintiff to do is to describe the property in such a manner as many suffice for identification ; it is not absolutely necessary to set forth the boundaries.—18 W. R., 461.

A suit brought by minors through the manager of their property as next friend must follow the form prescribed by Beng. Act IV of 1870.—20 W. R., 453.

In the case of an unincorporated or unregistered Company, the plaintiff, if he does not know of what persons the Company is composed, may sue the Company by the name under which they are carrying on business, stating in his plaint his inability to describe them better.—8 W. R., 45.

A suit to recover land without defining boundaries cannot be maintained, because, if decreed, the decree could not be executed.—25 W. R., 39.

As to the effect of misdescription of area and boundaries in a suit for enhancement of rent.—22 W. R., 426.

Where the object of a suit is to prevent the plaintiff's right's over certain lands from being infringed upon, the boundaries of the lands should be given in the plaint.—2 C. L. R., 134.

To describe the plaintiff as residing in Chitpore Road in the town of Calcutta is not a sufficient description, under sec. 50 of the Civil Procedure Code, of his place of abode ; nor is it sufficient under that section to describe the defendant as formerly of Calcutta without alleging that the plaintiff has been unable to ascertain his place of residence more definitely.—4 C. L. R., 366.

Where the owner of a tank wishes to bring a suit against a person for fishing in the tank without his permission, the plaint should be framed for the recovery of damages for trespass, and should not be based on an alleged dispossession by reason of the defendants fishing in the tank.—3 C. L. R., 509.

The fact of A's plaint not showing when the cause of action arose is ground for rejecting the plaint, but no ground for finding on the trial that the suit is barred upon an issue raised as to limitation.—2 Ind. Jur., N. S., 343.

Under sec. 26, Act VIII of 1859, the plaint is intended to be a statement of facts, and not merely a prayer for relief. The words "cause of action" in that section, as distinguished from the "relief sought for" and the "subject of the claim," mean the grounds entitling the plaintiff to the remedy he seeks.—1 Ind. Jur., O. S., 12.

A plaint charging fraud must set forth particulars ; general allegations however strong the words, not even amounting to an averment of fraud of which a Court can take notice. After an examination of the plaintiff's pleader by the Court to discover whether there were grounds, which did not appear, for an amendment, a suit was dismissed on the defects of the plaint, which, charging fraud, did not set forth a good cause of action in regard to the above. *Held* that dismissal was not the proper mode of dis-

posal of the suit ; but the plaintiff should have been rejected, a course which would have enabled the plaintiff, if he found himself at a future time in a position to make averments giving relevancy to an action, to present a fresh plaint.—I. L. R., 15 Cal. 533.

The plaintiffs alleged that the defendants had encroached on the bed of a tank, raised embankments, and cultivated crops which interfered with the plaintiffs' supply of water ; and they prayed for a decree ejecting the defendants from the land encroached on and restraining them from interfering with it. *Held*, that the Court was not precluded by sec. 53 of the Code of Civil Procedure from passing a decree, declaring the plaintiffs' right to the water of the tank, directing the defendants' embankments, &c., to be removed, and regulating the cultivation of their lands ; but that the defendants' liberty of cultivation should not be restricted more than was necessary to secure the plaintiffs' supply of water.—11 Madr. 94.

In a suit for cancellation of a sale-deed by the person whose name appeared on it as executant, it was alleged in the plaint that it was a forgery, and that if it was not a forgery, its execution had been obtained by fraud and that it was, moreover, void for want of consideration. The plaintiff's interest in the property to which the instrument related had been assigned by her to another by a conveyance which contained certain covenants by her with regard to the land :—*Held*, that the plaintiff was not entitled to maintain the suit. *Per cur* : The gist of the plaintiff's charge against the defendant was that she had never executed a sale deed in his favor, and that the document set up by him was a forgery. It was not competent to the plaintiff to combine with this charge as an alternative the wholly inconsistent charge that if she did execute the document no consideration was received by her or that fraud had been practised upon her.—13 Madr. 549.

In all cases, whether a plaint is verified by the plaintiff or by some other person, the party verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the information of others.—6 Cal. 675.

There is no law at present in force in the mofussal which obliges a person claiming under a will to obtain probate of the will, or otherwise establish his right as executor, administrator, or legatee before he can sue in respect to any property which he claims under the will. In any suit or proceeding instituted by him, it is for the Court in which the suit or proceeding is pending to determine, for the purposes of such suit or proceeding, whether the will is genuine and valid, and confers upon the plaintiff or applicant the right which he claims.—6 Bom. 73.

See I. L. R., 16 Bom. 519, noted under sec. 4 of the Succession Certificate Act (VII of 1889).

**51.** The plaint shall be signed by the plaintiff and his  
Plaints to be signed and verified. pleader (if any), and shall be verified at  
the foot by the plaintiff, or by some other  
person proved to the satisfaction of the Court to be acquainted  
with the facts of the case :

Provided that, if the plaintiff is, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him in this behalf.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where the plaintiffs described themselves as lately carrying on business under the name of C and Co., *held* that there was no irregularity in the plaint being signed by C and Co., and verified only by A B, one of the partners.—5 B. L. R., (App.) 89.

By the practice of the Court, in a suit brought by a firm, one partner can, without having obtained special leave, verify the plaint on his own behalf and also on behalf of his co-partners. *Quære*.—Whether such a practice is correct, or ought to be allowed to continue? Act XIV of 1870 does not affect the procedure to the High Court.—12 B. L. R., 35.

The plaintiff in a suit went on a pilgrimage after he had been ordered to file a written statement, but without having filed it. Not having return when the case was on the board, his son applied, under secs. 28 and 123 of Act of VIII of 1859, for leave to verify and file a statement, alleging himself to be interested as a reversioner. The application was refused. *Held* that a third party will not be allowed to verify and file a written statement for a plaintiff who has culpably neglected to file one himself.—Bourke's Rep., (O. C.) 153.

The Judge on appeal dismissed a suit, on the ground that the plaint was verified by an agent, when it might and ought to have been verified by the plaintiff himself. *Held* that, the plaint having been admitted, the suit ought not to be dismissed for this defect, but the Judge might properly have required the verification of the plaintiff to be supplied.—Marshall's Rep., 344; 2 Hay's Rep., 325.

Sec. 36 read along with sec. 51, of the Code of Civil Procedure (Act X of 1877), shows that a plaint which may be presented by an authorized agent may in like manner be subscribed by him, and that subscription would be a compliance with sec. 51.—3 C. L. R., 579.

Under sec. 51 of the Code of Civil Procedure, Act X of 1877, the Court may in its discretion admit a plaint which has been subscribed by an authorized agent of the plaintiff.—3 C. L. R., 15

When a plaint has been verified by a person who has not shown to the Court that he is a person competent to verify it, the Court will order the plaint to be removed from the file.—1 Ind. Jur., N. S., 39.

The verification of a plaint signed with the name of the plaintiff by her mooktear, and which does not aver what is false, but attempts to do what the law estops her from doing, is not a false verification within the meaning of sec. 24, Act VIII of 1859.—W. R., (F. B.) 41; Marsh. Rep., 127; 1 Ind., Jur., O. S., 44.

A plaintiff may be excused from verifying his plaint, not only by reason of his absence, but also for any other good cause to the satisfaction of the Court.—7 W. R., 168.

It is not competent to a Judge of a Small Cause Court to raise any objection to the verification of a plaint by an agent, after such verification has been expressly sanctioned by him at the commencement of the suit.—12 W. R., 465.

A plaint, signed by a person holding a general power-of-attorney to sue on behalf of the plaintiff, is properly signed within the meaning of the proviso in Act X of 1877, sec. 51 (as amended by Act XII of 1879).—4 Bom. 468 (F. B.)

A person filing a written statement in a suit is bound by law to state the truth, and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence within the meaning of sec. 191 of the Penal Code.—6 Al. 626.

See I. L. R., 6 Cal. 675, noted under sec. 50.

**52.** The verification must be to the effect that the same is true to the knowledge of the person making it, except as to matter stated on information and belief, and that as to those matters he believes it to be true.

Contents of verification.  
Verification to be signed and attested.

The verification shall be signed by the person making it.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where the plaint alleges matter which cannot be personally known to the person making the verification, and which is not stated to be on information and belief, a verification which does not distinguish how much is true to the knowledge of the person making it, and what is alleged to be true on information and belief, does not fulfil the requirements of sec. 52, Act X of 1877.—4 C. L. R., 366.

The Court must be satisfied, under sec. 52, that a person, other than a plaintiff verifying the plaint, is acquainted with the facts of the case; but in the case of person holding a general power-of-attorney, or of any other recognized agent, the Court will not insist on any extreme stringency of proof.—4 Bom. 468 (F. B.)

Sec. 52 does not require the verification of a plaint to be made in the presence of an officer of the Court; but having regard to the necessity of satisfying the Court that the person, other than the plaintiff, who verifies the plaint, is acquainted with the facts of the case, it is desirable that a verification by such a person should be made in the presence of the Court, unless the Court be satisfied that there is sufficient ground for dispensing with its attendance.—4 Bom. 468 (F. B.)

See I. L. R., 6 Cal. 675, noted under sec. 50.

When plaint may be rejected, returned for amendment, or amended.

**53.** The plaint may, at the discretion of the Court,—

(a) at, or at any time before, the settlement of issues, be rejected, if it does not disclose a cause of action;

(b) at, or at any time before, the settlement of issues, be returned for amendment within a time to be fixed by the Court, and upon such terms as to the payment of costs occasioned by such amendment as the Court thinks fit, if it—

(i) is not signed and verified as hereinbefore required,

(ii) does not state correctly and without prolixity the several particulars hereinbefore required, or contains particulars other than those so required,

(iii) is wrongly framed by reason of non-joinder or misjoinder of parties, or joins causes of action which ought not to be joined in the same suit, or

(iv) is not framed in accordance with the provisions of sec. 42;

(c) at any time before judgment be amended by the Court upon such terms as to the payment of costs as the Court thinks fit:

Provided that a plaint shall not be amended, either by the party to whom it is returned for amendment, or by the Court, so as to convert a suit of one character into a suit of another and inconsistent character.

When a plaint is amended under this section, the amendment shall be attested by the signature of the Judge.\*

#### Notes.

This section applies to Provincial Small Cause Courts.

The property of several co-sharers, some of whom were minors, was sold to a single purchaser, under a deed of sale, which contained a covenant by the vendors, who professed to act on behalf of themselves and the minors, that they would compensate the vendee for any loss he might incur, should the minors, when they come of age, not ratify the sale. A sued to enforce her right of pre-emption in respect of the lands sold. The lower Appellate Court was of opinion that A could not enforce her claim of pre-emption in respect of the shares of the minors, and on the Court's suggestion the plaint was amended so as to ask only for enforcement of her claim in respect only of the shares of the vendors of full age. *Held* that A was bound to claim her right against all the shares, and could not enforce it in respect of some only. *Semble*.—A plaint cannot be amended in an Appellate Court.—I. B. L. R., (A. C.) 78, 10 W. R., 111.

An Appellate Court is competent at any stage to allow objections to be taken to an apparent defect in the plaint. *Held* that a party against whom an order has been obtained under sec. 246, Act VIII of 1859, must, if he sue for its reversal, assert substantially the same right as that which has been contended for in the execution. *Held* by JACKSON, J., that, in a suit for declaration of title, defendants must have given a cause of action by impugning it antecedently to plaint filed, even though their written statement be hostile.—2 B. L. R., (A. C.) 212; 11 W. R., 40.

An application was made to amend a plaint by substituting the names of Messrs. L L for the Official Assignee as defendants. Messrs. L L had been adjudicated insolvents, and one of them had obtained his personal discharge. As to this there was a mis-statement in the plaint, to amend which was also asked in the present application. No written statements had been filed by either party to the suit. PHEAR, J., granted the application, ordering the costs to be paid by the plaintiff.—7 B. L. R., (App.) 65.

The defendant agreed with the plaintiff to take the plaintiff's mare "Bridesmaid" on "racing terms,"—all winnings to be divided equally between them, and the plaintiff to have the option of claiming a one-fourth

\* This section has been substituted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 9, for the one originally enacted.



share of any lottery in which she might be brought by or on account of the defendant ; the plaintiff to keep and train "Bridesmaid" for Rs. 60 a month. Subsequently the plaintiff agreed to keep and train, for a like sum for each horse, five horses belonging to the defendant. The defendant having been posted as a defaulter, the plaintiff at the defendant's request advanced certain sums to the Secretary of the Calcutta Races to enable the defendant's horses to run. As security for the repayment of such advances, and of a sum of Rs. 4,456-6 which had become due to the plaintiff, and which included an item of Rs. 1,149 for "balance of bets and lotteries" and a smaller sum in respect of certain tickets in the "Secundra Raffle," the defendant gave to the plaintiff a letter of hypothecation of his five horses, whereby it was agreed that, in case of the defendant's default, the plaintiff should be at liberty to sell the horses. The defendant made default, and the plaintiff advertised the horses for sale. On the same day the defendant wrote and gave to the plaintiff a letter, stating that, in consideration of the plaintiff's withdrawing the advertisement, and withholding the sale for a certain period, he would give the plaintiff a promissory note for the balance of his claim. A note for Rs. 7,000 was accordingly given by the defendant to the plaintiff. In the account delivered by the plaintiff to the defendant, he had by mistake over-credited the defendant with Rs. 744 in an item headed, "Cash received from the Secretary of the Calcutta Races, balance of racing account," and under which was included the following item : "I. O. U., deducted from lottery account Rs. 480." On receiving information of the error, the defendant gave the plaintiff another promissory note for Rs. 744. In an action of the notes brought under Act V of 1866, the plaintiff obtained a decree, which was set aside on the defendant's application, and leave was given to him to appear and defend. Written statements were then filed on the plaintiff's application. *Held*, by Macpherson, J., that the two promissory notes were given as a security for the whole of the plaintiff's claim ; that the items for "balance of bets and lotteries" and for the "Secundra Raffle" being rendered illegal by the Lottery Act (V of 1844), part of the consideration for the notes was illegal, and no action was maintainable upon them. His Lordship, therefore, dismissed the plaintiff's suit. On appeal, *held*, by COUCH, C. J., that the promissory note for Rs. 7,000 was not vitiated by the Rs. 1,149 being part of the consideration for it : although that portion of the latter sum which was won by lotteries was obtained by an illegal transaction, it was not illegal, for the defendant to receive the money, and, having done so, to pay the plaintiff his share, or to promise to do so. But the money paid in respect of the "Secundra Raffle," being money paid in execution of an illegal purpose, was an illegal consideration, which dis-entitled the plaintiff to recover on the note. *Held* further that the note for Rs. 744 was given upon good consideration. All the facts of the case being stated in the plaintiff's written statement, the Court might allow the plaint to be amended, and framed an issue as to what amount was due to the plaintiff in respect of the consideration for the note for Rs. 7,000. *Held*, by MARKBY, J., that both notes were good, inasmuch as the promise contained in them did not spring from, nor was it the creature of, the original illegal agreement, but was a separate agreement.—9 B. L. R., 441; 18 W. R., 424.

A sued B to obtain possession of certain land, on the ground that he had a right of pre-emption thereto, in preference to that of B, to whom the same had been sold. He stated in his plaint that he was a co-partner (*shafia khalit*) or the vendor. The defendant set up that he was also a co-partner in the mouza ; and, therefore, had equal right with the plaintiff. The Mun-

sif held that, even if the interest of all the co-sharers of the mouza be equal, the plaintiff had a particular right to the lands in dispute, as they were situate within his own share of the putti. The principal Sudder Ameen confirmed the judgment of the Lower Court, holding that the objection of the defendant was fanciful and whimsical. On special appeal, *held* that the question of vicinage was immaterial, as "the right which the plaintiff claimed was not a right of vicinage, but a right as co-partner. He distinctly used in his claim the Mahomedan term, showing that he claimed his right as a co-partner. He cannot be allowed to travel beyond his plaint and he cannot, therefore, obtain a decree by right of vicinage."—*Per* KEMP and E. JACKSON, JJ., *Kunjabehari Lal v. Giridhari Lal*, Special Appeal No. 271 of 1868, from Tirhoot. 21st July 1868. [1 B. L. R., S. N., 10 W. R., 189.] 3 B. L. R., (App.) 142.

Where in the plaint the relief sought for was possession and mesne-profits, and the plaint was in the course of the suit amended, and an additional stamp paid, so that the suit became one for resumption, *held* the amendment was improperly made, and the suit must proceed as a suit for possession and mesne-profits.—B. L. R., Sup. Vol. 581; 6 W. R., 211.

An estoppel *in pais* need not be pleaded in order to make it obligatory. With the Indian system of pleading, a party's statement in a judicial proceeding cannot be excluded like allegations in bills in equity and pleadings at common law. But mere statements for the purpose of a particular judicial proceeding can only be exclusive evidence in another proceeding as to such material facts embodied therein as must have been found affirmatively to warrant the judgment of the Court upon the issues joined. They are then conclusive between the same parties, not because they are the statements of those parties, but because, for all purposes of present and prospective litigation, they must be taken as truth. A brought a pauper suit, and virtually denied possession of certain property. B petitioned to dispauper A, alleging that A was possessed of such property. The Court decided that A was in possession, and rejected her prayer to be allowed to sue as a pauper. *Held* in a subsequent suit by A's representative against B's representative for the property that, even if A's allegation, found to be false, could be treated as an estoppel, B's allegation, found to be true, would also be an estoppel, and "estoppel against estoppel setteth the matter at large;" but that, although A's allegation was receivable evidence against A and her representative, they were not concluded by such allegation and the decision thereon.—2 M. H. C. R., 31.

Where the plaintiff alleged that he was in possession of property, and prayed the Court to cause the registry to be altered into his name, without alleging that the proper authorities had improperly refused to make the entry, and without joining as a defendant the only person who had power so to do, *held* that the plaintiff's suit ought to have been dismissed.—2 M. H. C. R., 363.

Where a plaint alleges the cause of action to be the prosecution of a false charge of forgery, and the statement of the subject-matter imports that the charge was false to the knowledge of the defendant, the omission to allege expressly malice and the absence of reasonable and probable cause is no good ground of objection to the hearing of the suit. Magistrates are not incapacitated to give evidence of matters which have come before them in the course of a preliminary inquiry into a criminal charge. *Held* that in a suit for a malicious prosecution the defendant had a right to the evidence of the Subordinate Magistrate who held a preliminary inquiry into a charge

of forgery preferred by the defendant against the plaintiff. *Semble*, a defect which appears on the face of the plaint, which would have rendered it inadmissible, is not a matter for amendment at the final hearing of the suit.—3 M. H. C. R., 372.

In a suit by the plaintiffs to recover damages from the defendant, a surety, upon a contract to deliver coffee to the plaintiffs, the plaint did not allege the willingness of the plaintiffs to pay on delivery. *Held* on special appeal that such allegation was not necessary, its absence not having prejudiced the defendant. The plaint alleged a contract to deliver on the 2nd March, and the evidence showed an extension of the time to the 31st March, but the pleadings alleged that the breach was on the 2nd March. *Held* that this objection was not tenable, the defendant having been perfectly aware of the case he had to meet on this point. The surety had begun to perform the duty which the principal had contracted to perform. *Held* that this circumstance did not preclude the plaintiffs from suing the defendant as surety.—7 M. H. C. R., 364.

In 1874 plaintiff sued to recover certain property, or its value, “dishonestly misappropriated” on the 21st January 1872 by first defendant, assisted by the other defendants. The lower Court held that the right to sue did not accrue until the property had been demanded and refused; that the plaint contained no allegation of such demand and refusal; that the plaint could not be amended by the insertion of such an allegation after answer; filed and that therefore the suit could not be maintained. *Held*, reversing the decree, that, even if the present case were one in which the provision as to demand could have any application at all, still the suit ought not to have been dismissed on that technical ground when the defendant by his answer traversed the whole of the allegations in the plaint, and pleaded the Statute of limitations.—7 M. H. C. R., 400.

Where a mortgagor brings a suit to redeem mortgaged land on payment of such sum as shall be found due to the mortgagee, the Court is not justified in decreeing possession without payment in favour of the mortgagor, merely because the mortgagee denies the existence of the mortgage. Where a point is taken on appeal, the Appellate Court should consider and decide it, although the vakil may omit to argue it.—6 Bom. H. C. R., (A. C.) 9.

Where a lessor sues to eject his tenant on the expiration of the latter's term, or for breach of the conditions of his lease, and fails to prove the lease, he is not ordinarily at liberty in the same suit, ignoring the lease, to fall back upon his general title as though he had not set up and failed to prove the alleged lease. A plaintiff must be limited to the case which he puts forward in this plaint, but he may put forward an alternative case in his plaint from the commencement, as the defendant then will know that he has more than one case to meet, and will not be taken by surprise. Where the plaintiff has not put forward an alternative case in the plaint, he may have leave to amend his plaint and to state his case correctly therein, if the Court think that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake, or misconstruction of document.—9 Bom. H. C. R., (A. C.) 1.

Secs. 29 and 31 of the Civil Procedure Code empower the Court to permit such amendment in the plaint as may enable the Court to give relief in respect of the wrong originally complained of, but not to allow totally new causes of action to be added by a supplemental plaint.—1 N.-W. P. H. C. R., 171; Ed. 1873, 250.

The plaintiff brought a suit against the Secretary of State, which the Judge dismissed ; on the petition of the plaintiff he allowed the plaint in the suit so disposed of to be amended, and the name of a new defendant to be substituted, and a different cause of action to be stated. *Held* that the Judge acted illegally, and that the plaintiff should have been referred to a new suit. The Secretary of State is only responsible for the acts of public servants done within the scope of their authority.—1 N.-W. P. H. C. R., 118; Ed., 1873; 204.

A plaint may be amended upon subsequent application, with reference to an objection taken when it was filed.—Bourke's Rep., (O. C.) 273.

Amendment of a plaint is not allowable after issues are fixed.—5 W. R., 234.

A plaintiff can be allowed to amend his case only when he has an honest case, but either through mistake or some misapprehension he was not placed the real facts before the Court.—16 W. R., 123.

Where the plaint, on the face of it, is one in which a manager suing on behalf of minors is himself plaintiff, and which seeks to set aside deeds constituting a mortgage transaction, the court cannot, by amending the plaint, turn the suit into a redemption-suit on the part of the minors.—20 W. R., 453.

The court is not to make a case for a plaintiff which he has not made for himself.—7 W. R., 478.

A plaint charging fraud must set forth particulars ; general allegations, however strong the words, not even amounting to an averment of fraud of which a Court can take notice. After an examination of the plaintiff's pleader by the Court to discover whether there were grounds, which did not appear, for an amendment, a suit was dismissed on the defects of the plaint, which, charging fraud, did not set forth a good cause of action in regard to the above. *Held* that dismissal was not the proper mode of disposal of the suit ; but the plaint should have been rejected, a course which would have enabled the plaintiff, if he found himself at a future time in a position to make averments giving relevancy to an action, to present a fresh plaint.—I. L. R., 15 Cal. 533.

A suit in the Court of a District Munsiff to enforce acceptance of a patta and execution of a muchlika by defendant in respect of a holding in a village to which plaintiff claimed title was dismissed as not being maintainable. *Held* that the suit should not have been dismissed, but the plaint should have been amended by the addition of a prayer for a declaration of the plaintiff's title : and that the Court then would have had jurisdiction to grant by way of consequential relief the relief originally sought.—12 Madr. 481.

The plaintiff brought this suit in the High Court at Bombay against the defendant for defamation alleged to be contained in a notice that appeared in the *Bombay Gazette* on the 9th April 1888. The defendant was the chairman of the Hinganghat Mill Company. The plaintiff had been for some years secretary and manager of that company. In April 1888, he was dismissed from his appointment, and shortly afterwards she filed a suit (No. 1 of 1888) in the Court of the Deputy Commissioner at Wardah, in the Central Provinces (which was the Court of the district in which Hinganghat is situated), for wrongful dismissal. The present suit was filed in July 1888. The defendant took out a summons calling on the plaintiff to show cause why the suit should not be stayed, and the plaint returned to the plaintiff, in order that, if he thought proper, it might be presented to the

Court at Wardah. The defendant relied on the following points :—(1) that neither he nor the plaintiff resided or carried on business at Bombay ; (2) that all the defendant's witnesses resided at Wardah ; (3) that the other suit (No. 1 of 1883) was pending at Wardah, and that the decree of that suit would decide the present case also. *Held* that the plaintiff was entitled to sue in Bombay.—13 Bom. 178.

In a suit for collision originally filed against the owners of a ship, *held* that the plaintiffs might amend the plaint by adding the ship as a party-defendant.—12 Bom. 237.

A suit was brought by the manager of the M Bank against the executrix of B to recover a sum of money as due upon a bond executed by B in favour of the Bank. The plaint described the defendant as " Mrs. Sarah G. Barlow of Mussoorie," and stated that she was executrix of the deceased B. It began thus :—" George Henry Webb, manager of the above-named plaintiff's business, states as follows," and proceeded to state that the deceased was, at the time of his death, " indebted to the plaintiff," and to set forth the cause of action in detail. It was signed and verified thus :—" For the M Bank, Limited, G. H. Webb, Manager." The Court of first instance returned the plaint for amendment under sec. 53 of the Civil Procedure Code : (i) because the defendant was not properly described ; (ii) because the plaint was set out as made by George Henry Webb as manager, and not as on the part of the Bank ; and (iii) because the suit should not have been brought in the form in which it was brought, but in the form referred to in sec. 213 and No. 105 of sch. iv of the Code. *Held*, that the first of these grounds failed, because it was clear that the defendant was stated to be the executrix of the deceased, and the suit was brought against her in that capacity. *Held* that the second ground did not come within sec. 53 of the Code, as it was clear that the circumstances set out in the plaint applied to the case of the plaintiff Bank, and the plaint sufficiently fulfilled the requirements of the Code that the facts which the plaintiff considers essential should be concisely and clearly set out, and that the verification should be made by some one acquainted with these facts. *Held*, with reference to the third ground, that the plaintiff was at liberty to bring a suit for money against any person administering to or representing an estate ; and if such suit should be found, with reference to the facts in evidence, not maintainable, it should be dismissed ; but there was no authority for returning a plaint for amendment, when it was found that the suit was not maintainable in the form in which it was brought, in order to amend it so as to convert the suit into one of a different character.—9 Al. 188.

A plaint can be rejected, returned for amendment, or amended by the Court of first instance only at or before the first hearing of the suit, and not after the first hearing thereof. *Modhe v. Dongre* dissented from. *Soorj-mukhi Koer's Case*, *Burjore v. Bhagana*, and *Fazul-un-nissa Begam v. Mulo* distinguished by MAHMOOD, J. *Per* MAHMOOD, J.—The plaint may, for causes other than those mentioned in sec. 53, be amended by the Court after the first hearing.—7 Al. 79.

Where in an action of ejectment against a tenant holding over, the lease sued on was inadmissible in evidence for want of registration, and the plaint was not amended to one containing an alternative claim for partition :—*Held*, that the plaintiff could not be allowed to fall back upon his general title, and obtain a decree for partition.—10 Bom. 451.

The decision of the Court of first instance, that a plaint is undervalued, is binding upon the Court of appeal, reference or revision ; but the Court



of first instance is not justified in rejecting the plaint without giving to the plaintiff an opportunity of affixing the proper stamp. Where it is open to the plaintiff to ask for an account, against the defendant, of moneys received by him under a certificate of heirship, and for payment of moneys not properly accounted for, he is precluded by sec. 2 of the Specific Relief Act, I of 1877, from asking for a mere declaratory decree. Plaint allowed by the High Court to be amended by insertion of a prayer for account.—9 Bom. 355.

Where, at the first hearing of a suit, the plaint is returned for amendment within a fixed time under the provisions of Act X of 1877, sec. 53, and it is amended accordingly, it cannot afterwards be again returned for amendment.—2 Al. 671.

Where a plaintiff's claim as originally stated in his plaint was based on the allegation of the invalidity of a will, an application at the hearing of the case to amend the plaint by inserting a clause submitting that, even if the will were valid, it did not dispose of the whole of the testator's property was refused,—the Court holding, under sec. 53 of the Civil Procedure Code (Act XIV of 1882), that the case made by the proposed amendment would be inconsistent with the case made in the plaint as originally framed.—7 Bom. 155.

Where a plaintiff alleged that M, the deceased widow of S, a Hindu, while administering the estate of her deceased husband, borrowed money from plaintiff for purposes binding on the estate, and executed a promissory note to secure the payment of the same, and that the first and second defendants, as reversionary heirs of S, and the third defendant, were in possession of the estate of S, and refused to pay the debt incurred by M: *Held* that the plaint was properly rejected as disclosing no cause of action against the defendants.—4 Madr. 375.

The plaintiff in a suit applied for the amendment of the plaint. The defendant objected to the amendment, and a day was fixed by the Court for the "admission or rejection of the petition, and the determination of the defendant's objections thereto." The Court, after hearing the parties, made an order allowing the "petition of amendment," and rejecting the defendant's objections. The defendant appealed from such order to the High Court. *Held* that, inasmuch as orders amending plaints then and there are not made appealable by Act X of 1877, and it was into this category, if into any at all, that such order must fall, such order was not appealable.—3 Al. 854.

In a suit for confirmation of possession and declaration of title in respect of land, where the plaint did not disclose any facts from which it could be said that the defendants denied the plaintiff's title, but from the proceedings in the original cause it was established that, before the suit was brought, there was a dispute existing between the parties as regards the title, and that a decree in favour of the plaintiffs had been passed by the original Court on the merits of the case: *Held* that though the plaint might have been rejected in the first instance under sec. 53 of the Civil Procedure Code on the ground that it did not disclose any cause of action, it was too late for an Appellate Court to reverse the decree solely on that ground, without being satisfied that no such cause of action was established on the evidence.—7 Cal. 343.

Sec. 53 of the Civil Procedure Code, which provides that a plaint cannot be amended so as to convert a suit of one character into a suit of another and inconsistent character, does not prevent a plaintiff, who has been



ousted after suit brought for declaration of title, from amending his plaint by adding a prayer of possession. If the congregation of a church as a body cease to follow the observances of a particular form of worship, and in preference for forty years follow those of a different form of worship, there would be no one left for whom and by whom the original form of worship can be continued, the objects of the original trust cease to exist, and the church-funds and property become impressed with a trust for the performance of the later form of worship. Where a defendant out of the jurisdiction of the Court was summoned to produce a letter, and did not comply with the summons, but appeared by pleader at the last moment at the hearing of the suit, and service of notice on the pleader to produce the letter would have been nugatory, secondary evidence of the letter was admitted under sec. 66, proviso 6 of the Evidence Act.—2 Madr. 295.

Where, after a trial has begun, or even after it has concluded, it appears that the Court has not jurisdiction to hear the case, the plaint should be returned in order that it may be presented to the proper Court, and no additional court-fees are payable. The pre-existing state of the law as recognized by the tribunals is one of the chief means of interpreting laws of procedure. *Jagjivandas Javherdas Seth v. Magdum Ali* (I. L. R., 7 Bom. 487 overruled.—8 Bom. 313.

See I. L. R., 6 Madr. 239, noted under sec. 26 ; 5 Bom. 609, noted under sec. 34 ; 11 Madr. 94, noted under sec. 50 ; 11 Madr. 42, noted under sec. 31 ; 15 Madr. 255 noted under sec. 42 of the Specific Relief Act.

When plaint shall be rejected.

**54.** The plaint shall be rejected in the following cases:—

(a) if the relief sought is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :

(b) if the relief sought is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so :

(c) if the suit appears from the statement in the plaint to be barred by any positive rule of law :

(d) if the plaint, having been returned for amendment within a time fixed by the Court, is not amended within such time.

#### Notes.

This section applies to Provincial Small Cause Courts.

The personal performance of the tulub-ishhad, or demand for pre-emption by the pre-emptor, depends on his ability to perform it. He may do it by means of a letter or messenger, or may depute an agent, if he is at a distance, and cannot afford personal attendance. Where a defendant, after the case had been gone into on the merits, set up that the suit had been under-valued, and the Court of first instance found in favour of the plaintiff on that issue, but the lower Appellate Court was of a contrary opinion, and dismissed the suit, *held* that the lower Appellate Court should, before dismissing the suit on that ground, have allowed the plaintiff the option of supplying the necessary stamps, as the first Court would have done, under

sec. 31, Act VIII. of 1859. In any case, the order of the first Court was not one affecting the merits of the case or jurisdiction of the Court; and, therefore, under sec. 350, Act VIII. of 1859, the suit could not be dismissed on appeal upon that ground.—4 B. L. R., (A. C.) 139; 12 W. R., 484.

We are of opinion that there is no ground for this review. We are asked to pass an order enabling the applicant to have the plaint back in order to file it in the proper Court. The case was discussed at great length when the special appeal was argued, but no such request was then made before us. It was held by us, on the plaintiff's own showing, that the Court in which the suit was brought was admittedly a Court which had no jurisdiction to try it. If a party brings a suit in a Court which, according to his own showing, has no jurisdiction to try the case, it does not lie in him, failing in that Court, to ask to have the plaint back in order to file it in the proper Court. However, as the matters stand in the case, this request, as an alternative plea, was never made or otherwise raised before; and I think that to allow such a point to be raised at this stage would be against the proper legal principle—*viz.*, that there must be some end to litigation.—6 B. L. R., App. 141.

Where a plaint is rejected under sec. 30 of Act VIII of 1859 by the first Court, on the ground that it is undervalued, an appeal lies from such order under sec. 36 of Act VIII of 1859, and this appeal was not taken away by the note to art. II, Sch. B to Act XXVI. of 1867, the object of which was to prevent appeals only where the question merely related to the amount of stamp to be impressed upon the plaint.—7 B. L. R., (F. B.) 663; 16 W. R., (F. B.) 10; 7 B. L. R., 664 note; 13 W. R., 415.

On the presentation of a plaint for libel, the Court must see whether the alleged libellous matter set out in the plaint is really libellous; if it is not, there is no ground of action, and the plaint ought not to be admitted. If the words which are set out in the plaint are not a libel, the plaintiff cannot, by alleging that they were printed and published by the defendant with the intent to injure the plaintiff, and bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected that the plaintiff was a dishonest person, and had been actuated by sinister and fraudulent motives, make them a libel; nor can the plaintiff, by alleging that words are spoken ironically, make them libellous if they do not appear to the Court to be so.—10 B. L. R., 7; 18 W. R., 516.

Where a plaint, is returned for amendment under sec. 29 of the Code of Civil procedure, the order of return should specify a time for such amendment. Where the plaintiff, within three years from the arising of the cause of action, presented his plaint, which was returned to him for amendment, but without specifying a time for such amendment, and the plaint was re-produced and filed some days beyond the three years, and the defendants pleaded the Statute of Limitation, *held* that the date of commencing the action was that of the original presentation of the plaint.—1 M. H. C. R., 427.

Where the lower Court rejected a plaint on the ground of an improper joinder of causes of action, and also that the suit was not sufficiently valued, and the High Court were of opinion that there had been no improper joinder of causes of action, the order of the lower Court was reversed, and the Civil Judge directed to deal with the case in accordance with sec. 31, Act VIII of 1859.—2 M. H. C. R., 436.

A suit between two brothers, A and B, respecting ancestral property, was compromised, and the particulars of the compromise embodied in a razi-

nama presented in Court by both parties. A having died, his widow and B presented in Court another razinama, embodying the particulars of an arrangement respecting the property, in which she had become interested as widow, and which was comprised in the former razinama; and of this second razinama they subsequently put in an amended copy. *Held* that a claim arising out of such arrangement could not, within the meaning of Act VIII of 1859, sec. 2, be considered to have been a cause of action heard and determined in the former suit. A plaint will not be rejected under sec. 32 of Act VIII of 1859, if the subject-matter alleged raises a fair question of claim or right for trial and determination between the parties. The mere unlikelihood of the plaintiff's success is not enough to justify the rejection of his plaint.—1 M. H. C. R., 240.

Where the plaint in a suit to establish a right to landed property and to recover arrears of rent alleged no specific acts of ownership since 1845, but contained a statement general enough to let in evidence of such acts, and it did not appear that the plaintiff had been questioned, *held* that the plaint should not have been rejected under sec. 32 of Act VIII of 1859, on the ground that it appeared to the Court that the right of action was barred by lapse of time.—1 M. H. C. R., 322.

Though a plaint has been registered, the Court may reject it under Act VIII of 1859, sec. 32, as barred by the Act of Limitation. The contract of hypothecation defined. When land is hypothecated, the contract gives the creditor an interest in immoveable property, and the period of limitation for actions on such contract is twelve years under cl. 12 of sec. 1 of Act XIV of 1859. A creditor suing under such a contract must prove that there was an actual pledge, and that the land was part of the debtor's estate at the time of pledge. The decree will then be for sale of the property hypothecated, unless the debtor pay the amount due with interest within a period to be named by the Court.—2 M. H. C. R., 51.

*Held* that the Court to which a plaint is presented has no authority to reject it, merely because the document upon which the plaintiff sues is not produced with the plaint, as directed by sec. 39 of Act VIII of 1859; and that the High Court has power to set aside such an order of rejection, as well as the decision of the District Court confirming it in appeal, and to direct that the plaint be received.—2 Bom. H. C. R., 391.

Where there is a want of jurisdiction in the Court to which a plaint is presented to try the cause of action mentioned in it, the plaint should be returned to the plaintiff.—5 Bom. H. C. R., (A. C.) 212; 1 Agra H. C. R., 228; 10 W. R., 385.

Where a plaint is presented to the Judge of a district, in which plaint an officer of Government is added as a nominal defendant, no cause of action being alleged against him, the proper course for the District Court to adopt is either to reject the plaint or to call upon the plaintiff to amend it by striking out the name of the officer improperly added as a defendant, and, upon the plaintiff consenting to do so, to return the plaint to the plaintiff for presentation to the Court of the lowest grade competent to try it. Where the District Judge did not adopt this course, but proceeded to try the cause, the High Court annulled his decree, and (the plaintiff consenting to amend his plaint) returned it to him for amendment and presentation to the proper Court.—10 Bom. H. C. R., (A. C.) 17.

A Judge, in considering, under sec. 32 of the Civil Procedure Code, whether he should admit or reject a plaint, is wrong in referring to documents and facts not stated in, or annexed to, the plaint, nor ascertained by

him by interrogation of the plaintiff, although such documents and facts may have been on record in other proceedings in the Judge's Court. In a plaint claiming damage for an unsuccessful criminal prosecution of the plaintiff by the 1st defendant, and sanctioned by the 2nd defendant as a Subordinate Judge, the plaintiff (though stating in the plaint that the 2nd defendant "maliciously, and without authority," sanctioned the prosecution, and that the Magistrate before whom it was brought held that there was no cause whatever for the charge,) did not allege in the plaint that the 1st defendant prosecuted him (plaintiff) maliciously and without any reasonable or probable cause, or that the prosecution was sanctioned by the 2nd defendant without reasonable or probable cause. *Held* that the plaint was properly rejected, and that there was no good ground for allowing the plaint to be amended, the plaintiff having delayed the filing of it until the last day but one allowed by the law of limitation. *Quære*.—Whether the first and second defendants could properly be joined in such an action? In every such plaint, plaintiff should name the amount damages which he seeks to recover as compensation for the injury of which he complains.—10 Bom. H. C. R., (A. C.) 182.

A suit a set aside to false sale-deed was sufficiently valued at the sum mentioned in that sale-deed. And even if this were not so, it was the duty of the Court, in which such suit was preferred, to give the suitor the option of supplying such additional stamp as was thought necessary before rejecting the plaint.—1 N.-W. P. H. C. R., 17; Ed. 1873, 16.

Where it appears that the relief sought in a suit has been undervalued, and that the Court is not competent, by reason of the real value of the relief sought, to try the suit, the plaint must be returned to the plaintiff under sec. 57 of the Civil Procedure Code, although the defendant may have been called upon to enter upon his defence and has filed his written statement. An order dismissing a suit on the ground that, by reason of the value of the relief sought, the Court has no jurisdiction, is an order affecting the merits, and an appeal lies from such order. See *Muzhur Ali v. Basoo* (8 W. R., 47.)—11 C. L. R., 300.

If at the hearing of a suit it proves to be undervalued, and if the Court would not have jurisdiction to entertain it if properly valued, the suit ought to be dismissed.—8 W. R., 47; 2 Hay's Rep., 386.

Were a plaint is rejected under sec. 32, Act VIII of 1859; the plaintiff can bring a suit on the same subject-matter, provided he is not barred by lapse of time.—14 W. R., 289.

The Deputy Registrar has no authority to make an order returning a petition of appeal when the stamp-fee paid upon is insufficient. The right course for that officer, if his requirements as to stamps are not complied with, is to lay the matter before the Court. But if the appellant is ready to pay what is required, then, whether the time for filing the appeal has expired or not, the Deputy Registrar is bound to receive it, if it was originally presented in time.—24 W. R., 258.

Where a Subordinate Judge, after registering a plaint and allowing the parties to go to issue on the question of jurisdiction, found that he had no jurisdiction, it was held that he did wrong, under Act XXIII of 1861, sec. 3, in dismissing the suit. He ought to have returned the plaint to the plaintiff.—23 W. R., 263.

A plaint, which is unnecessarily prolix, or argumentative, or which contains irrelevant matter, ought to be rejected by the Court to which it

is presented, or ought to be returned to the plaintiff for amendment. A plaint which contains a prayer that the defendant may be criminally prosecuted for forgery should be rejected.—8 W. R., 295.

A plaint drawn up in what is, practically, Persian ought not to be admitted on the file, but should be rejected or returned for amendment and presentation in Urdu, the ordinary language of intercourse and business in use in the district (Patna).—8 W. R., 495.

Where a petition of appeal had been filed, time allowed for the issue of notice, and a day fixed for hearing, it was held to be the duty of the Judge, under sec. 31, Act VIII of 1859, on finding that the petition was inadequately stamped, to give the appellant an opportunity of filing the proper stamp.—11 W. R., 145.

Sec. 54 of the Civil Procedure Code may be applied at any stage of a suit.—I. L. R., 12 Al. 553.

An Appeal lies against an order rejecting a plaint on the ground of its being insufficiently stamped.—6 Cal. 249.

Sec. 54 of Act X of 1877, which directs that a plaint shall be rejected in certain cases, applies only to the initial stages of suit before a plaint has been registered.—2 Madr. 308.

The law may lay down, for purposes of revenue, certain rules for the valuation of suits; but such valuation cannot be accepted as a criterion of the actual amount or value of the claim upon which the jurisdiction of a Court depends. The actual value of the estate to which the plaintiff claims to be entitled, and not the value which it may eventually represent to the plaintiff, is the value of the subject-matter.—Bom. 538.

A plaint can only be rejected under sec. 54 of Act X of 1877 before it is registered.—8 Cal. 192.

On the 6th April, 1891, the plaintiffs obtained an order giving them leave to amend the plaint and proceedings in the suit. By the order this amendment was to be made on or before the 30th April, 1891. On the 18th August, 1891, the plaintiffs obtained a summons calling on the defendants to show cause why the time allowed for amendment should not be extended for a month and why the hearing of the suit should not be postponed. *Held*, making the summons absolute, that although the time originally fixed for amendment had expired, the Judge had a discretion to extend the time, and that under the circumstances the plaintiffs were entitled to the order asked for.—16 Bom 263.

Where, under Act VIII of 1859, sec. 336, a memorandum of appeal is returned for the purpose of being corrected, the Appellate Court should specify a time for such correction. Where an appellant presented an appeal within the period of limitation prescribed therefor, and the Appellate Court returned the memorandum of appeal for correction, the appeal, again presented some days after the period of limitation, was held presented within time, the date of its presentation being the date it was presented.—1 Al. 260.

**55.** When a plaint is rejected, the Judge shall record with his own hand an order to that effect with the reason for such order.

Procedure on rejecting plaint.

**Note.**—This section applies to Provincial Small Cause Courts.

When rejection of plaint does not preclude presentation of fresh plaint.

**56.** The rejection of the plaint on any of the grounds herein-before mentioned shall not, of

clude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

#### Notes.

This section applies to Provincial Small Cause Courts.

An appellate Court has no power to set aside a decision arrived at by the Court of first instance as to the valuation of the property in suit.—6 B. L. R., App. 11: S. C., 14 W. R., 381.

Under Act XXVI of 1867, the decision of a Court of first instance, as to the valuation of the subject-matter of a suit, is final.—6 B. L. R., App. 12; 14 W. R., 451: 6 B. L. R., App. 11: S. C., 14 W. R., 381.

A suit was brought in the Court of a Munsiff, who gave judgment for the plaintiffs, but his decree was reversed by the District Judge, on the ground that the claim was improperly valued. A second suit on the same cause of action was then brought in the Court of the Munsif, who again decided for the plaintiffs; but his decree was reversed by the District Judge, on the ground that the suit was prohibited by Reg. II. of 1827, sec. 21. The High Court, on special appeal, reversed that decision, and remanded the suit; and the District Judge then threw out the claim under sec. 2 of Act VIII of 1859, on the ground that the cause of action had already been heard and determined. In a second special appeal against this decision, *held* that the plaintiffs were not precluded from presenting a fresh plaint in respect of the same cause of action; and that the case came within the spirit of sec. 36 of Act VIII of 1859, as, there being no express power given by the Code to reject a plaint after it had been registered by reason of the claim being improperly valued, the doing so ought to have only the same effect as if the plaint had been originally rejected.—4 Bom. H. C. R., (A. C.) 110.

See I. L. R., 12 Al. 553, noted under sec. 54.

When plaint shall be returned to be presented to proper Court.

**57.** The plaint shall be returned to be presented to the proper Court in the following cases:—

(a) if a suit has been instituted in a Court whose grade is lower or higher than that of the Court competent to try it, where such Court exists, or where no option as to the selection of the Court is allowed by law:

(b) if, in a suit relating to immoveable property, but not coming under the proviso to section 16, it appears that no part of such property is situate within the local limits of the Jurisdiction of the Court to which the plaint is presented:

(c) if, in any other case, it appears that the cause of action did not arise, and that none of the defendants are dwelling, or carrying on business, or personally working for gain, within such local limits.

On returning a plaint, the Judge shall, with his own hand, endorse thereon the date of its presentation and return, the name of the

Procedure on returning plaint.



party presenting it, and a brief statement of the reason for returning it.

#### Notes.

This section applies to Provincial Small Cause Courts.

*Held* in special appeal that the lower Appellate Court was right in setting aside the proceedings of the Munsif, on the ground that the property in suit was valued at an amount beyond his jurisdiction; but the plaintiff was entitled to have the plaint returned to him that he might present it with the proper additional stamp before the proper Court.—5 B. L. R., App. 13; 15 W. R., 385.

A Civil Court has jurisdiction to determine a suit where the defendants dwell, or the cause of action arises, within the jurisdiction of the Court.—6 M. H. C. R., 43.

The fact that the cause of action arose within the jurisdiction of the Civil Court gives the Court jurisdiction in civil suits irrespective of the residence of the defendants.—5 M. H. C. R., App. 4.

In a suit filed in a District Munsif's Court to recover certain land, the defendants alleged that the value of the land was understated by the plaintiff, and exceeded by far the pecuniary limits of the Court's jurisdiction. Upon enquiry the Munsif found this allegation to be true, and directed the plaint to be returned to the plaintiff for presentation in a superior Court. The plaint having been presented in the Subordinate Court, the Subordinate Judge, on the authority of *Jagjivan Javerdhas Seth v. Magdum Ali* (I. L. R., 7 B., 487), dismissed the suit:—*Held* that the procedure adopted by the Munsif was correct.—I. L. R., 8 Madr. 62.

In all cases where no option as to the selection of the Court is allowed by law to the plaintiff, a plaint presented in a wrong Court must be returned for presentation in the proper Court.—10 Madr. 211.

A Munsif, after hearing the evidence on both sides, found that the suit had been under-valued; but instead of returning the plaint under sec. 57 of Act X of 1877, he dismissed the suit: *Held*, that the provisions of sec. 57 were imperative, and might be put into force at any stage of the hearing; and that such dismissal of the suit was a matter which affected the merits of the case, and formed a proper subject for an appeal.—8 Cal. 334.

A suit to redeem a usufructuary mortgage of certain lands was instituted in the Munsif's Court. After the suit had been admitted, and the parties called on to produce evidence, the Munsif ordered the plaint in the suit to be returned to the plaintiff for presentation in the proper Court on the ground that the suit should have been instituted in the Court of the Subordinate Judge, the value of the property in suit being beyond the jurisdiction of a Munsif: *Held* that, under Act VIII of 1859, the Munsif's order was appealable to the lower Appellate Court, and under Act X of 1877, the lower Appellate Court's order to the High Court.—1 Al. 620.

Although Act X of 1877, sec. 57, contemplates the return of the plaint should error be patent when it is first presented, yet there is nothing in the wording of that section which forbids the return of the plaint at a later stage in the suit. Where, therefore, after the issues in a suit were framed, the Court decided that it had no jurisdiction, and returned the plaint to be presented in the proper Court: *Held* that, in so doing, the Court acted under sec. 57; and its decision, not coming within the definition of a "decree" in Act XII of 1879, sec. 2, was not appealable as such, but was appealable under Act X of 1877, sec. 588, as an order.—2 Al. 357.

The plaintiff in this suit claimed in a Civil Court (i.) a declaration of his right to certain land ; (ii.) that certain leases of such land, so far as their terms exceeded the term of settlement, should be cancelled ; and (iii.) arrears of rent for such land. The Court held, as regards claim (i.), that the plaint did not disclose a cause of action, as it was not alleged that the defendant had disputed the plaintiff's right ; as regards claim (ii.) that, with reference to the terms of sec. 29 of Act XVIII of 1873, the plaintiff's cause of action had not yet arisen : and as regards claim (iii), that it was cognizable in a Court of Revenue ; and it directed that under sec. 57 of Act X of 1877 the plaint should be returned to the plaintiff to be presented to the Revenue Court. *Held* that under the circumstances the plaint should have been rejected, and not returned.—3 Al. 766.

The Court of first instance made an order returning the plaint in a suit to be presented to the proper Court, on the ground that it was not competent to try such suit. On appeal from such order the Appellate Court, holding that the Court of first instance was competent to try such suit, made an order "decreeing the appeal." It subsequently made an additional order directing that the case "should be returned for re-trial." On appeal to the High Court from such additional order, *held* that the appeal would not lie, as it was in reality one from an order passed in appeal from an order returning a plaint, which, under the last clause of sec. 588 of Act X of 1877, was final, and not an appeal from an order remanding a case under sec. 562, the character of the original order of the Appellate Court not being altered by the passing of the additional order.—3 Al. 855.

An allottee, under a private partition, sued to stay subsequent partition-proceedings brought under Reg. XIX of 1814, and to have his possession confirmed. The defendants objected to the valuation of the suit, and to the suit being heard by the Civil Courts, no proceedings having first been instituted before the Revenue Authorities. *Held* that such a suit should be considered to be one for a declaratory decree, or for something in the nature of an injunction and that, therefore the plaint should not be stamped according to the value of the entire estate. That the question, whether the Collector would have brought the lands to partition, depended upon whether they were held "in common tenancy ;" if they were not so held, the Collector would be only competent to make an assignment of the Revenue in proportion to the several portions of the land held by the shareholders. That a private partition is no bar to proceedings in the Revenue Courts under sec. 30 of Reg. XIX of 1814. A Munsif dismissed a suit, on the ground that, if it had been properly valued, it would not have come within his jurisdiction. The District Judge, affirmed the Munsif's judgment, and directed the plaint to be returned for presentation to the proper Court under sec. 57 of the Civil Procedure Code. This was not done. *Held* that a second appeal would lie. *Ajoodhia Lall v. Gumani Lall* (2 C. L. R. 134) approved. *Adjoodhya Pershad v. Kristo Dyal* (15 W. R., 165) dissented from.—8 Cal. 126.

The right to join in one suit two causes of action against a defendant cannot be exercised, unless the Court to which the plaint is presented has jurisdiction over both causes of action. The defendants, who resided and carried on business at 'Bombay,' acted as the agents of the plaintiff for the sale, purchase, and despatch of goods to 'Tellicherry,' where the plaintiff resided. The plaintiff sued the defendants for money due on account of the transactions in 'Tellicherry':—*Held*, that no cause of action arose in

'Tellicherry.' To the claim arising out of the agency-transactions the plaintiff joined a claim on account of a partnership-transaction, which claim was triable by the Court of the District Munsiff at 'Tellicherry.' The Subordinate Judge held that he had no jurisdiction to try the claim arising out of the agency-transactions, found that nothing was due to the plaintiff on account of the partnership-transaction, and dismissed the suit:—*Held*, that the plaint ought to have been returned to the plaintiff with the proper endorsement as required by sec. 57 of the Code of Civil Procedure, 1882.—7 Madr. 171.

See I. L. R., 4 Al. 478, noted under sec. 25; 7 Al. 230, noted under sec. 15; 14 Madr. 462, noted under sec. 13 of the Madras Civil Courts Act.

**58.** The plaintiff shall endorse on the plaint, or annex thereto, a memorandum of the documents (if any) which he has produced along with it; and, if the plaint be admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court, by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief or remedy, required, in the suit, in which case he shall present such statements.

If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or issued.

The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

The chief ministerial officer of the Court shall sign such memorandum and copies or statements if, on examination, he finds them to be correct.

The Court shall also cause the particulars mentioned in section 50 to be entered in a book to be kept for the purpose, and called the Register of Civil suits. Such entries shall be numbered in every year according to the order in which the plaint is admitted.

**Note.**—This section applies to Provincial Small Cause Courts.

**59.** If a plaintiff sues upon a document in his possession or power, he shall produce it in the Court when the plaint is presented, and shall, at the same time, deliver the document, or a copy thereof, to be filed with the plaint.

If he rely on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

#### Notes.

This section applies to Provincial Small Cause Courts.

A document given to a witness as a script to refresh his memory is not "received in evidence" within the meaning of sec. 39 of Act VIII of 1859, and need not, therefore, have been produced when the plaint was filed. In an action by the vendee against the vendor for breach of a contract to deliver goods "in two or three days," *held* that the measure of damages was the difference between the contract-price and the price which similar goods bore on the lapse of a reasonable time for delivery not less than three days from the date of the contract.—1 M. H. C. R., 168.

*Held* that the Court to which a plaint is presented has no authority to reject it, merely because the document upon which the plaintiff sues is not produced with the plaint, as directed by sec. 39 of Act VIII of 1859; and that the High Court has power to set aside such an order of rejection, as well as the decision of the District Court confirming it in appeal, and to direct that the plaint be received.—2 Bom. H. C. R., (A. C.) 369.

In a suit brought upon a promissory note, where the note was produced when the plaint was presented, and marked by the officer of the Court, but the Judge, at the hearing, refused to receive it, when tendered in evidence, because he found that there was no *copy* of the note among the papers, and the plaintiff's counsel was unable to explain the omission, and there being no application made to withdraw, the suit was dismissed. *Held* that the Judge ought to have received the note in evidence, as it was "produced in Court by the plaintiff when the plaint was presented;" that the plaintiff counsel was not bound, under the circumstances, to apply to withdraw the suit; and that the Judge was not justified in dismissing the suit, which was accordingly remanded under sec. 351 of the Code, with a direction that it should be restored to its original place on the register, and be tried by one of the Judges of the Court.—3 Bom. H. C. R., (O. C.) 66.

The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property, and tendered in evidence a sale-certificate, dated 20th September 1865. The first Court decided against the plaintiff, on the ground, among others, that the certificate was not registered, though registration of it was compulsory. On the 9th February 1875, the plaintiff filed an appeal in the High Court against that decree, and, on the 26th July 1875, applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February 1875, regarding the same property as that to which the certificate of the 20th September 1865 related. *Held* by the High Court that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it, or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence, which had no existence when that Court made such decree. (Distinction pointed out between this case and *Mohidin v. Mahadaji* (S. A., 437 of 1872). *Quære*—Whether, under the circumstances of this case, the Subordinate Judge, who issued the new certificate of sale on the 1st February 1875, ought to have so issued it, in order that the plaintiff might register it, the plaintiff having already lost, by his own laches, the right to register the original certificate? *Quære*.—

Whether the Court of first instance ought to have received the second certificate if it had been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing?—12 Bom. H. C. R., (A. C.) 247.

In compliance with an application for the sale of land to satisfy a decree, the Civil Court put up certain land to auction in four lots. One lot was purchased by the plaintiff for Rs. 88, and each of the other three were bought by him for less than Rs. 100, the price for the whole amounting to Rs. 111-8-0, for which amount the Court granted a single certificate of sale, dated 10th February 1874. This certificate was never registered. The plaintiff applied to be put in possession; but, the defendant resisting him, his application was rejected. On the 16th of November 1879, the plaintiff brought this suit to have his right declared to the piece bought for Rs. 88, and to recover its possession. Along with the plaint the plaintiff produced the unregistered certificate of sale of the 10th February, 1874. On the application of the plaintiff, another certificate for the same property was issued by the Court to the plaintiff on the 31st of October 1877,—that is, three years after the confirmation of sale. This was registered on the 20th of December 1877, and was produced by the plaintiff in the proceedings which gave rise to the present suit. It was obtained by the plaintiff on the 23rd of February 1880, and tendered in evidence, but was rejected under sec. 63 of the Code of Civil Procedure (Act XIV of 1882). *Held* that, although the four lots purchased by the plaintiff at the auction-sale were included in one certificate of sale, such certificate, although one instrument in form, should, for the purpose of registration, be regarded as four separate certificates of the four several lots. *Held* also that the registered certificate of sale, though issued three years after the confirmation of sale, was valid and admissible in evidence. *Vithal Janardan v. Vithojirav Putlajirav* approved, and *In re Khaja Pathanji and Tukaram v. Satvaji Khandoji* dissented from. *Held* also that the refusal to admit in evidence the registered certificate of sale under sec. 63 of the Code of Civil Procedure (Act XIV of 1882) on the ground that it had not been produced with the plaint, as required by sec. 59 of the Code, was improper, there having been no doubt of its existence at the date of suit.—I.L.R., 8 Bom. 377.

Statement in case of documents not in his possession or power.

**60.** In the case of any such document not in his possession or power, he shall, if possible, state in whose possession or power it is.

**Note.**—This section applies to Provincial Small Cause Courts.

**61.** In case of any suit founded upon a negotiable instrument, if it be proved that the instrument is lost, and if an indemnity be given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may make such decree as it would have made if the plaintiff had produced the instrument in Court when the plaint was presented, and had, at the same time, delivered a copy of the instrument to be filed with the plaint.

**Notes.**

This section applies to Provincial Small Cause Courts.

The indorsees of a cheque sued the indorser, stating in their plaint that the cheque had been lost, and that the defendant refused to give them a duplicate of it, and claiming a duplicate of it or the refund of the money they had paid the defendant on the cheque. *Held* that the plaint disclosed a cause of action against the defendant. *Held* also that the plaint should be amended by joining the drawer of the cheque as a defendant in the suit.—I. L. R., 2 Al. 754.

**62.** If the document on which the plaintiff sues be an entry in a shop-book or other book in his possession or power, the plaintiff shall produce the book at the time of filing the plaint, together with a copy of the entry on which he relies.

*Production of shop-book.*

The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, and attesting the copy if found correct, shall return the book to the plaintiff, and cause the copy to be filed.

*Original entry to be marked and returned.*

**Note.**—This section applies to Provincial Small Cause Courts.

**63.** A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

*Inadmissibility of document not produced; when plaint filed.*

Nothing in this section applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant, or handed to a witness merely to refresh his memory.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 8 Bom. 377, noted under sec. 59.

**CHAPTER VI.****OF THE ISSUE AND SERVICE OF SUMMONS.***Issue of Summons.*

**64.** When the plaint has been registered, and the copies of concise statements required by section 58 have been filed, a summons may be issued to each defendant to appear and answer the claim on a day to be therein specified,

*Summons.*



(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some other person able to answer all such questions.

Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court :

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint, and admitted the plaintiff's claim.

**Note.**—This section applies to Provincial Small Cause Courts.

**65.** Every such summons shall be accompanied with one of the copies or concise statements mentioned in section 58.

Copy or statement accompanying summons.

**Note.**—This section applies to Provincial Small Cause Courts.

**66.** If the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

Court may order defendant or plaintiff to appear in person.

If the Court sees reason to require the personal appearance of the plaintiff on the same day, it may make an order for such appearance.

#### Notes.

This section applies to Provincial Small Cause Courts.

A plaintiff, who had been ordered, under sec. 66, to appear in person in Court upon a day specified, failed to appear, and under sec. 107, read with sec. 102, his suit was dismissed. He then applied to the Court under sec. 103, for an order to set the dismissal aside, but his application was rejected. He thereupon preferred an appeal from the decree dismissing the suit under the provisions of sec. 540 :—*Held* that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under sec. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. *Lal Singh v. Kunjan* (I. L. R., 4 Al. 327.) referred to.—I. L. R., 8 Al. 20.

No party to be ordered to appear in person unless resident.

**67.** No party shall be ordered to appear in person unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits and at a place less than, fifty or, where there is railway-communication for five-sixths of the distance between within 50 or, where there is railway, 200 miles.

the place where he resides and the place where the Court is situate, two hundred miles from the Court-house.

**Note.**—This section applies to Provincial Small Cause Courts.

**68.** The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Summons to be either to settle issues or for final disposal.

Provided that, in every suit heard by Courts of Small Causes, the summons shall be for the final disposal of the suit.

**Note.**—This section applies to Provincial Small Cause Courts.

**69.** The day for the appearance of the defendant shall be fixed by the Court with reference to its current business, the place of residence of the defendant, and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Fixing day for appearance of defendants.

What shall be deemed 'sufficient time' must be determined with reference to the circumstances of the case.

**Note.**—This section applies to Provincial Small Cause Courts.

**70.** The summons to appear and answer shall order the defendant to produce any document in his possession or power, containing evidence relating to the merits of the plaintiff's case, or upon which the defendant intends to rely in support of his case.

Summons to order defendant to produce documents required by plaintiff or relied on by defendant.

**Note.**—This section applies to Provincial Small Cause Courts.

**71.** When the summons is for the final disposal of the suit, it shall direct the defendant to produce, on the day fixed for his appearance, the witnesses upon whose evidence he intends to rely in support of his case.

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

**Note.**—This section applies to Provincial Small Cause Courts.

### *Service of Summons.*

**72.** (1) If the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall ordinarily be delivered or

Delivery or transmission of summons for service.

sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of another Court than that in which the suit is instituted, and, where he is such an officer, the summons may, subject to any rules which the High Court may make in this behalf, be sent to him by post or in such other manner as the Court may direct.\*

**Note.**—This section applies to Provincial Small Cause Courts.

**73.** Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge, or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Mode of service.

**Note.**—This section applies to Provincial Small Cause Courts.

**74.** When there are more defendants than one, service of the summons shall be made on each defendant.

Service on several defendants.

Provided that, if the defendants are partners, and the suit relates to a partnership-transaction, or to an actionable wrong in respect of which relief is claimable from the firm, the service may be made, unless the Court directs otherwise, either (a) on one defendant for himself and for the other defendants, or (b) on any person having the management of the business of the partnership at the principal place, within the local limits of the Court's ordinary original civil jurisdiction, of such business.

—This section applies to Provincial Small Cause Courts.

Whenever it may be practicable, the service shall be made on the defendant in person, unless he have an agent empowered to accept the service, in which case service on such agent shall be sufficient.

Service to be on defendant in person, when practicable, or on his agent.

#### Notes.

This section applies to Provincial Small Cause Courts.

Persons merely looking after the affairs of a defendant are not agents on whom service of summons will be sufficient under sec. 49, Act VIII of 1859.—17 W. R., 33.

**76.** In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons issues,

Service on agent by whom defendant carries on business.

\* This section has been substituted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 10, for the one originally enacted.

service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

For the purpose of this section, the master of a ship is the agent of his owner or charterer.

**Note.**

This section applies to Provincial Small Cause Courts.

**77.** In a suit to obtain relief respecting, or compensation for wrong to, immoveable property, if the service cannot be made on the defendant in person, and the defendant have no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

Service on agent in charge, in suits for immoveable property.

**78.** If in any suit the defendant cannot be found, and if he have no agent empowered to accept the service of the summons on his behalf, the service may be made on any adult male member of the family of the defendant who is residing with him.

When service may be on member of defendant family.

*Explanation.*—A servant is not a member of the family within the meaning of this section.

**Note.**—This section applies to Provincial Small Cause Courts.

**79.** When the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

Person served to sign acknowledgment.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where a respondent refused to sign the acknowledgment of service endorsed on the original notice of the appeal, and the serving officer, instead of affixing a copy of the notice on the outer door of the house in which the respondent was residing, returned the notice to the Court with an affidavit stating the respondent's refusal to sign the acknowledgment, and the Court passed an *ex parte* decree against the respondent. *Held* that under the circumstances there was no due service of the notice, and that the appeal was wrongly decided *ex parte*. *Held* also that a second appeal lies from an *ex parte* decree of a lower appellate Court.—I. L. R., 16 Bom. 117.

Procedure when defendant refuses to accept service.

**80.** If the defendant or other person refuses to sign the acknowledgment.

or if the serving-officer cannot find the defendant, and  
or cannot be found. there is no agent empowered to accept  
the service of the summons on his behalf,  
nor any other person on whom the service can be made,

the serving-officer shall affix a copy of the summons on the outer door of the house in which the defendant ordinarily resides, and then return the original to the Court from which it issued, with a return endorsed thereon or annexed thereto stating that he has so affixed the copy and the circumstances under which he did so.

#### Notes.

This section applies to Provincial Small Cause Courts.

An affidavit in support of service of a writ of summons under sec. 80 of the Civil Procedure Code should show that proper efforts have been made to find out when and where the defendant is likely to be found.—I. L. R., 19 Cal. 201.

Where the service of summons has been effected on a defendant by affixing a copy of the summons on the door of his dwelling-house, the Court must decide whether the summons has been duly served by such affixing or not, and, if it decides in the negative, a new summons must be issued, or substituted service directed. Before the Court can decide in favour of the sufficiency of this mode of service, it must be satisfied that the defendant is keeping out of the way for the purpose of avoiding service. Where a summons has been transmitted by one Court to another for service by the latter, the transmitting Court is not bound, in every case, to satisfy itself that the law as to service has been strictly followed. The presumption in favour of the proceedings of a Court of Justice is that everything has been duly performed, and if the return made by the Court serving the summons states that the summons has been duly effected, that presumption must prevail, unless the return disclose some patent irregularity or clear divergence from the law. As a rule, on a return from a competent Court, that *summons has been duly effected*, it may be presumed that either personal service has been effected, or substituted service under sec. 82, or under secs. 80 and 82 combined.

As proof of due service of summons, a return from the Court of Small Causes at K was relied upon in the High Court. The return was in the following words:—"Read bailiff's endorsement on the back of the process, stating that the summons has been affixed to the defendant's house on the 22nd December 1884 at 9 A. M., and proof of the same having been duly taken by me, it is ordered that the summons be returned." *Held* that there was no sufficient service. The return itself proved the insufficiency. There was no statement, under the hand of the Judge, that the summons had been *duly effected*, and it did not appear that anything had been done beyond fixing the summons on the defendant's door. That affixing was not sanctioned after inquiry by the local Court, as required by sec. 82. All that appeared to have been done was the affixing prescribed by sec. 80, which was insufficient until confirmed under sec. 82.—10 Bom. 202.

See I. L. R., 16 Bom. 117, noted under sec. 79.

**81.** The serving-officer shall, in all cases in which the summons has been served under section 79, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when, and the manner in which, the summons was served.

**Note.**—This section applies to Provincial Small Cause Courts.

**82.** “When a summons is returned under section 80, the Court shall, if the return under that section has not been verified by the affidavit of the serving-officer, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court, touching his proceedings,”\* and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served, or order such service as it thinks fit.

Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding the service, or that, for any other reason, the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided, or in such other manner as the Court thinks fit.

#### Notes.

This section applies to Provincial Small Cause Courts.

In cases of substituted service, it is not sufficient to show that the notice has been attached to the door, unless the condition which renders such a mode of service good, *viz.*, that the person who ought to be served is keeping out of the way, has been first established to the satisfaction of the Court.—(P. C.) 2 P. C. R., 836; (19 W. R., 353; 12 B. L. R., 229). See also 22 W. R., 482; 24 W. R. 381.

Where substituted service of summons is ordered under Act X of 1877, sec. 82, a sufficient time ought, under sec. 84, to be given for notice of the fact to reach the defendant, wherever he may be; and if an *ex parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient, will set aside the decree.—I. L. R., 2 Bom. 449.

See I. L. R., 16 Bom. 177, noted under sec. 79.

**83.** The service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Effect of substituted service.

\* The words quoted have been substituted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 11, for the words, “when a summons is returned under sec. 80, the Court shall examine the serving-officer on oath touching his proceedings,” as originally enacted.



**Note.**—This section applies to Provincial Small Cause Courts.

**84.** Whenever service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

When service substituted, time for appearance to be fixed.

**Note.**

This section applies to Provincial Small Cause Courts.

**85.** If the defendant resides within the jurisdiction of any Court other than the Court in which the suit is instituted, and has no agent resident within the local limits of the jurisdiction of the latter Court empowered to accept the service of the summons, such Court shall send the summons, either by one of its officers or by post, to any Court, not being a High Court, having jurisdiction at the place where the defendant resides, by which it can be conveniently served, and shall fix such time for the appearance of the defendant as the case may require.

Service of summons when defendant resides within jurisdiction of another Court, and has no agent to accept service.

The Court to which the summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court, and shall then return the summons to the Court from which it originally issued, together with the record (if any) made under this paragraph.

**Note.**—This section applies to Provincial Small Cause Courts.

**86.** Whenever any process, issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay, and Rangoon, is to be served within any such town, it shall be sent to the Court of Small Causes within whose jurisdiction the process is to be served,

of process issued by Provincial Courts.

and such Court of Small Causes shall deal with such process in the same manner as if the process had been issued by itself,

and shall then return the process to the Court from which it issued.

**Note.**—This section applies to Provincial Small Cause Courts.

**87.** If the defendant be in jail, the summons shall be delivered to the officer in charge of the jail in which the defendant is confined,

Service on defendant in

and such officer shall cause the summons to be served upon the defendant.

The summons shall be returned to the Court from which it issued, with a statement of the service endorsed thereon, and signed by the officer in charge of the jail, and by the defendant.

#### Notes.

This section applies to Provincial Small Cause Courts.

The Court will take judicial notice of the signature of the jailor under sec. 16, Act XV of 1869 (Prisoners' Testimony Act).—4 B. L. R., (O. C.) 51.

**88.** If the jail in which the defendant is confined is not in the district in which the suit is instituted, the summons may be sent by post or otherwise to the officer in charge of such jail, and such officer shall cause the summons to be served upon the defendant, and shall return the summons to the Court from which it issued, with a statement of the service endorsed thereon, and signed as provided in section 87.

Procedure if jail be in different district.

**Note.**—This section applies to Provincial Small Cause Courts.

**89.** If the defendant resides out of British India, and has no agent in British India empowered to accept the service, the summons shall be addressed to the defendant at the place where he is residing, and forwarded to him by post if there be postal communication between such place and the place where the Court is situate.

Service when defendant resides out of British India, and has no agent to accept service.

#### Notes.

This section applies to Provincial Small Cause Courts.

A summons cannot be sent by post to any place to which letters are not registered by a post-office. A special bailiff cannot be sent to serve civil process in a foreign territory.—2 B. L. R., (A. C.) 59; S. C., 10 W. R., 349.

Where a respondent resides at Chandernagore—i. e., out of British territory—the summons or notice of appeal should be forwarded to him by post under a registered cover; and if he does not appear, a verified statement should be put in to show that he is at present, or has recently been, residing there.—15 W. R., 31.

**90.** If there is a British Resident or Agent, or a Superintendent appointed by the British Government, or a Court established or continued by the authority of the Governor-General in Council, in or for the territory in which the defendant resides, the summons may be sent to such Resident, Agent, Superintendent, or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the

Service in foreign territory through British Resident or Court.

Resident, Agent, or Superintendent, or the Judge of the Court, returns the summons with an endorsement under his hand that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be evidence of the service.\*

**Note.**—This section applies to Provincial Small Cause Courts.

**91.** The Court may, notwithstanding anything hereinbefore contained, substitute for the summons a letter signed by the Judge or such officer as he appoints in this behalf, when the defendant is, in the opinion of the Court, of a rank which entitles him to such mark of consideration.

The letter shall contain all the particulars required to be stated in the summons, and, subject to the provisions contained in section 92, shall be treated in all respects as a summons.

**Note.**—This section applies to Provincial Small Cause Courts.

**92.** When a letter is so substituted for a summons, it may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; unless the defendant has an agent empowered to accept service of summons, in which case the letter may be delivered or sent to such agent.

**Note.**—This section applies to Provincial Small Cause Courts.

#### *Service of Process.*

**93.** Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued; unless the Court otherwise directs.

The court-fee leviable for such service shall be levied within a time to be fixed by the Court before the process is issued.

This section applies to Provincial Small Cause Courts.

A plaintiff in the Munsif's Court filed a list of witnesses, but failed to deposit tulubana, or cost of the service of summons, for their attendance. The Court failed to fix a time for the service of tulubana. The processes were not served, and the Court dismissed the suit, because the plaintiff had produced no evidence in support of his claim. *Held*, under Act XXIII of 1861, sec. 2, the lower Court should first have fixed a time for the deposit of tulubana. Case remanded.—3 B.L.R., App. 25. S.C., 11 W.R., 290.

\* This section has been substituted for the original by the Civil Procedure Code Amendment Act (VII of 1888), sec. 12.

Though it is the duty of the Court to issue process after application has been made for execution, yet the law fully intends that, when the decree-holder sees that the Court has taken no steps to issue any process, he shall be diligent, and move the Court from time to time, as required, to keep him within the period of limitation.—13 W. R., 83.

**94.** All notices and orders required by this Code to be given to or served on any person shall be in writing, and shall be served in the manner hereinbefore provided for the service of summons.

Notices and orders in writing how served.

**Note.**—This section applies to Provincial Small Cause Courts.

### *Postage.*

**95.** Postage, where chargeable on any notice, summons, or letter issued under this Code, and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed by the Court before the communication is forwarded :

Postage.

Provided that the Local Government, with the previous sanction of the Governor-General in Council, may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

**Note.**—This section applies to Provincial Small Cause Courts.

## CHAPTER VII.

### OF THE APPEARANCE OF THE PARTIES, AND CONSEQUENCE OF NON-APPEARANCE.

**96.** On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard, unless the hearing be adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

**Note.**—This section applies to Provincial Small Cause Courts.

**97.** If, on the day so fixed for the defendant to appear and answer, it be found that the summons has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee leviable for such service, the Court may order that the suit be dismissed :

of suit, where not served in consequence of plaintiff's failure to pay fee for issuing.

Provided that no such order shall be passed, although the summons has not been served upon the defendant, if, on the day fixed for

Proviso.

him to appear and answer, he attends in person or by agent, when he is allowed to appear by agent.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where the Court of first instance ordered a co-defendant to be joined in the suit, but the plaintiff failed to pay the allowance necessary for the purpose of causing a notice to be served on such co-defendant, who accordingly did not appear at the hearing, *held* that the proper course for the Court to have adopted was to dismiss the suit under sec. 5 of Act XXIII of 1861. Where the Court did not adopt that course, but proceeded with the suit, and passed a decree, from which the original defendant appealed on the merits to the Assistant Judge, without taking the objection that the suit ought to have been dismissed, it was held that he could not raise this objection for the first time in special appeal. *Semble*.—The provisions contained in the first portion of sec. 5 of Act XXIII of 1861 are imperative. —5 Bom. H. C. R., (A. C.) 118.

A special appeal lay from an order passed under secs. 5 and 6 of Act XXIII of 1861 dismissing an appeal for non-service of notice in consequence of failure to deposit the cost of issuing the same.—3 W. R., Mis. 23 ; 7 W. R., 338.

A notice to a respondent having been returned unserved, owing to the omission on the part of the appellant to deposit the requisite *tulubana* in the proper Court, the default under secs. 5 and 6, Act XXIII of 1861, was held to be in no way excused by the fact of its having been committed by an ignorant *karpardaz*, or man of business, whom appellant chose to employ, rather than a *vakil*.—11 W. R., 417.

An order under sec. 97 of the Civil Procedure Code, dismissing a suit, on its being found that the summons has not been served on the defendant, in consequence of the failure of the plaintiff to pay the court-fee leviable for such service, is not appealable.—I. L. R., 9 Cal. 627.

The plaintiff sued the defendant in Bombay for damages for breach of contract. The suit was filed on the 13th May, 1890. The summons was not served on the defendant, but on the 16th May the plaintiff's agent procured his arrest before judgment. On that day he was brought before a Judge of the High Court, and was at once discharged. When the case subsequently came on for hearing, the plaintiff applied, under sec. 373 of the Civil Procedure Code (Act XIV of 1882), for leave to withdraw the suit, with liberty to file a fresh suit on the same cause of action. The defendant's counsel objected, and claimed either that the plaintiff should continue his suit to a hearing, or that the suit should be dismissed with costs, and that compensation for his arrest should be awarded to the defendant under sec. 491 of the Civil Procedure Code (Act XIV of 1882). The plaintiff contended that inasmuch as the summons had not been served on him, the defendant was not entitled to appear, and that no compensation could be awarded to him. *Held*—(1) that inasmuch as the plaintiff had by a legal process brought the defendant before the Court, the defendant had the right to appear at the hearing of the case, although no summons had been served upon him, and that he was entitled to object to the suit being dismissed under Rule of Court No. 64 ; (2) that under the circumstances the defendant was entitled to compensation for his arrest under sec. 491 of the Code of Civil Procedure (Act XIV of 1882) ; (3) that the plaintiff might withdraw the suit under sec. 373 of the Civil Procedure Code (Act XIV of

1882) with liberty to bring a fresh suit on payment of the costs incurred by the defendant in the present suit.—15 Bom. 160.

**98.** If, on the day fixed for the defendant to appear and answer, or on any other subsequent day to which the hearing of the suit is adjourned, neither party appears, the suit shall be dismissed, unless the judge, for reasons to be recorded under his hand, otherwise directs.

If neither party appears,  
suit to be dismissed.

#### Notes.

This section applies to Provincial Small Cause Courts.

When a suit is dismissed for default of the plaintiff, and no appearance has been entered by the defendant, the plaintiff can, under sec. 110, Act VIII of 1859, bring a fresh suit after a lapse of 30 days, if he be not otherwise barred by lapse of time.—3 B.L.R., App. 130. See 24 W.R., 114.

The provisions of sec. 110 of Act VIII of 1859 are properly applicable under sec. 33 of Act XXIII of 1861 to proceedings in execution-decree.—4 N.-W. P. H. C. R., 10. See 5 N.-W. P. H. C. R., 164.

The affidavit of a party alleging inability to attend from illness is not enough to satisfy the Court, but for this purpose there must be a medical certificate, or the affidavits of third parties.—Bourke's Rep., (O.C.) 115.

When a case has been struck out in consequence of the non-appearance of the plaintiff, the Court will grant a fresh summons.—1 Ind. Jur., N. S., 40.

A decree-holder having allowed the term of three years to run within a very few days of expiry before applying for execution, and then, though allowed five days to pay tulubana, having neglected to do so, his application was found to be not *bona fide*. Held that sec. 7, Act XXIII of 1861, did not apply to the case, that section applying only to suits dismissed under the provisions of sec. 5 of that Act.—15 W. R., 473.

A District Munsif struck a case off the file of his Court on neither party appearing. Subsequently, on an application by the plaintiffs, the case was restored. The order of restoration was reversed by the District Judge:—Held, (1) that the order to strike off the case was illegal; (2) that assuming that the case was dismissed, no appeal lay to the District Judge, whose order was accordingly made without jurisdiction.—I. L. R., 10 Madr. 270.

A suit was filed in a Munsif's Court, but neither party appeared for the hearing, and the suit was dismissed. The Munsif subsequently on review made an order restoring the suit, and eventually decreed for the plaintiff. The defendant, in the meanwhile, appealed to the District Court against the order of restoration, and after the date of the decree, the District Court made an order allowing the defendant's appeal. The plaintiff appealed to the High Court, and the order of the District Court was reversed and the order of restoration upheld. Held that the Munsif's decree was not passed without jurisdiction.—10 Madr. 190.

See I. L. R., 15 Madr. 111, noted under sec. 13.

**99.** Whenever a suit is dismissed under section 97 or section 98, the plaintiff may (subject to the law of limitation) bring a fresh suit; or if, within the period of thirty days from the date of the order

In such case plaintiff  
may bring fresh suit,



dismissing the suit, he satisfies the Court that there was a sufficient excuse for his not paying the court-fee required within the time allowed for the service of the summons, or for his non-appearance, as the case may be, the Court shall pass an order to set aside the dismissal, and appoint a day for proceeding with the suit.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where the plaintiff in a suit failed to deposit the 'talubana' required for the purpose of issuing summonses to certain persons whom it was proposed to make defendants in addition to the original defendants in such suit, and the Court on that ground irregularly dismissed such suit as against such original defendants by an order purporting to be made under sec. 110 of Act VIII of 1859 on a day previous to that fixed for the hearing of such suit, *held* that such order of dismissal did not preclude the plaintiff from instituting a fresh suit.—I. L. R., 2 Al. 318.

See I. L. R., 10 Madr. 270 & 290, noted under sec. 98.

**99.A** If, after a summons has, whether before or after the first day of June 1882, been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from such return to apply for the issue of a fresh summons, and to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served or that such defendant is avoiding service of process, the Court may dismiss the suit as against such defendant.

In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

**Note.**—This section applies to Provincial Small Cause Courts.

**100.** If the plaintiff appears, and the defendant does not appear, the procedure shall be as follows:—

(a) if it is proved that the summons was duly served, the Court may proceed *ex-parte*:

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant:

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing

of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

If it is owing to the plaintiff's default that the summons was not served in sufficient time, the Court shall order him to pay the costs occasioned by such postponement.

#### Notes.

This section applies to Provincial Small Cause Courts.

A defendant against whom a decree has been passed *ex parte*, and who has not adopted the procedure provided by sec. 108 of the Code of Civil Procedure, can appeal from such decree under the general provisions of sec. 540. *Lal Singh v. Kunjan* (I. L. R., 4 Al. 387) dissented from.—I. L. R., 9 Madr. 445.

The plaintiff in a suit described one of the defendants thus: "N. C., guardian on behalf of her own minor son, S. C." Upon the presentation of the plaint the Court directed the plaintiff to produce an affidavit to the effect that the mother of the minor defendant was his guardian, and, an affidavit having been made that the "minor defendant" was under the guardianship of the mother, ordered a suit to be registered, and summons to be issued on the defendants. N. C. then filed a written statement, alleging that she held the land in suit on behalf of the minor. *Held* that, having regard to the orders of the Court and the allegations made in the plaint and written statement, the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, could not, without proof of prejudice, invalidate a decree against him in the suit. *Held* also that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit, when it appeared on the face of the proceedings that the Court had sanctioned the appointment. *Held* (O'KINEALY, J., dissenting) that the fact that an order appointing a guardian *ad litem* at the instance of the plaintiff was made *ex parte* was not necessarily fatal to the suit, unless it could be shown that the minor had in any manner been prejudiced thereby. *Per* MITTER, J. (PETEHRAM, C. J., concurring), that, although the matter of the appointment of a guardian *ad litem* is left to the discretion of the Court, it is always desirable that the appointment at the instance of the plaintiff should not be made, unless the minor, or his friends and relatives in whose care he may be, failed to move the Court for that purpose within a reasonable time after receiving notice of the institution of the suit.—14 Cal. 204.

The plaintiff sued, under sec. 3, clause *w*, of Act XVII of 1877, for money due on a bond, dated the 8th September 1877. The defendant, though duly summoned, did not appear on the day fixed in the summons, which was for the final disposal of the suit. The Court, therefore, proceeded with it *ex parte*. The defendant, being subsequently summoned and examined as a witness under sec. 7 of the Act, admitted the bond sued upon, but pleaded part-payment of the plaintiff's claim. He then applied to the Court that his witnesses should be summoned, and that their evidence be taken in support of his allegation. The Subordinate Judge was of opinion that he (defendant) was not entitled to offer the evidence. On his referring the case to the High Court, *held*, that it was his duty to summon the witnesses named by the defendant.—5 Bom. 184.

When the plaintiff in a suit appears at the hearing, and the defendant does not appear, the proper procedure to follow is that prescribed by sec.

100 of Act X of 1877, whether the defendant has been summoned only to appear and answer the claim, or has in addition been summoned to attend and give evidence. It is not necessary, before proceeding to hear and determine a suit *ex parte* under sec. 100, that all the process prescribed by law for compelling the attendance of the defendant as a witness should be exhausted. It is sufficient that due service of the summons upon the defendant is proved. If such proof is not given, the courses to be adopted are one or other of those mentioned in clauses (b) and (c) of sec. 100 according to the circumstances of the case. The plaints and records in a number of suits upon bonds instituted by the same plaintiff against different persons were destroyed by fire. The suits were re-instituted, and duplicate copies of the plaints were filed. The only evidence of the contents of the bonds, from which the plaints were prepared, consisted of a register kept by the plaintiff's gumashtas of the names of the executants of the bonds, the matter in respect of which the bonds had been given, the amounts due thereunder, and the names of the attesting witnesses. From this register the duplicate plaints had been prepared. *Held* that, though the register was not secondary evidence of the contents of the bonds, yet it was a document which might be referred to by a witness for the purpose of refreshing his memory under sec. 159 of the Evidence Act.—5 Cal. 353.

See I. L. R., 7 Al. 538, noted under sec. 101.

**101.** If the Court has adjourned the hearing of the suit *ex-parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit, as if he had appeared on the day fixed for his appearance.

Procedure where defendant appears on day of adjourned hearing, and assigns good cause for previous non-appearance.

#### Notes.

This section applies to Provincial Small Cause Courts.

The first hearing of a suit was fixed for the 12th December 1883, on which day the defendant did not appear, and the case was adjourned to the 18th December, and, as the defendant did not then appear, a decree was passed in favour of the plaintiff. A *vakalatnama*, had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment.

*Held* that these acts on the defendant's part did not constitute an "appearance" by him within the meaning of sec. 100 of the Civil Procedure Code, which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under sec. 64; that the decree was therefore *ex parte* within the meaning of secs. 100 and 108, and an appeal consequently lay to the High Court under sec. 583, clause (9) from an order rejecting an application to set the decree aside. (2 Al. 67 distinguished.)—I. L. R., 7 Al. 538.

Defendants, who put in no appearance at the original hearing, and who have subsequently been refused leave to appear and defend are at liberty, where an *ex parte* decree has been passed against them, to appeal to a

higher Court, without previously taking any steps to have the *ex parte* decree set aside under sec. 108 of Act X of 1877.—8 Cal. 272.

See I. L. R., 5 Bom, 184, noted under sec. 100.

**102.** If the defendant appears, and the plaintiff does not appear, the Court shall dismiss the suit, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Procedure where defendant only appears.

#### Notes.

This section applies to Provincial Small Cause Courts.

The abandonment of proceedings taken under sec. 269, Civil Procedure Code, 1859, does not amount to dismissal in default under sec. 114, and is no bar to plaintiff's bringing a fresh suit.—10 W. R., 61.

The dismissal of a suit for the plaintiff's non-attendance is a highly penal matter, and the punishment ought not to be inflicted unless after a distinct order to attend, and upon proof that the plaintiff has deliberately disobeyed the Court's order.—17 W. R., 141.

An order made in a suit "number kharij or struck off" is not a passing of judgment against the plaintiff by default under sec. 114, Act VIII of 1859, precluding him from bringing a fresh suit in respect of the same cause of action.—17 W. R., 219.

In a case struck off for default, if the order has been properly made under Act VIII of 1859, sec. 114, the remedy is by motion under sec. 119; if improperly made, it is open to appeal.—21 W. R., 124.

The plaintiff duly attended the Court on the day fixed for the hearing of his case, and waited for some time, as the Judge happened to be sitting on that day at first in the appeal Court. Believing that, when the Judge took his seat in his own Court, a part-heard case would be proceeded with and would occupy some time, the plaintiff left the Court-house and went to assist his employer, who had sent for him to explain some matters connected with a mercantile transaction. The plaintiff returned to the Court in about half an hour, and found that in his absence his suit had been called on for hearing and dismissed under sec. 102 of the Civil Procedure Code (Act XIV of 1882). On application under sec. 103 to set aside the order of dismissal, *held*, refusing the application, that the above circumstances did not amount to "sufficient cause" for his non-appearance when his suit was called on for hearing. He was not taken unawares. He was under no compulsion to leave the Court, nor was his absence due to any weighty Cause. He accepted the risk of the case being called on his absence.—I. L. R., 13 Bom. 12.

Sec. 103 of the Civil Procedure Code does not take away the remedy of appeal from a decree dismissing a suit under sec. 102. *Lal Singh v. Kunjan*, (I. L. R., 4 Al. 387), *Ajudhia Prasad v. Balmukand* (I. L. R., 8 Al. 354), and *Partab Rai v. Ram Kishen* Weekly Notes, 1883, p. 171, referred to.—9 Al. 427.

In a suit, issues having been settled, the final hearing of the suit was adjourned to a fixed date for final disposal. On that date plaintiff did not appear, and the suit was dismissed. *Held* that, as this was not a case

which had been adjourned in favour of either party to enable him to "produce his proofs, or cause the attendance of his witnesses," the order was not one which could properly be made.—1 Madr. 287.

See I. L. R., 16 Cal. 98 & 545, 13 Madr. 510, noted under sec. 13.

**103.** When a suit is wholly or partially dismissed under Decree against plaintiff by default bars fresh suit. sec. 102, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside; and, if it be proved that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall set aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

No order shall be made under this section unless the plaintiff has served the defendant with notice in writing of his application.

#### Notes.

This section applies to Provincial Small Cause Courts.

Per GARTH, C.J.—The operation of sec. 103 of the Code of Civil Procedure is confined to those cases only where a second suit is brought for the same object and cause of action as the suit which is dismissed.—I. L. R., 9 Cal. 426.

Where a suit was adjourned on the application of the defendant, and on the day to which the case was adjourned the plaintiff was absent, and the suit was dismissed for default by an order purporting to be passed under sec. 158 of the Code of Civil Procedure, 1882:—*Held*, that sec. 158 was not applicable to the circumstances, and that the plaintiff was entitled to apply under sec. 103 to have the dismissal set aside.—7 Madr. 41.

See I. L. R., 9 Al. 427 & 13 Bom. 12, noted under sec. 102; 15 Madr. 111, noted under sec. 13.

**104.** If, on the day fixed for the hearing of a suit against a defendant residing out of British India, who has no agent empowered to accept service of summons, or on any day to which the hearing has been adjourned, the defendant does not appear, the plaintiff may apply to the Court for permission to proceed with his suit, and the Court may direct that the plaintiff be at liberty to proceed with his suit in such manner and subject to such conditions as the Court thinks fit.

Procedure where defendant residing out of British India does not appear.

**Note.**—This section applies to Provincial Small Cause Courts.

**105.** If there be more plaintiffs than one, and one or more of them appear and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs

Procedure in case of non-attendance of one or more of several plaintiffs.

pearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, and pass such order as it thinks fit.

**Note.**—This section applies to Provincial Small Cause Courts.

**106.** If there be more defendants than one, and one or more of them appear, and the others do not appear, the suit shall proceed, and the Court shall, at the time of passing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

Procedure in case of non-attendance of one or more of several defendants.

**Note.**—This section applies to Provincial Small Cause Courts.

**107.** If a plaintiff or defendant, who has been ordered to appear in person under the provisions of section 66 or section 436, does not appear in person, or shew sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing sections applicable to plaintiffs and defendants, respectively, who do not appear,

Consequence of non-attendance, without sufficient cause shewn, of party ordered to appear in person.

**Note.**—This section applies to Provincial Small Cause Courts.

*Of setting aside Decrees ex parte.*

**108.** In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside;

Setting aside decree *ex-parte* against defendant.

and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court, or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit.

**Notes.**

This section applies to Provincial Small Cause Courts.

Process for enforcing judgment is executed within the meaning of sec. 119 of Act VIII of 1859 and sec. 58 of Act X of 1859, when an attachment of the property of the defendant has taken place; and any application by the defendant under those sections to set aside an *ex-parte* decree must be made within thirty and fifteen days respectively from the date of the attachment.—B. L. R., Sup. Vol., 947; 9 W. R., 236.

Sec. 119, Act VIII of 1859, does not apply to a defendant who is only absent on an adjourned hearing. It relates only to one who has never appeared.—3 B. L. R., Ap. 121; 12 W. R., 169.



Sec. 119 of the Civil Procedure Code (Act VIII of 1859) is made applicable to rent-suits under Act VIII of 1869 (B. C.) by the provisions of sec. 34 of the latter Act. Sec. 103 of Act VIII of 1869 (B. C.) does not apply to applications for a re-hearing after an *ex parte* decree on the ground of ignorance of the suit.—7 B. L. R., 207 ; 16 W. R., 17.

A suit was postponed on the application of the defendant's pleader ; but on his applying for further adjournment at the time fixed for hearing, the application was refused ; the Court tried the case, the defendant not appearing, and not being represented, and gave a decree for the plaintiff. An appeal was allowed, and the case was sent back for retrial.—8 B. L. R., 44 ; 15 W. R., 503.

Where a decree is passed *ex parte* in an original suit, the defendant has no right to a special appeal, even though his appeal may have been entertained by the Civil Court.—1 M. H. C. R., 189.

A party to a suit, against whom a judgment *ex parte* has been passed in regular appeal, cannot prefer a special appeal from that judgment. He must first proceed under sec. 119 of the Civil Procedure Code to get rid of the *ex parte* judgment against him —3 M. H. C. R., 109 ; 6 M. H. C. R., 1.

The first hearing of a suit took place on the 16th November, when issues were settled, and the final hearing of the suit was fixed for the 22nd January following. On the 22nd January the plaintiff changed her vakil, and applied by the new vakil for a summons for a witness ; and on the 23rd the new vakil stating that, owing to the absence of his witnesses, he was not prepared to go on with the case, the Judge dismissed the suit. *Held* that, under sec. 148 of the Civil Procedure Code, the Judge was justified in dismissing the suit. Sec. 119 of Act VIII of 1859 does not empower a Judge to set aside a decree passed under sec. 148 of the same Act. *Semble*, sec. 114, as well as secs. 110 and 111 of the Code, have reference only to the first hearing of the suit, which may be either on the day named in the summons, or on a subsequent day to which such hearing may have been adjourned.—4 M. H. C. R., 56.

Where a defendant appears in person or by pleader, the fact that the defendant is not prepared to put in a written statement does not warrant the trial of a suit *ex parte*.—2 M. H. C. R., 311.

The parties to a suit appeared on the day fixed for the first hearing. On the application of the defendant's vakil the hearing was adjourned, in order to enable them to obtain certain documents from the Collector's office, and afterwards put in written statements. This they failed to do on the day to which the hearing was adjourned, and when the suit came on for final hearing, they were still in default, and also failed to appear in person or by vakil. A decree was given for the plaintiff. *Held* that the decree of the original Court was not an *ex parte* decree under sec. 147 of the Code of Civil Procedure for non-appearance, but a decree under sec. 148, and was therefore appealable.—4 M. H. C. R., 254.

The effect of granting an application under sec. 119 of Act VIII of 1859 is to declare that there has not been yet a valid decree in the suit, and thereby any attachment that has issued in execution of the decree which has been set aside becomes invalid. A obtained a decree *ex parte* against B. Property belonging to B was attached in execution. While under attachment, B sold the property to C. Afterwards B applied for and obtained an order under sec. 119 of Act VIII of 1859 to set aside A's decree, and for a new trial. *Held* that C's purchase was not null and void under sec. 240 of Act VIII of 1859.—1 Bom. H. C. R., (A. C.) 17.

On appeal from the rejection of an application made under sec. 119 of Act VIII of 1859 to set aside a judgment by default, *held* that, in order to satisfy the Court "that the plaintiff was prevented by any sufficient cause from appearing," it was enough to show that there had been a *bona-fide* mistake, which was not unreasonable.—3 Bom. H. C. R., (O.C.) 60.

A Judge has no jurisdiction to grant an application, made by a defendant against whom an *ex parte* judgment has been passed, to set aside the judgment after the expiration of the thirty days allowed, by sec. 119 of the Code of Civil Procedure, for making such applications. Such an application must be made within thirty days after the *first* process for enforcing the judgment against such defendant has been executed. Though an order passed for setting aside a judgment is, on the merits of the application, final, yet where a Civil Court makes an order setting aside an *ex parte* judgment on an application presented after the period allowed by law has elapsed, an appeal against that order will lie, on the ground that it has been made without jurisdiction.—8 Bom. H. C. R., (A. C.) 44; 15 W. R., 175; 26 W. R., 99.

*Held* that the hearing of a suit in which a pleader was duly appointed on behalf of the defendant, but not instructed to answer, or instructed not to answer at all, was an "*ex parte*" hearing, and that no appeal lay from a judgment passed in such suit.—4 Bom. H. C. R., (A. C.) 206.

On an application made under sec. 119 of Act VIII of 1859 to set aside a judgment by default, *held* that the words "prevented by any sufficient cause from appearing" should be read so as to include the case of the absence of the plaintiff's counsel or attorney, when such absence has been caused by a *bona-fide* mistake. Under such circumstances, a judgment by default under sec. 114 was set aside upon payment by the attorney for the plaintiff of costs of the hearing.—2 Bom. H. C. R., (O. C.) 282; 2nd Ed. 267.

The Court of first instance refused to receive the defendant's written statement, because it had been tendered after the day on which the Court had ordered it to be filed, and the delay had not been satisfactorily explained. The Court, however, framed the issues in the presence of the defendant's pleader, who was allowed to cross-examine the plaintiff's witnesses. The Court made a decree in favour of the plaintiff. In appeal, the District Judge held that the decree of the first Court was *ex parte* under sec. 119 of the Civil Procedure Code, and that, therefore, no appeal lay. *Held* by the High Court in special appeal that the decree of the first Court was not *ex parte* under the circumstances.—1 Bom. H. C. R., 217.

A mere formal appearance in Court, with no further action than the putting in a written statement, does not prevent a decision passed in such a case from being regarded as an *ex parte* decision under the Civil Procedure Code.—1 N. W. P. H. C. R., Ed. 1873, 154.

The plaintiff's witnesses not being present on the day fixed for the hearing of the plaintiff's suit, it was dismissed for default of prosecution under sec. 114 of the Code of Civil Procedure, and was afterwards re-admitted under sec. 119. *Held* that, the default not being of the nature described in sec. 114, the suit was wrongly dismissed under that section, and for the same reason, that the suit was improperly dismissed under that section, it was also improperly re-admitted under sec. 119.—5 N.-W. P. H. C. R., 74. See also 7 N.-W. P. H. C. R., 126.

The remedy, when a case in execution of a decree is disposed of in the absence of the judgment-debtor, is that provided by sec. 119 of Act VIII of 1859, and not an appeal.—5 N.-W. P. H. C. R., 164; 4 N.-W. P. H. C. R., 10.

An application under sec. 119, Act VIII of 1859, for the re-hearing of a case decreed *ex parte*, was rejected. Under that law this order was appealable. No appeal was, however, filed until October 1st, 1877, on which date Act X of 1877 came in force. *Held* that the appeal was inadmissible, there being no provision in Act X of 1877 for such an appeal.—1 C. L. R., 402.

An *ex parte* decree having been granted in a suit against A personally and as guardian of her infant sons, the infants subsequently applied under sec. 119 of Act VIII of 1859 to set aside the decree, on the ground that the summons had not been duly served. It was proved that the summons had been duly served upon A, and the application was dismissed. On appeal to the High Court, *held* that, although so far as the decrees made A personally liable, the Court had no power to interfere, yet as the infants were not responsible for their non-appearance, it might be said that they had been prevented by "sufficient cause from appearing," and that the decrees might be set aside under sec. 119 of Act VIII of 1859 (sec. 108 of Act X of 1877) as against them.—6 C. L. R., 69.

An appearance in person or by pleader, without putting in any answer or written statement, is an appearance within the meaning of sec. 119 of Act VIII of 1859, and the judgment pronounced thereafter is not an *ex parte* judgment, and therefore an appeal will lie.—Marshall's Rep., 32; 7 W. R., 295.

A defendant in a suit instituted before the passing of Act VIII of 1859 was entitled, under sec. 387, to any advantage of right which he might have possessed under the old procedure; but this did not bar him from availing himself of any advantages which he might obtain from the new procedure—*e. g.*, a re-hearing, under sec. 119, in the case of an *ex parte* decree.—W. R., 1864, Mis., 36.

The object of sec. 119, Act VIII of 1859, was to make it imperative on a defendant against whom an *ex-parte* decree had been passed, and who desire to come in and set aside that decree, to apply to the Court as soon as possible after he had notice of the passing of the decree—*i. e.*, within a reasonable time not exceeding thirty days from the first actual execution of process to enforce the judgment.—7 W. R., 375.

Where a party applies, under sec. 119, Code of Civil Procedure, to have an *ex-parte* decree set aside, on the allegation that the decree was obtained upon a petition of confession of judgment put in by a person fraudulently employed to personate him, the Court is bound to enquire into the truth of the allegation, and, if it be established, the decree may be set aside.—6 W. R., Mis., 36.

Where a Court of first instance had admitted an application, made after the time allowed by law, to set aside an *ex-parte* decree, *held* that the Appellate Court was authorized to try in appeal whether under the law the Court of first instance had power to receive the application, and, if its order was made without jurisdiction, to set it aside.—6 W. R., 300.

Process of enforcing a judgment (within thirty days from which a defendant may apply to set aside an *ex-parte* decree) has not been executed within the meaning of sec. 119, Act VIII of 1859, until the proceedings

in execution have been brought to a termination by a sale of the property attached.—7 W. R., 198.

In a case in which one of many defendants, who was made a party to the suit, did not appear, and a decree for possession was passed without any such special orders regarding that defendant as might have been passed under sec. 116, Act VIII of 1859, *held* that no *ex-parte* judgment was passed against her, and she could not re-open the suit, under sec. 119, Code of Civil Procedure.—9 W. R., 597.

Where in the absence of a plaintiff's pleader the case was decided it was held to have been decided *ex parte*, and his proper course was held to be an application for review, not a special appeal.—10 W. R., 348.

Where a defendant entered appearance and filed a written statement, the case cannot be *ex parte*, through the defendant does not appear in person at the hearing ; and the defendant's vakil is entitled to cross-examine the plaintiff's witnesses.—11 W. R., 5.

A suit having been decreed against a number of defendants, some of whom did not appear, one (R) of the latter applied for a new trial under sec. 119, Act VIII of 1859, and the case was remanded by the Judge to the Sudder Ameen. On the last day of the new trial, another (K) of the defendants, against whom judgment had been given *ex-parte*, tendered a written statement in which it was alleged that summons had not been duly served upon her. The statement was received, and the suit was dismissed *in toto*. In appeal, the Principal Sudder Ameen reversed that part of the decree which related to K, on the ground that she had presented no petition in conformity with sec. 119 of the Code. *Held* that K was properly before the Sudder Ameen's Court, and was entitled to the benefit of the order of dismissal, and that the Principal Sudder Ameen went on too narrow a ground, and should have tried the case on its merits.—11 W. R., 18.

It is not necessary that the judgment-debtor should have special notice of any process for enforcing an *ex parte* decree ; he is bound to seek the remedy provided by sec. 119, Act VIII of 1859, within thirty days after execution of any process to enforce the judgment.—13 W. R., 436.

Where a defendant was prevented by the fraud of the plaintiff from appearing on the last day of hearing, the suit was held to have been decided *ex parte*, notwithstanding that the defendant had been represented on the first day of hearing ; and the first Court was held to have done right in reatoring the case to the file under Act VIII of 1859, sec. 119.—18 W. R., 457.

When a duly authorized vakil of the defendant under a vakalutnama filed in Court in appears for his client on the day fixed, and the case comes on for hearing, the decree passed on such hearing is not an *ex parte* decree, even though the pleader be not sufficiently instructed to proceed with the case.—20 W. R., 53.

An application by a party to set aside an *ex parte* decree, which application he has had an opportunity of making within time, and has neglected to do so, should not be entertained on the supposition that there has been collusion to defeat the defendant's rights.—26 W. R., 99.

There is no appeal from an order setting aside an *ex-parte* decree.—I. L. R., 16 Cal. 426.

A defendant failing to comply with an order to answer interrogatories, the Court, under sec. 136 of the Code struck out his defence, and, proceeding *ex-parte*, passed a decree against him.

*Held*, that the decree could not be treated, in respect of the remedy by appeal, as an *ex-parte* decree and so not appealable under the ruling in 4 Al. 387, but that an appeal would lie from the decree.—7 Al. 159.

Under sec. 540 of the Civil Procedure Code an appeal lies from decrees passed *ex parte*. If a defendant appears at the first hearing, and files a written statement, he should not be placed *ex-parte*.—3 Madr. 264.

*Held* by STUART, C. J., and STRAIGHT and TYRRELL, JJ. (OLDFIELD and BRODHURST, JJ., dissenting), that a defendant against whom a decree has been passed *ex-parte*, and who has not adopted the remedy provided by sec. 108 of the Civil Procedure Code, cannot appeal from such decree under the general provisions of sec. 540.—4 Al. 387.

An *ex-parte* decree was obtained against a defendant, who applied to have it set aside under sec. 108 of the Civil Procedure Code. The application was made more than thirty days from the date of attaching the defendant's property in execution of the decree, but within thirty days of the service of the sale-proclamation. *Held* that the application was barred by limitation under art. 164, sch ii., Act XV of 1877.—9 Cal. 869.

An *ex-parte* order was made against S, to whom a certificate under Act XL of 1858 had been granted, revoking such certificate, and granting it to A, and directing S to deliver the property of the minor to A and to render an account of all moneys received and disbursed within thirty days. In pursuance of this order a precept or injunction was served on S informing her that the certificate granted to her had been revoked, and had been granted to A, and directing her to deliver the property of the minor to A and to render him accounts of all moneys realized and expended within one month. *Held* that such precept or injunction was a "process for enforcing" such *ex-parte* order, and that it was "executed" when it was served on S, within the meaning of art. 164 of the Limitation Act, 1877.—6 Al. 14.

The only proper mode of dealing with cases, whether a regular suit or a miscellaneous proceeding, when the parties do not appear, is to dismiss it. A case so dismissed can be restored on application under sec. 108, which is, by sec. 647, applicable as well to execution proceedings as to suits and appeals.—10 Cal. 416.

See 1 L. R., 7 Al. 538 and 8 Cal. 272, noted under sec. 101.

**109.** No decree shall be set aside on any such application as aforesaid, unless notice thereof in writing has been served on the opposite party.

No decree to be set aside  
notice to opposite

**Note**—This section applies to Provincial Small Cause Courts.

## CHAPTER VIII.

### OF WRITTEN STATEMENTS AND SET-OFF.

**110.** The parties may, at any time before or at the first hearing of the suit, tender written statements of their respective cases, and the Court shall receive such statements, and place them on the record.

Written statements.

**Notes.**

This section applies to Provincial Small Cause Courts.

This section contemplates that a defendant shall, in his written statement, set forth the case he intends to make at the trial.—1.L.R., 1 Bom. 209.

A written statement of his case, tendered by a party to a suit at any time before or at the first hearing of the suit, is not liable to any court-fee and may be written on plain paper (sec. 110 of Act X of 1877). A written statement called for by the Court after the first hearing is also exempt from stamp-duty (sec. 19 of Act VII of 1870).—5 Bom. 400.

In a suit for wrongful dismissal, in which the defendants pleaded justification by reason of the plaintiff's misconduct, *held* (1) that the defendants at the hearing could not give evidence of a transaction involving instances of misconduct not set forth in their written statement. They should either have filed a supplemental written statement before the hearing, or have furnished the plaintiff with particulars of the misconduct in question, and intimated to him their intention of relying on the transaction as going to establish the general allegation of misconduct. (2) That, although the transaction in question could not be made the subject-matter of an auxiliary issue, the evidence of it, as such, could not be received, yet that questions relating to it might be put to the plaintiff in cross-examination for the purpose of affecting his credit. Supplemental written statements cannot be filed after the parties have entered upon their case at the hearing. Statements laid by clients before Counsel for the purpose of obtaining legal advice are privileged. A was employed by B, at intervals of a week or fortnight, to write up B's account-books, B furnishing him with the necessary information either orally or from loose memoranda. *Held* that the entries so made could not be given in evidence to contradict A, under sec. 145 of the Indian Evidence Act, as previous statements made by him in writing. The statements were really made, not by A, but by B, under whose instructions A had written them. *Held* also that it is only such books as are entered upon as transactions take place that can be considered as books regularly kept in the course of business with sec. 34 of the Indian Evidence Act.—4 Bom. 576.

**111.** If in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally removeable by him from the plaintiff, and if, in such claim of the defendant against the plaintiff, both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards, unless permitted by the Court, tender a written statement containing the particulars of the debt sought to be set off.

The Court shall thereupon inquire into the same, and if it finds that the case fulfils the requirements of the former part of this section, and that the amount claimed to be set-off does not exceed the pecuniary limits of its jurisdiction, the Court shall set-off the one debt against the other.

Particulars of set-off to be given in written statement.

Inquiry.



Such set-off shall have the same effect as a plaint in a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both in the original and on the cross-claim; but it shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

Effect of set-off.

*Illustrations.*

(a) A bequeaths Rupees 2,000 to B, and appoints C his executor and residuary legatee. B dies, and D takes out administration to B's effects. C pays Rupees 1,000 as surety for D. Then D sues C for the legacy. C cannot set-off the debt of Rupees 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rupees 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects, and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c.) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation, which he claims to set off. The amount not being ascertained cannot be set-off.

(d.) A sues B on a bill of exchange for Rupees 500. B holds a judgment against A for Rupees 1,000. The two claims being both definite, pecuniary demands may be set-off.

(e) A sues B for compensation on account of a trespass. B holds a promissory note for Rupees 1,000 from A, and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rupees 1,000. C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rupees 1,000. B cannot set-off a debt due to him alone by A.

(h.) A owes the partnership-firm of B and C Rupees 1,000. B dies, leaving C surviving. A sues C for a debt of Rupees 1,500 due in his separate character. C may set-off the debt of Rupees 1,000.

**Notes.**

This section applies to Provincial Small Cause Courts.

A, by deed of zur-i-peshgi, let certain lands to B to secure a sum advanced by him to her, and interest thereon. B covenanted to pay certain dues annually to A. On failure by B, A obtained a decree against him for the amount. In execution of a decree against B, C purchased his interest in the sum secured by the deed of zur-i-peshgi, and sued A to recover the same. *Held* that A was entitled in such suit to set off the amount of the decree obtained by her against B.—2 B. L. R., (A. C.) 84; 10 W. R., 380.

A and B, having obtained a decree for a sum of money against C and D, sold part of their interest therein to E, who afterwards sold the same to F. G obtained a decree against F, and in execution attached and sold F's interest in the decree obtained by A and B, and H became the purchaser of

the same. H applied for execution against C and D. A claimed to have set off the amount of a decree obtained by his son I against G, and which C alleged was held by I benami for him as a cross-decree within the meaning of sec. 209 of Act VIII. of 1859. *Held* that the decrees could not be set off. Also *held* that a special appeal lies from a regular appeal heard *ex parte*.—2 B. L. R., (A. C.) 110; 10 W. R., 450.

Where there were cross-decrees, and one of the decree-holders was, by an order of the Court made with the consent of both parties, bound, in executing his decree, to set off the amount of the decree against him, *held* that it would be inequitable to allow the other decree-holder to obtain execution in full without setting off the amount decreed against him. A decree cannot be executed, nor can it be seized and sold in portions.—3 B. L. R., (A. C.) 114; 11 W. R., 488.

Plaintiff sued in a Small Cause Court, on an instalment-bond, for Rs. 81. The bond had been executed for nuzzur or salami contemporaneously with the execution of a patta and kubuliat, by which the defendants agreed to pay the plaintiff Rs. 335 a year, for two years, as rent for certain land. The patta and kubuliat had not been registered. A previous suit brought by the plaintiff under Act X of 1859 had been, therefore, dismissed, and no oral evidence was admitted to prove the terms of the patta and kubuliat. The defendants now claimed a set-off against the amount claimed under the bond, on the footing of a contract contained in the patta and kubuliat. The Judge refused to receive them in evidence, or to receive oral evidence of their contents, and gave a decree in favour of the plaintiff, subject to the opinion of the High Court on four questions submitted by him. *Held* that the suit on the bond was properly cognizable by the Small Cause Court as a simple debt due under the bond. It was clearly not for an ab-wab or illegal cess; whether it was nuzzur or salami was immaterial. The defendant having benefited in the Act X suit by the fact that no oral evidence had been admitted to prove the contents of the patta and kubuliat, it would have been contrary to rule and inequitable to admit such evidence now in support of his claim of set-off.—5 B. L. R., App. 1; 13 W. R., 307.

A contract of guarantee is a "matter of contract and dealing" within the terms of sec. 17 of 21 Geo. III., c. 70, and therefore such a contract made by a Hindu is not affected by sec. 4 of the Statute of Frauds. When a defendant raises a claim of set-off, on the trial of that issue, he must be considered as plaintiff.—5 B. L. R., 639. As to how cases of set-off will be dealt with.—1 M. H. C. R., 396.

The purchaser of a decree sought to execute the decree, but was opposed by the judgment debtor, who sought to set-off two other decrees, obtained by herself and her sisters, against the judgment-creditor. These decrees were obtained about the date of the purchase, but it did not appear whether previously or subsequently. *Held*, in neither case could they be the subject of set-off.—6 B. L. R., App. 125; 15 W. R., 127.

In a suit brought against a lessee of a portion of an estate by one of the co-sharers for money alleged to be due as the plaintiff's share of arrears of rent for a certain period, where the claim was admitted, *held* the defendant was not entitled to set-off under sec. 121, Act VIII of 1859, the plaintiff's share of the Government revenue of the whole estate which had been paid by the defendant for the period for which the arrears of rent were alleged to be due. *Held* also that there was no such connexion between claim of the plaintiff and the counter-claim of the defendant as would en-

title the defendant, as a matter of equity apart from legislative enactment, to a set off.—13 B. L. R., 440 ; 22 W. R., 15.

The plaintiffs obtained a decree against B in the Subordinate Judge's Court. Some time afterwards B recovered a decree in the Munsif's Court against the plaintiffs. The plaintiffs thereupon applied for the attachment of this decree in satisfaction of their own against B. Before attachment, however, B assigned her decree to C. On C trying to execute B's decree against the plaintiffs, they brought the present suit for a declaration of their right to have a set-off made of the two decrees. *Held* that such a suit would not lie.—13 B. L. R., 489 ; 22 W. R., 235.

Act VIII of 1859, sec. 209, which provides for the set-off of cross-decrees, applies only to decrees of the same Court, or decrees sent to a Court for execution. Therefore, when, on application for execution of a decree in the Court of a Principal Sudder Ameen, it was sought to set off a decree obtained in the Judge's Court, which had not been sent to the Principal Sudder Ameen for execution, *held*, that sec. 209, Act VIII of 1859, did not apply. Question referred, not answered, on the ground that it did not arise in the case.—B. L. R., Sup. Vol. 203 ; 6 W. R., Mis., 72.

Secs. 121 and 195 of the Code of Civil Procedure (Act VIII of 1859) have not the effect of enlarging the right of set-off. In a suit against the acceptor to recover the amount due upon several bills of exchange, the defendant sought to set-off a claim for unliquidated damages unconnected with the bills of exchange. *Held* that defendant has no right to set-off his claim against the debt due to the plaintiffs. *Semble*, the right of set-off will be found to exist, not only in cases of mutual debts and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit.—2 M. H. C. R., 296.

The statement of a party to a suit is admissible original evidence against him to prove the contents of a written instrument. In a suit to recover balance of rent due, the defendant pleaded the pendency of a suit brought by him in the District Munsif's Court against the plaintiff for damages for illegal dispossession, and that he had given credit against the amount of damages for the balance of rent due. *Held* that the pendency of the suit in the District Munsif's Court was not a bar to the present suit, but that it was open to the Court in its discretion to postpone the hearing of the present suit until the District Munsif had given his decision.—3 M. H. C. R., 158.

The right set-off exists where there are cross-demands arising out of one and the same transaction, or where they are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit. In a suit to recover money due under a contract made between the plaintiff and defendants, *held* that the defendants were entitled to set-off the amount of damages which the defendants had proved they had sustained by reason of the plaintiff's breach of the contract sued on. Where a written contract, liable to an optional stamp, is put in evidence by the defendants, the plaintiff cannot recover a larger amount under it than (if stated) the optional stamp upon the instrument would have been sufficient to cover. In a suit for the recovery of money due under a written contract, the defendants admitted that a sum of Rs. 6,328-4 was due to the plaintiffs, subject to certain deductions which they claimed to be entitled to set-off against the plaintiff's

claim. The defendants put in evidence the written contract, the stamp upon which was only sufficient to cover the sum of Rs. 5,000. *Held* that, notwithstanding the admission of the defendants, the plaintiff could only recover Rs. 5,000 in the suit.—4 M. H. C. R., 120.

*Held* that a defendant may deny the plaintiff's claim, and also plead a set-off, and may obtain a decree for it, although a sum may be found to be due to the plaintiff.—6 Bom. H. C. R., (A. C.) 151.

Before cross-decrees can be set-off the one against the other, it is necessary that they should be in the same Court for execution.—3 N.-W. P. H. C. R., 104; 16 W. R., 303.

A Court cannot entertain the question of set-off if the amount claimed by the defendant exceeds the amount cognizable by it. When a defendant pleads a set-off, and claims a decree, the subject-matter of the suit is no longer the mere claim of the plaintiff, but the cross-claims of both the parties.—3 N.-W. P. H. C. R., 114.

G and R referred to arbitration disputes between them regarding the partition of their paternal estate. The concluding portion of the award ran as follows: "Both parties shall jointly satisfy the debts on the creditors demanding payment, which debts are joint, and have hereunder been declared payable by both parties. Should one party neglect to pay or show carelessness in the matter, and should the other be obliged to pay the whole amount of any such debts, the latter shall be competent to realize from the former the portion of the debt paid on his account, together with costs and interest, by the enforcement of this award, and shall also be entitled to recover the amount by suit in Court. Both parties shall act up to this award in its entirety. The sum of Rs. 338-0-9, which has been found due and payable by Gauri Sahai to Ram Sahai as per account showing the mutual dealings between the parties, shall be made good as follows, *i.e.* Gauri Sahai shall pay to Ram Sahai the whole amount of Rs. 338 0-9 by the middle of the month of Pus 1276 Fasli, either in a lump-sum or by instalments, and in case of non-payment within the said period he shall be charged with interest at the rate of one per cent. up to the day of payment." R sued to recover from G the money found to be due and payable to him under the award. G admitted the claim, but desired to set-off half the amount of certain debts, which were payable under the award by the parties jointly, and which he alone had satisfied. The Lower Appellate Court deducted from the claim items of the demand admitted by R, but refused to determine G's right to set-off the items which R disputed, on the ground that they could be more conveniently enquired into in a separate suit. It was held that sec. 27 of Act XXIII of 1861 was no bar to the hearing of a special appeal. It was also held (per Stuart, C. J., Spankie, J., dissenting) that G was entitled to demand a set off, and that the lower Appellate Court should have enquired into the disputed items of the demand, and not have referred G to a separate suit in respect of those items.—7 N.-W. P. H. C. R., 127.

If the cultivator suffers damage in execution of a decree of the Civil Court, he may sue and claim compensation for such damage; but until such damage has been ascertained and decreed, it cannot be set-off against a claim for rent.—2 Agra H. C. R., Pt. II., 177.

Under sec. 121, Act VIII of 1859, a defendant could not claim a set-off for damages in respect of an alleged breach of contract which had not been ascertained in a suit brought against him to recover the amount due on certain dishonoured hundis.—3 Agra H. C. R., 43 and 97.

A and B were the proprietors of a jote, of which B leased half of his share to C as mirasidar. The zemindar brought a suit for rent of the jote against A and B, and got a joint decree, in execution of which he put up the jote for sale. C; in order to save his mirasi right, paid the amount of the decrees before sale, and then sued A and B for the amount so paid. *Held* that C was entitled to recover, and that a claim for rent by B against C, but which C disputed, could not be admitted as an answer to C's claim in the present suit or as a set-off. It is essential to the validity of a set-off that the debts should be mutual, due from and to the same parties and in the same right. Beng. Reg. VIII of 1819, sec. 13, and Beng. Act VIII of 1869 sec. 62, discussed.—2 C. L. R., 414.

In a suit by a zemindar for arrears of rent, the defendant alleged that his tenure had been placed under the management of the Collector, and had so remained for a number of years, and that the Collector from money realised by him as manager had, in addition to satisfying all other claims of the plaintiff, paid the rents accruing, not only during the period of his management, but up to, and inclusive of the years the arrears of rent for which were claimed in the suit. The lower Court refused to consider the defendant's plea, on the ground that it was in the nature of a set-off, and that not being a debt due from the plaintiff to the defendant, it was not such a set-off as could be allowed by the Court. *Held* that the plea was a plea of payment merely, and not in the nature of a set-off.—4 C. L. R., 296.

In ascertaining the amount due for contribution in a suit by one of two persons jointly liable under a decree for rent, the Court is bound to take into consideration sums paid by the defendant, on former occasions, for rent in excess of his own share of the rent, although such sums are not claimed in his written statement, the sums paid not being in the nature of a set-off.—12 C. L. R., 539.

*Held* that, according to the true construction of sec. 246 of Act X of 1877, a purchaser under a sale in execution is not bound to enquire whether the judgment-debtor had a cross-judgment of a higher amount such as would have rendered the order for execution incorrect. If the Court has jurisdiction, such purchaser is no more bound to enquire into the correctness of an order for execution, than he is as to the correctness of the judgment upon which execution issues.—L. R., 13 I. A., 105.

A had dealings with a firm consisting of a father and two sons, who carried on business jointly. Shortly after the father's death the two brothers separated, and A dealt with each separately, having notice of the separation. A could not set off, against a claim made by one of the brothers in respect of the separate dealings between himself and A, a debt due to himself from the former joint concern.—1 Ind. Jur., N. S., 354.

A widow is liable for a debt contracted by her husband. Such debt may be set off against a debt due to her.—1 W. R., Mis., 23.

A claim for rent cannot be pleaded as a set-off in a suit for money paid by the plaintiff on account of revenue to protect a lease in the nature of a mortgage held by him.—1 W. R., 297.

In order to admit of a set-off being made when there are cross-decrees the parties must be the same, and the sum due under each decree or decrees must be definite.—5 W. R., Mis., 12.

A judgment-debtor is entitled to set-off a decree whether the judgment-creditor may or may not intend to object on appeal to the judgment debtor's decree.—5 W. R., Mis., 52.

A set-off is not admissible in a suit for mesne-profits, which is not a suit for a debt within the meaning of sec. 121, Act VIII of 1859.—5 W. R., 160.

Where execution of A's decree against B was stayed, pending the passing of a decree in B's cross-suit, *held* that no subsequent purchase of B's rights and interests in his cross-suit could be set up as a bar to A's rights to attach the whole of the decree in the cross-suit, in execution of his decree against B.—7 W. R., 219.

The decree must be under execution at the same time,—7 W. R., 535.

In a suit for money claimed on account of the carriage of goods in which defendant pleaded non-indebtedness and a set-off on account of damage caused to the goods, *held* that defendant could not answer the claim with the set-off on account of damages; though the extent, if any, to which defendant was entitled to draw back might be put in issue, after which it would still be open to defendant to bring an action against plaintiff for special damages.—10 W. R., 295.

An award of private arbitration *per se* did not come under the provisions of sec. 209 of Act VIII of 1859, so as to be set-off against a decree of Court.—11 W. R., 144.

S had against M in the Rungpore Court a decree for costs which he removed for execution to the Court of Beerbhoom. On this M applied to the latter Court, under sec. 209, Act VIII of 1859, for stay of execution pending the decision of another suit which he had brought against S. *Held* that, on the decision of the other suit, it ought to have been ascertained which party had a decree for the larger sum, and that execution should have been taken out by that party only, and for so much as should remain after deducting the smaller sum, which should have been entered on the decree for the larger sum.—12 W. R., 212.

When a decree in favour of an appellant describes a set of costs as due by the appellant to the respondent, it means, not that any sum should be actually paid to the latter, but that the costs in question should be deducted from the gross amount decreed, and the remainder only recovered under the decree, sec. 209, Code of Civil Procedure, had no application in such a case.—12 W. R., 308.

Where two parties have to recover sums from each other under the same decree (not cross-decrees), the party entitled to the lesser sum cannot be allowed to take out execution against the party entitled to the larger sum, and the Court is bound to direct a set-off or to enter satisfaction of the smaller sum upon the decree.—13 W. R., 106.

Where a widow administering her husband's estate sued to recover certain moveable property wrongly appropriated by her son, who pleaded a set-off on account of a claim against his father, *held* that defendant was rightly referred to a separate suit.—14 W. R., 136.

Under sec. 121, Act VIII. of 1859, a defendant, desirous of setting off against the claim of the plaintiff the amount of any payment made by him on plaintiff's account, was bound to tender a written statement containing the particulars of his demand.—14 W. R., 473.

A liquidated sum due on a bond is capable according to law, even without an agreement to that effect, of being set-off against sums due for rent. 16 W. R., 225.

A Revenue Court acting under the provisions of sec. 24, Act X of 1859,



had jurisdiction to allow a set-off for any sums which the agent might either have paid to his principal directly, or used for the benefit of his principal with his sanction and authority.—18 W. R., 339.

Where there are cross-decrees for possession and mesne-profits in respect to the same land, the earlier decree comprehending only a part of the land embraced in the latter, each party may take out execution and be entitled to receive wasilat separately.—16 W. R., 256.

A set-off cannot be allowed for costs not actually awarded as where a decree of the High Court gave the successful appellant costs of that Court and of the lower Appellate Court, but omitted to award the costs of the first Court.—16 W. R., 308.

A decree which is incapable of being enforced cannot be set-off against a decree which is alive.—16 W. R., 308.

Setting off an unascertained sum against another is a mode of settlement which, if suggested to the parties as a compromise, may with their assent, be a fit end of a litigation, but cannot properly be made the basis of a decree between hostile litigants.—17 W. R., 113; 10 B. L. R., 45.

It is not equitable to allow a set-off against a claim relating to a particular account stated of a matter of another nature altogether.—17 W. R., 177.

Where a Court makes two different awards of costs in one and the same decree, when it ought to have made a decree only for the difference between them, *held* that execution could only be taken out for the difference between the two amounts awarded.—19 W. R., 187.

Where a defendant claims a right of set-off arising out of one and the same transaction as that in which the suit originated, it is not equitable to drive him to a cross-suit: a decree under Act VIII. of 1859, sec. 195, and the latter portion of sec. 121, being of the same effect and subject to the same rules as if it had been made in a separate suit.—20 W. R., 410.

An indefinite claim for damages in the nature of unascertained mesne-profits cannot be pleaded as a set-off against a specific claim for rent of later years. Such damages must be sued for separately. In a suit for rent a defendant has no right to set-off against the plaintiff's claim money in deposit with the plaintiff, unless such money was due and payable to the defendant at the time the suit was brought.—22 W. R., 1.

In a suit for arrears of rent, where defendant pleaded that, under an arrangement between him and plaintiff's ancestors, payment had been made by him in cash or in kind, and asked for an account to be taken, the lower Court was held to have been wrong in decreeing the suit, on the ground that it could not go into evidence on a question of set-off in a rent-suit, and was bound to take an account.—23 W. R., 20.

Plaintiffs, as being entitled collectively to an 11-anna share of the jumma of a talook, and alleging that they had obtained such portion of their share as the 14-anna talookdars were liable for, sued the 2-anna sharer for what he ought to have contributed. The lower Appellate Court, finding that the defendant had a 2-anna share in the zemindari, as well as in the Shikmi, considered that the one right might be set-off against the other, and that the plaintiffs had consequently no claim against the defendant. *Held* that this conclusion was erroneous, for though there were in a certain sense opposing rights, still they were not mutual rights as between the parties to the present suit. The plaintiffs were entitled to get a 2-anna share of the jumma from the defendant and the 14-anna talookdars jointly, and

the defendant was entitled to get a like share from these 14-anna talook dars and himself jointly, but the defendant had no right to set-off the debt thus due to him against the debt due to the plaintiffs from the same persons.—23 W. R., 134.

A, got a decree against B, who subsequently got a larger decree against A, which he sold to C. After that A executed his decree, and put up B's decree for sale and bought it himself. C then took out execution against A, who having unsuccessfully put in a claim under Act VIII. of 1859, sec. 246, brought a suit to have his claim established, and the sale of B's decree to C declared collusive. Both the lower Courts found that the sale was *bona fide*. *Held* that this finding could not be set aside on special appeal, but that, when C took out execution, A might apply for a set-off under section 209.—24 W. R., 299.

Sec. 195, Act VIII. of 1859, which enabled a defendant to obtain a decree against a plaintiff in respect of a counter-claim, was only applicable where defendant had been allowed to "set off" a demand against plaintiff's claim, and did not apply to a case where, in ascertaining a defendant's liability for mesne-profits, deductions were allowed from the rent proved to have been received, in the nature of allowances made for costs of cultivation or collection expenses.—25 W. R., 275.

When the defence raises a cross-demand which is found to arise out of the same transaction as, and is connected in its nature with, the plaintiff's suit, the defendant is entitled to have an adjudication of it, although it may not amount to a set-off under sec. 111 of the Civil Procedure Code. *Bhagbat Panda v. Bamdeb Panda* (I. L. R., 11 Cal. 557) relied on. *Clark v. Ruthnavaloo Chetti* (2 M. H. C. R., 296) referred to.—I. L. R., 16 Cal. 711.

In a suit in which the plaintiff sued, as son of a deceased vakil, to recover the amount of a promissory note and bond executed by the defendant to his deceased father, the defendant alleged in his written statement that the plaintiff's father had collected funds belonging to him, as his vakil, exceeding the amount due on the promissory note and bond and asked for a decree for the difference :—*Held*, (1) that the written statement must be regarded as a plaint in regard to the set-off and should have been stamped accordingly : (2) that if the plaintiff claimed as the heir and representative of his father the set-off was rightly pleaded ; (3) that when a memorandum of appeal is insufficiently stamped the deficient stamp duty should be levied by the Appellate Court.—15 Madr. 29.

In a suit brought by the plaintiff to recover Rs. 36-7-9 from the defendant, under the Small Cause jurisdiction of a Subordinate Judge, the defendant claimed to set-off Rs. 72, which exceeded the pecuniary jurisdiction of the Judge as a Small Cause Judge. On reference to the High Court, *held* that the set-off might be pleaded by the defendant. The Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off.—12 Bom. 31.

A written statement containing a claim of set-off is chargeable with the court-fee which would be payable on a plaint of that nature.—13 Bom. 672.

The provision of the Code, sec. 111, does not take away from parties any right to set-off, whether legal or equitable, which they would have had independently of that Code. And such right exists, not only in cases of material debts and credits, but also where cross-demands arise out of the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant

should be driven to a cross suit. (2 M. H. C. R., 296 and 4 M. H. C. R., 120 followed.)—I. L. R., 11 Cal. 557. Also 7 Al. 284.

The provisions of Act X. of 1877 do not give the right to set-off claims for unliquidated damages, but that Act does not take away any right of set-off, whether legal or equitable, which parties to a suit would have independently of its provisions.—4 Bom. 407.

Where, in a suit for the price of goods sold and delivered, the defendant admitted that there was a sum of Rs. 1,159-12 due by him to the plaintiff, but sought to set-off the sum of Rs. 972 as damages sustained by him by reason of the non-delivery of some of the goods contracted for: *Held* that as the claim of the defendant against the plaintiff was connected with the same transaction, and arose out of one and the same contract, as that in respect of which the plaintiff's suit was brought, and as the amount of the defendant's claim was capable of being immediately ascertained, the defendant might set-off his claim.—4 Bom. 407.

The usufructuary mortgagee of certain lands sued the mortgagor for the money due under the mortgage. The mortgagor alleged that the mortgagee had committed waste, and was liable to him for compensation, which he claimed to set-off. *Held* that, under Act X. of 1877, sec. 111, the amount of such compensation could not be set-off.—2 Al. 252.

The heirs to M, deceased, appointed A, one of the heirs, manager of M's estate with a view to the payment of the debts due by the deceased. A creditor of the deceased sued his heirs to recover his debt, and obtained a decree, in execution of which the share of Z, one of the heirs in M's landed estate, was sold. The sale-proceeds exceeded Z's share of such debt, and she sued the other heirs for contribution in respect of the difference. The defendants claimed a set-off in respect of Z's share of the liabilities of M's estate which had been satisfied by A as manager. *Held* that the set-off claimed could not be entertained in such suit.—5 Al. 299.

The defendant was lessee from Government of a bridge of boats over the Ganges under a lease for five years, the consideration for which was payable by instalments extending over the term of the lease. The lease contained, amongst other provisions one to the effect that the Government, if it saw fit at the expiration of the lease to farm the bridge to any other contractor, should be bound to take over the lessee's plant at a fair valuation to be determined by arbitration; and another clause provided that "should the Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible he will be entitled to compensation from Government for all losses." The lessee died before the expiration of the lease, and the Magistrate of the District, acting on behalf of the Government, proceeded to deprive his representatives of the use of the bridge and to seize the stock and materials. The Magistrate then directed two persons to assess the value of the stock, which was ultimately fixed at Rs. 10,900. The Magistrate added a percentage, bringing the total amount up to Rs. 12,100; and a suit was filed on behalf of Government against the representatives of the deceased lessee giving credit to the defendants for such amount, and claiming the balance due in respect of the last two instalments under the contract. *Held* that the sum of Rs. 12,100 assessed in the manner above described could not strictly be regarded as a set-off. The suit was one for balance of account and the defendants were entitled to dispute the correctness of the plaintiff's estimate of the item allowed in their favor.—13 Al. 296.

See I. L. R., 15 Madr. 290, noted under sec. 2 of the Transfer of Property Act.

No written statement to be received after first hearing.

**112.** Except as provided in the last preceding section, no written statement shall be received after the first hearing of the suit :

Provided that the Court may, at any time, require a written statement or additional written statement from any of the parties, and fix a time for presenting the same :

Provisoos.

Provided also that a written statement, or an additional written statement, may, with the permission of the Court, be received at any time for the purpose of answering written statements so required and presented.

#### NOTES.

This section applies to Provincial Small Cause Courts.

Counsel for defendant applied to be allowed to file an additional written statement. PHEAR, J., said that, in such cases, the Court would make a great difference between the case of an application by the plaintiff, and that of an application by the defendant. The plaintiff would not be allowed to file an additional written statement in such a case as the present ; but although the filing of such an additional written statement as that now sought to be filed by the defendant would rightly be the subject of strong comment by the plaintiff at the hearing, still the Court would grant the application of the defendant upon the conditions that the defendant pay the costs of this application and of filing the additional written statement, and that he furnish the plaintiff with a copy of the additional written statement free of charge.—3 B. L. R., App. 11.

An application was made by the defendants for an order under sec. 124, Act VIII. of 1859, directing the removal from the file, or the amendment of, the plaintiff's written statement, on the ground that it contained irrelevant matter, namely, letters containing an offer made by the defendants without prejudice. MACPHERSON, J., ordered the paragraphs relating to the offer to be struck out.—12 B. L. R., App. 19.

A Court was held not to have done wrong in admitting a supplemental written statement which it had called for under sec. 122, Civil Procedure Code, 1859, which did not add to or vary the plaintiff's claim.—11 W.R., 71.

Interrogatories are not in this country to be framed to anticipate or supply defects of pleading or to ascertain the case of the other side. Where the pleading of either party is too vague, the Court may call for a further or fuller written statement, or may frame and record issues until the case raised by the pleadings is ascertained with sufficient clearness. A plaintiff may interrogate with a view to obtain information or admission in support of his own case, and this right extends not only to his original case, but also to any answers which he has to make to the defendant's case, subject to the qualification (*inter alia*) that the interrogatories must be directed to a case on which the plaintiff has already determined and to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it.—I. L. R., 17 Cal. 840.

**113.** If any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pass a decree against him, or make such order in relation to the suit as it thinks fit.

Procedure when party fails to present written statement called for by Court.

NOTE.—This section applies to Provincial Small Cause Courts.

**114.** Written statements shall be as brief as the nature of the case admits, and shall not be argumentative, but shall be confined as much as possible to a simple narrative of the facts which the party by whom or on whose behalf the written statement is made believes to be material to the case, and which he either admits or believes he will be able to prove.

Frame of written statements.

Every such statement shall be divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation.

#### NOTES.

This section applies to Provincial Small Cause Courts.

The plaintiff in a suit went on a pilgrimage after he had been ordered to file a written statement, but without having filed it. Not having returned when the case was on the board, his son applied, under secs. 28 and 123 of Act VIII. of 1859, for leave to verify and file a statement, alleging himself to be interested as a reversioner. The application was refused. *Held* that a third party will not be allowed to verify and file a written statement for a plaintiff who has culpably neglected to file one himself.—Bourke's Rep. (O. C.) 153.

To a suit, brought in 1883, for redemption of a mortgage made in 1853, of villages in Oudh, subsequently included in the mortgagee's talukdari estate and sanad, the defence was that, the mortgagor having brought a suit in 1864 to redeem, and not having appeared at the hearing, in person or by pleader, judgment was passed, the mortgagee having appeared to defend against the plaintiff under sec. 114 of Act VIII. of 1859. *Held* that, although the plaintiff, who had claimed in the prior suit the under-proprietary right in virtue of a sub-settlement, claimed in the present suit the superior proprietary right, the difference in the mode of relief claimed did not affect the identity of the cause of action, which was, in both cases, the refusal of the right to redeem; and that under sec. 114 of the Act the judgment of 1864 was final.—I. L. R., 15 Cal. 422.

**115.** Written statements shall be signed and verified in the manner hereinbefore provided for signing and verifying plaints, and no written statement shall be received unless it be so signed and verified.

Written statements to be signed and verified.

#### NOTES.

This section applies to Provincial Small Cause Courts.

See I. L. R., 6 Al. 626, noted under sec. 51.

**116.** If it appears to the Court that any written statement, whether called for by the Court or spontaneously tendered, is argumentative or prolix, or contains matter irrelevant to the suit, the Court may amend it then and there, or may, by an order to be endorsed thereon, reject the same, or return it to the party by whom it was made for amendment within a time to be fixed by the Court, imposing such terms as to costs or otherwise as the Court thinks fit.

Power of Court as to argumentative, prolix, or written statement.

When any amendment is made under this section, the Judge shall attest it by his signature.

of amend-

When a statement has been rejected under this section, the party making it shall not present another written statement, unless it be expressly called for or allowed by the Court.

Effect of rejection.

#### NOTES.

This section applies to Provincial Small Cause Courts.

See 3 B. L. R., App. 11 and 12 B.L.R., App. 19, noted under sec. 112.

### CHAPTER IX.

#### OF THE EXAMINATION OF THE PARTIES BY THE COURT.

**117.** At the first hearing of the suit, the Court shall ascertain from the defendant or his pleader whether he admits or denies the allegations of fact made in the plaint, and shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the written statement (if any) of the opposite party, and as are not, expressly or by necessary implication, admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Ascertainment whether allegations in plaint and written statements admitted or denied.

NOTE.—This section applies to Provincial Small Cause Courts.

**118.** At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put, in the course of such examination, questions suggested by either party.

Oral examination of party, or companion of himself or his pleader.



## NOTES.

This section applies to Provincial Small Cause Courts.

Where defendants summoned under sec. 41, Act VIII of 1859, did not appear on the day fixed for them to appear and answer, and their reasons for non-attendance not having been considered sufficient, they were not allowed to appear in the case, *held* that the Court of first instance was justified in disposing of the case in their absence, and that sec. 125, Act VIII of 1859, contemplates a case in which a party who has appeared at the proper time afterwards appears by pleader.—12 W. R., 207.

**119.** The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Substance of examination to be written.

**120.** If the pleader of any party who appears by a pleader refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day, and direct that such party shall appear in person on such day.

Consequence of refusal or inability of pleader to answer.

If such party fails, without lawful excuse, to appear in person on the day so appointed, the Court may pass a decree against him or make such order in relation to the suit as it thinks fit.

NOTE.—This section applies to Provincial Small Cause Courts.

## CHAPTER X.

OF DISCOVERY, AND OF THE ADMISSION, INSPECTION, PRODUCTION, IMPOUNDING, AND RETURN OF DOCUMENTS.

**121.** Any party may, at any time, by leave of the Court, deliver, through the Court, interrogatories in writing for the examination of the opposite party, or, where there are more opposite parties than one, any one or more of such parties, with a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer:

Power to deliver interro.

Provided that no party shall deliver more than one set of interrogatories to the same person without the permission of the Court, and that no defendant shall deliver interrogatories for the examination of the plaintiff unless such defendant has previously tendered a written statement, and such statement has been received and placed on the record.

## NOTES.

This section applies to Provincial Small Cause Courts.

Sec. 121 of the Code of Civil Procedure contemplates (1) leave to interrogate, and (2) the service of the interrogatories through the Court. It is the duty of the Court under that section to determine whether the applicant should be allowed to interrogate the other side, but not to determine at that stage what question the party interrogated should be compelled to answer. Where an *ex parte* order is made in chambers giving leave to interrogate, the party ordered to answer has a right to come into Court to have the order set aside if the case is one in which interrogatories should not have been allowed. When an order for the administration of interrogatories is properly made, a party objecting to the interrogatories administered may, at his peril, omit to answer the interrogatories to which he objects; but the more prudent course is to file his affidavit in answer, stating it in his objections to answer such questions as he objects to. Where interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court may interfere at any stage. The power given to the Court by sec. 36 should not be exercised except in extreme cases.—I. L. R., 5 Cal. 707; 5 C. L. R., 509.

The question as to whether the Courts below have exercised a proper discretion in dismissing a suit under sec. 136 of the Civil Procedure Code is one into which the High Court will not enter on special appeal. When interrogatories are delivered with the leave of the Court under sec. 121 of the Procedure Code, and the Court orders such interrogatories to be answered within 10 days under sec. 126, there is virtually an order passed under the provision of Chapter X of the Code; and consequently, upon the party interrogated failing to comply with such order, the Court has the power to pass an order under sec. 136.—10 Cal. 505.

Omission to answer interrogatories, delivered after leave granted under sec. 121 of the Civil Procedure Code, does not render the party so omitting to answer liable to have his defence struck out under sec. 136 of the Code. *Lalla Debi Pershad v. Santo Pershad*, I. L. R., 10 Cal. 505, overruled.—18 Cal. 420.

See I. L. R., 17 Cal. 840, noted under sec. 112.

**122.** Interrogatories delivered under section 121 shall be served on the pleader (if any) of the party interrogated, or in the manner hereinbefore provided for the service of summons, and the provisions of sections 79, 80, 81, and 82, shall, in the latter case, apply, so far as may be practicable.

Service of interrogatories.

NOTE.—This section applies to Provincial Small Cause Courts.

**123.** The Court, in adjusting the costs of the suit, shall, at the instance of any party, inquire or cause inquiry to be made into the propriety of delivering such interrogatories; and if it thinks that such interrogatories have been delivered unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be borne by the party in fault.

Inquiry into propriety of exhibiting interrogatories.

NOTE.—This section applies to Provincial Small Cause Courts.

**124.** If any party to a suit be a body corporate or a joint-stock company, whether incorporated or not, or any other body of person empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply to the Court for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

Service of interrogatories on officer of corporation or company.

NOTE.—This section applies to Provincial Small Cause Courts.

Any party called upon to answer interrogatories, whether by himself or by any such member or officer, may refuse to answer any interrogatory on the ground that it is irrelevant, or is not put *bona fide* for the purposes of the suit, or that the matter inquired after is not sufficiently material at that stage of the suit, or on any other like ground.

to refuse to answer interrogatories as irrelevant, &c.

NOTE.—This section applies to Provincial S. C. Courts.

**126.** Interrogatories shall be answered by affidavit to be filed in Court within ten days from the service thereof, or within such further time as the Judge may allow.

Time for filing affidavit in answer.

#### NOTES.

This section applies to Provincial Small Cause Courts.

Where in an affidavit of documents, privilege is claimed for a correspondence on the ground that it contains instructions and confidential communications from the client (the plaintiff) to his solicitor, it must appear not merely that the correspondence generally contains instructions, &c., but that each letter contains instructions or confidential communications to the attorneys with reference to the conduct of the suit. *Bewicke v. Graham*, 7 Q. B. D., 400, followed.—I. L. R., 12 Cal. 265.

See I. L. R., 10 Cal. 505, noted under sec. 121.

**127.** If any person interrogated omits or refuses to answer, or answers insufficiently, any interrogatory, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer, or to answer further, either by affidavit or by *viva-voce* examination, as the Judge may direct: Provided that the Judge shall not require an answer to any interrogatory which in his opinion need not have been answered under Section 125.

Procedure where party omits to answer sufficient-

NOTE.—This section applies to Provincial Small Cause Courts. See I. L. R. 18 Cal. 420, noted under sec. 121.

**128.** Either party may, by a notice through the Court, within a reasonable time not less than ten days before the hearing, require the other party to admit (saving all just exceptions to the admissibility of such document in evidence) the genuineness of any document material to the suit.

Power to demand admission of genuineness of documents.

The admission shall also be made in writing, signed by the other party or his pleader, and filed in Court.

If such notice be not given, no costs of proving such document shall be allowed, unless the Judge otherwise orders.

If such notice is not complied with within four days after its being served, and the Judge thinks it reasonable that the admission should have been made, the party refusing shall bear the expense of proving such document, whatever may be the result of the suit.

NOTE.—This section applies to Provincial Small Cause Courts.

**129.** The Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order.

Power to order discovery of document.

Every affidavit made under this section shall specify which (if any) of the documents therein mentioned the declarant objects to produce, together with the grounds to such objection.

Affidavit in answer to order.

#### NOTES.

This section applies to Provincial Small Cause Courts.

In a suit brought by two Mahomedan *parda-nashin* ladies for recovery of immoveable property by right of inheritance, an order was passed under sec. 129 of the Civil Procedure Code, requiring the plaintiffs to declare by affidavit "all the papers connected with the points at issue in the case which were or had been in their possession or control." After some ineffectual proceedings, the plaintiffs were peremptorily ordered to file their affidavit on a certain date. On that date an affidavit was filed on their behalf by their brother and mukhtear, with a list of their documentary evidence; but the affidavit and list was considered defective upon several grounds, one of which was that it ought to have been made by the plaintiffs personally. Further time was then given to the plaintiffs to amend these defects, and ultimately they filed an affidavit purporting to be made by them personally, praying that the Court would have it verified in any manner thought proper, provided that their *parda-nashini* were not interfered with. The Court, under sec. 316 of the Code, dismissed the suit for want of prosecution, in consequence of the orders under sec. 129 not having

been complied with, though ample opportunity had been given to the plaintiffs, and no sufficient ground for non-compliance had been shown. *Held*, without going into the question of the sufficiency or non-sufficiency of the action of the plaintiffs with regard to the orders made under sec. 129 of the Code, that, looking at the disabilities of the plaintiffs and the circumstances of their suit, the case was not one in which it was expedient to enforce the liability to which they might have exposed themselves under the peculiar provisions of sec. 136.—I. L. R., 8 Al 265.

**130.** The Court may, at any time during the pendency therein of any suit, order the production of documents in his possession or power relating to any matter in question in such suit or proceeding as the Court thinks right; and the Court may deal with such documents when produced in such manner as appears just.

Power to order production of documents during suit.

**Notes.**

This section applies to Provincial Small Cause Courts.

Under sec. 622 of the Code of Civil Procedure, interlocutory orders passed under sec. 387 refusing applications for the issue of a commission to examine witnesses, or, under sec. 130, directing the production of documents, cannot be revised.—I. L. R., 9 Madr. 256.

Under sec. 130 of the Civil Procedure Code (Act X of 1877), a Judge has no discretion to refuse to allow inspection of documents relating to matters in question in a suit, provided they are not privileged. Confidential communications between principal and agent relating to matters in a suit are not privileged. *Held* in a suit for an injunction to restrain the defendant from using certain trade-marks that telegrams and letters between the plaintiff's firm in London and their managing Agent in Bombay, relating to the subject-matter of the suit, were not privileged.—*Barron v. White* (L. R., 1 Q. B. D. 423) and *Anderson v. Bank of British Columbia* (L. R., 2 Ch. D. 644) followed.—2 Bom. 453.

**131.** Any party to a suit may, at any time before or at the hearing thereof, give notice through the Court to any other party to produce any specified document for the inspection of the party giving such notice or of his pleader, and to permit such party or pleader to take copies thereof.

Notice to produce for inspection documents referred to in plaint, &c.

No party failing to comply with such notice shall afterwards be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice.

Notice of non-compliance with such notice.

**Notes.**

This section applies to Provincial Small Cause Courts.

If a notice under sec. 131 of the Civil Procedure Code be not answered as provided by sec. 132, the party seeking the inspection of documents

may apply for an order under sec. 133, and his application must be supported by an affidavit. The Court has no jurisdiction to pass an order under sec. 136, unless the provisions of sec. 134 are strictly complied with.—I. L. R., 14 Cal. 768.

Before the Court will make an order under sec. 133 of the Code of Civil Procedure, the preliminary steps mentioned in sec. 131 must be taken by the party applying for the order.—10 Cal. 56.

**132.** The party to whom such notice is given shall, within ten days from the receipt thereof, deliver through the Court to the party giving the same a notice stating a time, within three days from such delivery, at which the documents, or such of them as he does not object to produce, may be inspected at his pleader's office or some other convenient place, and stating which (if any) of the documents he objects to produce, and on what grounds.

Party receiving such notice to deliver notice when and where inspection may be had.

#### Note.

This section applies to Provincial Small Cause Courts.

Defendant was owner of certain cotton-ginning factories at and near A in the mufassal, and had also a place of business in Bombay. He entered into a contract in Bombay with the plaintiff to gin certain cotton of the plaintiff's at the said factories of the defendant in the mufassal. Plaintiff brought a suit for damages for the breach of this contract, and demanded inspection, in Bombay, of all the defendant's books relating to the business of the said ginning factories belonging to the defendant. The defendant was willing to give the inspection asked for, but contended that it should be had at A, where all the books in question were kept, and objected to bringing the books down to Bombay, as demanded by the plaintiff. *Held* that the contract, though made in Bombay, having been intended to be performed at a considerable distance from Bombay, at and near A, where the business of ginning was conducted, and where the books relating to the said business were kept, A was the proper place at which to give inspection.—I. L. R., 5 Bom. 467.

**133.** If any party served with notice under section 131 omits to give notice under section 132 of the time for inspection, or objects to give inspection, or names an inconvenient place for inspection, the party desiring it may apply to the Court for an order of inspection.

Application for order of inspection.

#### Notes.

This section applies to Provincial Small Cause Courts.

Letters written by one of the defendant's servants to another, for the purpose of obtaining information with a view to possible future litigation, are not privileged, even though they might, under the circumstances, be required for the use of the defendant's solicitor. In order that privilege may be claimed, it must be shown on the face of the affidavit that the documents were prepared or written merely for the use of the solicitor.—I. L. R., 11 Cal. 655.

See I. L. R., 10 Cal. 56, noted under sec. 131.



**134.** Except in the case of documents referred to in the plaintiff, written statement, or affidavit of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit, showing (a) of what documents inspection is sought, (b) that the party applying is entitled to inspect them, and (c) that they are in the possession or power of the party against whom the application is made.

Application to be founded on affidavit.

**Note.**—This section applies to Provincial Small Cause Courts.

**135.** If the party from whom discovery of any kind or inspection is sought objects to the same or any part thereof, and if the Court is satisfied that the right to such discovery or inspection depends on the determination of any issue or question in dispute in the suit, or that, for any other reason, it is desirable that any such issue or question should be determined before deciding upon the right to the discovery or inspection, the Court may order that the issue or question be determined first, and reserve the question as to the discovery or inspection.

Power to order issue or question on which right to discovery depends to be first determined.

#### Notes.

This section applies to Provincial Small Cause Courts.

The intention of sec. 135 of the Civil Procedure Code (Act X of 1877) is to give the Court the power of raising and determining an issue for the exclusive purpose of deciding the right to discovery of evidence which is to be used at the trial, and therefore, from the nature of the case, before the hearing of the cause. It should be a rule of practice that, when an order is made under sec. 135 of the Civil Procedure Code (Act X of 1877) by the Judge in chambers, the suit should be set down for the trial of the particular issue as well as of the cause itself when it comes to a hearing before the same Judge.—I. L. R., 6 Bom. 572.

In a suit for specific performance of a contract to purchase an indigo-factory, the defendant denied that the agreement relied on was final, and alleged that the plaintiff had induced him to sign the agreement by means of representations regarding the nature, the extent, the value, and the net income of the property, all of which representations the defendant charged were false and fraudulent to the knowledge of the plaintiff. The plaintiff in his affidavit of documents set out a list of title-deeds evidencing his title to, and the books of accounts and other papers and documents relating to, the property agreed to be purchased, and these he claimed to withhold from the defendant's inspection, on the ground that they were not sufficiently material at that stage of the suit. *Held* that the documents were not protected.—10 Cal. 808.

**136.** If any party fails to comply with any order under this chapter to answer interrogatories, or for discovery, production, or inspection,

Consequences of failure to answer or give inspection.

which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence (if any) struck out, and to be placed in the same position as if he had not appeared and answered ;

and the party interrogating, or seeking discovery, production, or inspection, may apply to the Court for an order to that effect, and the Court may make such order accordingly.

Any party failing to comply with any order under this chapter, to answer interrogatories, or for discovery, production, or inspection, which has been served personally upon him, shall also be deemed guilty of an offence under section 188 of the Indian Penal Code.

#### Note.

This section applies to Provincial Small Cause Courts.

A defendant failing to comply with an order to answer interrogatories, the Courts, under sec. 136 of the Civil Procedure Code, struck out his defence, and proceeding *ex parte*, passed a decree against him. *Held* that the decree could not be treated, in respect of the remedy by appeal, as an *ex parte* decree, and, therefore, under the ruling in *Lal Singh v Kunjan*, (I. L. R., 4 Al 387) not appealable, but that an appeal would lie from the decree.—I. L. R., 7 Al. 159.

The powers given to the Court by Act X of 1877, sec. 136, should not be exercised except in extreme cases.—5 Cal. 707 ; 5 C. L. R., 509.

Where a defendant neglects to comply with an order for production and inspection, the Court will, although in the last resort, order his defence to be struck out.—9 Cal. 923.

The High Courts in India possess the power of enforcing obedience to their orders by attachment for contempt. An order for attachment for contempt is not an order in exercise of the High Court's civil jurisdiction, and therefore does not come within the provision of sec. 591 of the Civil Procedure Code. Contempts are in the nature of offences, and therefore, under sec. 15 of the Letters Patent, 1865, an appeal lies from an order of committal for contempt. In dealing with an appeal from such an order, the Appellate Court will not go behind the order, the disobedience to which constitutes the contempt.—7 Bom. 5.

Under the authority conferred by the Charters of the Supreme Courts, and continued by their own Letters Patent, the High Courts in India possess the power of enforcing obedience to their orders by committal for contempt. As regards the High Courts in India, the remedies provided by sec. 136 of the Civil Procedure Code (Act X of 1877) in cases of disobedience to an order of Court may be regarded as cumulative. They subject the offender to particular liabilities for his contumacy, but do not extinguish the Court's power of constraining him to obedience. An application may properly be made in Court to commit for contempt of an order made in Chambers.—7 Bom. 1.

See I. L. R., 10 Cal. 505 and 18 Cal. 420, noted under sec. 121 ; 14 Cal. 768, noted under sec. 131 ; 8 Al. 265, noted under sec. 129.

**137.** The Court may of its own accord, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Every application made under this section shall (unless the Court otherwise directs) be supported by an affidavit of the applicant or his pleader, showing how the record is material to the suit in which the application is made, and that the applicant cannot, without unreasonable delay or expense, obtain a duly authenticated copy of the record, or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

Nothing contained in this section shall be deemed to enable the Court to use in evidence any document which, under the Indian Evidence Act, 1872, would be inadmissible in the suit.

**Notes.**

This section applies to Provincial Small Cause Courts.

*Held* that declarations made in pleadings in suits instituted before the Code of Civil Procedure came into operation are inadmissible as evidence of the facts stated therein. *Held* also that a Civil Court which inspects the record of another case, under sec. 138 of Act VIII of 1859, can only use as evidence such documents as are otherwise unobjectionable, and admissible for or against either of the parties to the suit.—2 Bom. H. C. R., (A. C.) 361; 2nd Ed. 341.

A Court had no discretion to refuse to send records which had been sent for by another Civil Court under sec. 138 of Act VIII of 1859.—4 C. L. R., 36.

A Judge may send for and inspect any document filed with any record in his Court; and there is nothing in the Code of Procedure to prevent his basing his decision, wholly or mainly, on such document.—1 W. R., 63.

Under sec. 138 a Court was not bound to send for the whole record, but only for such papers as might be specially mentioned in the application.—W. R., 1864, 272.

A Judge was not bound, under sec. 138, Act VIII of 1859, upon the application of any of the parties to a suit, to send for the record of any other suit.—7 W. R., 109; 18 W. R., 13.

In a suit on a registered bond in which defendant asked the Court to send for the registration books, with a view to prove the non-existence of the bond at the time it purported to be certified, *held* that, as defendant had failed to summon the Deputy Registrar, it was not necessary for the Judge to use the discretion given in sec. 138, Act VIII of 1859.—14 W. R., 302.

A casee's book is not strictly an official record. Before a document could be inspected under the provisions of sec. 138, Code of Civil Procedure, applied to Appellate as well as Original Courts, the Court was bound

to see whether it came under the description of a public record.—15 W. R., 173.

Where a specific title has been alleged but not proved, and the plaintiff endeavours to succeed in the first Court or second Court of Appeal upon title by twelve years' adverse possession, he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of first instance, with sufficient clearness to enable his adversary to understand that he claimed to succeed as well by twelve years' adverse possession as by the specific title alleged. In all cases in which parties apply for a summons to compel the attendance of witnesses, or a summons to produce documents, or apply to have a document sent for under sec. 137 of the Code of Civil Procedure, the Court ought not to refuse such application, merely because, in its opinion, the witnesses cannot be present, or the documents cannot be produced, before the termination of the trial.—I. L. R., 7 Cal. 560.

**138.** The parties or their pleaders shall bring with them, and have in readiness at the first hearing of the suit, to be produced when called for by the Court, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court at any time before such hearing has ordered to be produced.

Documentary evidence to be in readiness at first hearing.

#### Notes.

This section applies to Provincial Small Cause Courts.

Although in custom the ghatwali tenure descended from father to son, no succession was legal or valid till confirmed by the zemindar, and reported by him to the Government authorities. Where Government has dispensed with the services of the ghatwals, the zamindar is under no obligation to continue to appoint, and may, on a vacancy occurring, settle the tenure as he pleases. Parties are required to have with them in Court, at the first hearing of the suit, all their documentary evidence, but need not file it then, unless it is called for.—1 B. L. R., (A. C.) 120 ; 10 W. R., 179.

By sec. 128 of Act VIII. of 1859, it was not necessary to file with the plaint all the documents that the plaintiff intended to give in evidence. A document which is to be given in evidence need not be translated previous to the hearing of the case.—Bourke's Rep., (O. C.) 91 ; Cor. 151.

This section applies to documents which have been produced at the filing of the plaint but not filed, and in this way is not incompatible with sec. 39.—1 Hyde's Rep., 145.

Documents produced in Court under sec. 128, Act VIII. of 1859, become, upon and by reason of their production, exhibits in the case.—8. W. R., 91.

Under sec. 128, Act VIII. of 1859, the parties, though not entitled as of right to adduce fresh documentary evidence after the issues in the case are settled, may yet tender such evidence, stating the grounds upon which it was not tendered at an earlier stage ; and the Judge may receive or reject such evidence, but the grounds on which he acts should be stated on the record.—9 W. R., 294.

The main object of sec. 128 was to prevent parties from manufacturing

evidence pending the trial to meet unexpected exigencies, and not to shut out true, good, and valuable evidence, merely because the party had, without good and assignable cause, abstained from bringing it before the Court at the first hearing.—23 W. R., 29.

**139.** No documentary evidence in the possession or power of any party, which should have been, but has not been, produced in accordance with the requirements of section 138, shall be received at any subsequent stage of the proceedings, unless good cause be shown to the satisfaction of the Court for the non-production there-of. And the Judge receiving any such evidence shall record his reasons for so doing.

Effect of non-production of documents.

#### Notes.

This section applies to Provincial S. C. Courts.

Certain documents having been allowed by the District Munsif to be filed by the plaintiff during the trial of a suit, the District Judge, on appeal, held that he was bound to strike them off the file, on the ground that they were not filed with the plaint nor entered in any list annexed to the plaint, and because the Munsif had not recorded any reason for admitting them:—*Held* that, as the documents had been admitted in evidence by the Lower Court, the appellate Court was bound to consider them.—I.L.R., 8 Madr. 373.

**140.** The Court shall receive the documents respectively produced by the parties at the first hearing, provided that the documents produced by each party be accompanied by an accurate list thereof prepared in such form as the High Court may, from time to time, direct.

Documents to be received by Court.

The Court may, at any stage of the suit, reject any document which it considers irrelevant or inadmissible, recording the grounds of such rejection.

Rejection of irrelevant or inadmissible documents.

#### Notes.

This section applies to Provincial Small Cause Courts.

A Court cannot be said to have received documents as admissible in evidence when for want of time to inspect and consider them, it orders them to be filed; nor would it be wrong in law in rejecting or returning them after proper inspection; the object of sec. 129, Act VIII. of 1859, being that papers should be produced in a regular manner, and inspected by a Court at its convenience.—11 W. R., 350.

Attention drawn to the neglected provision of the Code of Civil procedure, 1859 (sec. 129), which prohibits Courts from receiving on the record of a case, without restriction and without discrimination, documents which are either irrelevant or inadmissible.—11 W. R., 576.

The High Court refused to interfere under sec. 15 of the Charter Act to set aside an order rejecting a document, made by a Court under Act VIII of 1859, sec. 129, an appeal from such order being barred by sec. 363.—18 W. R., 511.

**141.** (1) Subject to the provisions of the next following sub-section, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :—

- (a) the number and title of the suit,
  - (b) the name of the person producing the document,
  - (c) the date on which it was produced, and
  - (d) a statement of its having been so admitted,
- and the endorsement shall be signed by the Judge.

(2) If a document so admitted is an entry in a book, account, or record, and a copy thereof has been substituted for the original under the next following section, the particulars aforesaid shall be endorsed on the copy, and the endorsement thereon shall be signed by the Judge.\*

#### Notes.

This section applies to Provincial Small Cause Courts.

Exhibits produced in Court ought to be endorsed with the name of the person who produces them as required by sec. 132 of Act VIII. of 1859 — 6 W. R., 1.

A suit for possession by right of inheritance was brought by a claimant, alleging himself to be the heir, against the alleged adopted son of the last male owner, denying that an adoption purporting to be made by the widow had been duly authorized by the deceased. The Court of first instance called upon the defendant to prove his title as a son by adoption, notwithstanding that the plaintiff was out of possession, and could not have succeeded, in the event of the defendant's failure to prove it, without first proving his own title as collateral heir by descent: thus, in effect, proposing to make the establishment of the plaintiff's title depend upon the failure or success of the defendant in proving the adoption. The High Court pointed out the error of this proceeding, and the Judicial Committee affirmed its judgment, concurring also in its finding that the adoption had been proved. It was found also that the loss of the anumati-patra had been established; so that secondary evidence of it was receivable.—I L. R., 18 Cal 201.

(1) If a document admitted in evidence in the suit

endorsements on copies  
of admitted entries in books,  
accounts, and records.

count in current use, the party on whose behalf the account is produced may furnish a copy of the entry.

(2) If such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party

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\*Secs. 141, 141A, 142, and 142A, have been substituted by the Civil Procedure Code Amendment Act (VIII. of 1888), sec. 13, for secs. 141 and 142 as originally enacted.



on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(i) where the record, book, or account, is produced on behalf of a party, then by that party, or

(ii) where the record, book, or account, is produced in obedience to an order of the Court acting of its own motion, then by either of any party.

(3) When a copy of an entry is furnished under the foregoing provisions of this section, the Court shall, after causing the copy to be examined, compared, and attested in manner mentioned in section 62, mark the entry, and cause the book, account, or record in which it occurs to be returned to the person producing it.\*

**Note.**—This section applies to Provincial Small Cause Courts.

**142.** When a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b), and (c) of section 141, sub-section (1), and a statement of its having been rejected, and the endorsement shall be signed by the Judge.\*

Endorsements of documents rejected as inadmissible in evidence.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 18 Cal. 201, noted under sec. 141.

**142A.** (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under section 141A, shall form part of the record of the suit.

Recording of admitted and return of rejected documents.

(2) Documents not admitted in evidence shall not form part of the record, and shall be returned to the parties respectively producing them.\*

**Notes.**

This section applies to Provincial Small Cause Courts.

Where a document tendered in evidence in a Court of first instance was rejected as inadmissible, but was nevertheless allowed to remain on the record of the case,—*Held* that the mere fact of the document remaining on the record did not make it evidence in the appellate Court, but it must be tendered as evidence in the appellate Court and accepted thereby.—I. L. R., 14 Al. 356.

\* Secs. 141, 141A, 142, and 142A, have been substituted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 13, for secs. 141 and 142 as originally enacted.

ring the matter to the lower Court for enquiry "to ascertain the amount of maintenance which might appear to be justly and properly payable with reference to the means of the defendants and the other facts of the case, and to proceed to decision in the manner indicated in sec. 351 of the Civil Procedure Code," was equivalent to a direction of issues, and rendered any further issues unnecessary.—2 B. L. R., (P. C.) 72; 11 W. R., (P. C.) 33; 12 Moore's I. A. 495.

Where a plaintiff fails to show that a mortgage created by certain persons as executrix and executors of a Hindu will has been validly created by them in that capacity, the Court will, unless it is manifestly inequitable to do so, allow him to raise an issue that the mortgage was validly created by the parties in another character. *Held per* MARKBY, J., that the executors of the will of a Hindu cannot, by virtue only of their character of executors, mortgage the estate of the testator, in the absence of any power, express or implied, contained in the will. *Held*, on appeal, a creditor who purchases under an execution against the general assets of a testator's estate takes subject to a mortgage created in pursuance of a power contained in the will; and in a suit to foreclose, the purchaser is rightly made a party. Though the payment of debts is a charge on the property of a testator, it is not a charge on any specific portion of that property.—3 B. L. R., (O. C.) 7; 11 W. R., (O. C.) 21.

The children of fornication or adultery (*wahiduzzina*) have no *nasab* or consanguinity; hence, the right of inheritance being founded on *nasab*, one illegitimate brother cannot succeed to the estate of another. A man cannot acknowledge a brother, so as to establish the *nasab*.—4 B. L. R., (A. C.) 103; 12 W. R., 512.

The plaintiff sued for declaration of her title to property, of which the defendant was in possession, but of which she produced the title deeds in favour of herself. *Held* the *onus* was on the defendant to disprove the plaintiff's title. On the evidence, the defendant wished to raise issues as to the unchastity and inability of the plaintiff to succeed, and as to her suing on behalf of another person, not having alleged that she was doing so, neither of which matters were referred to in his written statement; but leave to raise them was refused, and the Court held that the plaintiff was, under the circumstances of the case, entitled to rely on the title given her by the production of the title-deeds in her favour.—6 B. L. R., 144.

Where, on an appeal, the Council for the appellant admitted he could not succeed on the merits as the evidence stood on the record, and their Lordships were of opinion that substantial justice had been done, the mere omission to settle issues by the Court of first instance, which was not made a ground of appeal to the first Court of Appeal, but was noticed and commented on by that Court, was held not to constitute a fatal mis-trial of the cause so as to render a new trial necessary.—6 B. L. R., 148; 15 W. R., (P. C.) 15; 13 Moore's I. A. 573; 22 W. R., 448.

A second adoption cannot take place in the lifetime of the first adopted son. Where the son of the son first adopted sued as heir of the second adopted son to obtain the property left by him, and the suit throughout was contested with respect to his claim as heir of that second adopted, *held* that the plaintiff could not, on appeal, shift his ground and regard the second adopted son as a trespasser, and seek to recover the property on the ground of its having belonged to the ancestor.—11 B. L. R., (P. C.) 391; 19 W. R., 12; L. R., I. A., Sup., Vol. 131.

In a suit for division of a village between members of the same family,

the defendant alleged that a former division relied upon by the plaintiff was merely nominal and never intended to be carried out, and also that the village was in 1836 granted to his father for his sole use, and both these allegations were found against defendant, who appealed, on the ground that the village, which is an inam, was granted to defendant, for his sole use in 1857, on the death of his father. *Held* that the grant to defendant was not a new grant, and was subject to the rights of the other members of the family. *Per* INNES, J.—The defendant not having been prejudiced by the circumstance that no issue was framed upon the question whether a fresh grant was made to the defendants, the decision of the lower Court ought to be confirmed.—2 M. H. C. R., 470.

The plaintiffs, the cultivators of certain lands yielding rent to a pagoda of which 1st defendant is the recently appointed dharmakarta, claimed to be declared proprietors of the said lands; to be exempted from the payment of rent at the rate of two-thirds of the gross produce; to be declared liable to pay a certain lower rent set forth in the plaint; and to obtain a refund of the amount paid under an order of the Sub-Collector in 1863, passed without jurisdiction, in excess of the rent justly payable. The issue given by the Principal Sadar Amin was "whether the 1st defendant is entitled to rent at the rate specified in document A." *Held* that this issue was in too general terms, and only embraced a part of the matter in dispute; and the issue "what is a fair and reasonable rate of rent" directed to be sent down to the lower Court.—3 M. H. C. R., 25.

The issues should raise matters fairly in controversy between the parties, even though the pleadings may be defectively drawn. The effect of the istemrar sanad is to ascertain, and limit, the demand of the Government for revenue, and to recognize and confirm, subject to this, the proprietary rights already in existence. *Katama Natchiar v. Rajah of Shivagunga* (9 Moore's L. A. 539) distinguished.—8 M. H. C. R., 114.

Plaintiffs contracted with defendants to sell them two numbered shares on payment of the price by defendants on or before 1st July 1865. Plaintiffs were in possession of the shares at the time of the contract, and continued so until they sold them after default made by the defendants; and they were registered as holders of the shares on the 1st July, when the share certificates, with transfer-deeds in blank, were tendered to defendants, who refused to accept them, or to pay the purchase-money. On the issue whether plaintiffs were ready and willing to perform the contract on their part, *held* that the acts necessary to be done on 1st July were concurrent; and that plaintiffs being able and willing on that day to make a valid transfer, if defendants had been ready to pay the price, plaintiffs were not bound to take any further step until the purchase-money was paid by defendants. There is nothing in the Code of Civil Procedure which imposes upon the Judge the duty of allowing an issue to be raised on a point of law which he considers to be perfectly clear.—2 Bom. H. C. R., (O. C.) 272; 2nd Ed. 258.

It may be laid down as a general rule that only such averments should be made the subject of issues as are essential to support the cause of action and are denied by the defendant, or as are essential to support a plea and are denied by the plaintiff. Mere pieces of evidence which are to be adduced to enable the Court to infer the truth of a material averment ought not to be made the subject of separate issues.—3 N.-W. P. H. C. R., 303.

A plaintiff may have been actuated by ill-will in instituting a suit, and may have done so out of pique; but if he establish that he had a cause of action, his motive in bringing the suit will not be an answer to it, al-

though where the evidence in support of his case is doubtful, the Court, in weighing that evidence, may properly take into consideration the motives imputed to the plaintiff as having induced him to sue.—3 N.-W. P. H. C. R. 303.

*Held* that the Court was not, on its own motion, competent to determine a question which was not alleged, nor raised by the pleadings of the parties. But if the question was raised even on the day of the hearing of the case at any time before the decision of the case, the Court ought not to have rejected it, because it was not raised by the written statement; but ought to have framed issues to determine the question.—3 Agra H. C. R., 246.

In a suit raising issues of fact it did not appear from the record transmitted from India that the Judge of the Zillah Court had, in conformity with the Code of Civil Procedure (Act VIII. of 1859), secs. 139, 141, settled or recorded the issues in the suit, although he allowed evidence in the cause to be taken. In such circumstances the Judicial Committee postponed the hearing of the appeal until a certified copy of the proceedings in the cause should be transmitted, and in the alternative, of no such issues being settled, set aside the decree of the Sudder Court at Agra, with directions to that Court to remand the suit to the lower Court to be tried upon issues to be settled and recorded in conformity with the provisions of Act VIII. of 1859.—11 Moore's L. A., 25.

All that can be done under sec. 139, Act VIII. of 1859, must be done at the settlement of issues; sec. 141 gave the Court discretion to amend or add issues only if some new matter should turn up in the course of the case.—2 Ind. Jur., N. S., 308.

Under sec. 139 of Act VIII. of 1859, the issues were to be framed upon the plaint, written statements, and allegations of the parties or their council.—2 Ind. Jur., N. S., 333.

If by inadvertence or other cause the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment for the decision of the real points in issue.—6 Moore's L. A. 393; 18 W.R., 81 note; 18 W.R., 297.

The question of a prescriptive right of occupancy cannot arise as an issue in a case where a tenant sues to recover possession of land from which he alleges he has been illegally ejected. The tenant might have been in lawful possession only six weeks, and yet his eviction might have been illegal, and he would be entitled to recover.—7 W. R., 27.

A Court cannot refuse to enquire into a plea set up by a plaintiff's pleaders in reply to questions put them by the Court, although such plea was not advanced in the original plaint. Sec. 139, Code of Civil Procedure, authorised a Court to frame issues on allegations collected from the oral examination of parties or their pleaders, notwithstanding discrepancy between these allegations and the written pleadings.—8 W. R., 354.

If the parties do not secure the attendance of their witnesses at the first hearing, and there are, on the examination of parties, issues upon which evidence is necessary, the Court is bound to fix a day for the hearing of such evidence.—9 W. R., 246.

In a suit for a kabuliat of twenty-five parcels of land, where the defendant alleged that he only held three, and that he was not the tenant of the plaintiff, but of a third party who intervened claiming the land as included in his half share of a part of a talook as being the person in receipt of the rents, the lower Appellate Court declared that, as neither party had given

any conclusive evidence of actual possession, and as the ryot's holding had been found to appertain to the half share of which the intervenor had proved possession, the plaintiff was entitled to a kabuliat for a moiety of the plots held by the defendant, *held* that the ryot was entitled to be heard whether he paid the rents to the plaintiff, and whether he was bound to give the kabuliat asked for, and plaintiff was entitled to be heard whether the ryot held three parcels or twenty-five.—11 W. R., 366.

The mortgage of certain property having been purchased by S, he sold it to G, who foreclosed, got a decree for possession, and sold to W. W's intervention having failed in a suit for arrears of rent by a party setting up a title intermediate between him and the ryot, on the ground of a miras pottah obtained from the mortgagor subsequently to the mortgage, he (W) sued to have his right declared to the rents payable by that ryot. The suit was dismissed on certain issues in the Court of first instance, but decreed in appeal on the single issue as to the pottah, having been granted subsequent to the conditional sale. *Held* that this issue arose legitimately, and was one within the lower Appellate Courts discretion to allow and within its jurisdiction to determine.—12 W. R., 19.

In a suit by a lessee to recover a sum on account of dispossession on the allegation that his lessors had fraudulently given a second lease to another party, and that with the exception of a specified sum collected by himself the remaining collections for the year had been made by the lessors, and that he was entitled to recover those collections, *held* that, with reference to the footing on which the plaintiff sued, it was not for the Judge to assess damages, but to find on the allegation that the lessors had collected the year's rents with the exception of a given sum.—12 W. R., 198.

It is not the written statements of parties, but the issues framed under the Code of Civil Procedure, which ought to be the index of what has been and has to be adjudicated.—12 W. R., 229.

Where certain zemindars sued to recover khas possession of certain shares of land, alleging that defendants were wrongfully in possession, it was held that, though bound to prove their right to khas possession, yet, whether they proved themselves to have been recently in khas possession or not, they had a right to a decision as to the alleged wrongful possession of the defendants.—12 W. R., 365.

When the plaintiff claimed pre-emption on one ground, and the Court raised an issue as to his right on another ground, to which the parties assented, and the case was decided against him, as he had not proved his right on that ground, *held* that the Court would not interfere with the finding on special appeal.—13 W. R., 205; 13 W. R., 189.

In a suit by putnidars for rent where the defendants plead a lakhiraj title set up long before the plaintiffs acquired their putni, the issue to be tried is, not whether the lakhiraj title is valid or not, but whether plaintiffs have at any time received rent for the lands in dispute.—14 W. R., 149.

Where a Court shortly before decision recorded a proceeding declaring its intention to frame additional issues, and reserved the actual framing of the issues for the time of giving judgment, its procedure was held not to be warranted by sec. 141 of the Code of Civil Procedure.—15 W. R., 151.

Issues are to be fixed under sec. 139, Code of Civil Procedure, when both parties appear and the Court can ascertain from them what are the points upon which they are at issue. The Court is not bound to fix any

issue when the defendant does not appear, but ought to proceed under sec. 111 to hear the case *ex parte*.—15 W. R., 145.

In a suit for possession of a piece of land, where defendant pleads limitation, and his witness unexpectedly discloses that his possession is that of a mortgagee, *held* that it was impossible for the Court to over look that testimony, and that it was its duty to frame an issue, find expressly on the fact of the mortgage, and provide for the rights of the mortgagee; for if the mortgage was found to subsist in defendant, the plaintiff could not in this case recover a decree for possession but should be referred to a suit properly framed for redemption.—16 W. R., 44.

In a suit to have the portion of a bund cut by the defendant closed up, and for an injunction restraining the defendant from so cutting the bund in future as to injure the plaintiff, *held* that it was material to try the question whether the plaintiff had a cause of action and also the question as to the property in the bund, because, if the bund belonged exclusively to the plaintiff, the defendant, unless he could prove a right of user, was a trespasser, and on the other hand, if it belonged exclusively to the defendant, it would be necessary to enquire whether the defendant had so used his own property as to injure the property of his neighbour.—17 W. R., 359.

Where a quite new and different issue is raised in the Appellate Court, it ought to be done in such a way as to give the parties the fullest opportunity of producing evidence upon it, because if it is at all likely that, in consequence of the issues framed in the first Court, the parties were induced to abstain from giving evidence, it would not be right to decide the issues against them on account of the absence of evidence.—17 W. R., 361. See 11 W. R., 61.

In a suit to recover possession of certain premises, on the allegation that defendant had sold them to plaintiff's husband nearly twelve years previously, defendant denied the execution of the deed on which plaintiff relied. The first Court was satisfied as to the fact of execution; but perceiving that possession had not followed, had some doubt as to the nature of the transaction, and examined a witness thereon. The result was that the transaction was found to be not an absolute sale, but a mortgage. As this fact, however, had been neither pleaded nor relied upon, the Munsif gave plaintiff a decree. The lower Appellate Court, finding that the preliminary foreclosure proceedings had not been taken by the plaintiff, reversed the decision. *Held* that it was incumbent on the Court of first instance, under Act VIII of 1859, sec. 141, to frame an issue as to the nature of the transaction, and that the suit was properly dismissed by the lower Appellate Court, because plaintiff had not foreclosed the mortgage.—19 W. R., 333.

A suit to recover possession of land in the wrongful possession of the defendant having been decreed by the first Court, the decision was reversed by the lower Appellate Court, because it did not appear that there had been any demand of possession. *Held* that, before deciding the case in this way, the lower Appellate Court ought to have framed an issue as to whether there had been a demand of possession.—20 W. R., 401.

In a suit for arrears of rent at enhanced rates, where it is found that a single notice has been issued, although there are two holdings at two rents, the Court should frame an issue which will allow the plaintiffs and the defendant, if they wish it, to give evidence—the former to show that the two holdings are now held at one consolidated rent, and it may be



enhanced as of one holding—and the latter that he is entitled to have the enhancement made in such a way that he may give up one and retain the other.—20 W. R., 442.

Parties are not bound by an opinion of the lower Court on a matter not in issue in the same manner as if the Judge had decided an issue formally and properly raised before him ; and when a case comes before the High Court on appeal, it should be determined upon the issues and grounds raised in the Court below, except where, under Act VIII of 1859, sec. 354, the Court would consider it right to frame an additional issue.—21 W. R., 59.

A defendant is not precluded from setting up a defence which does not appear in her written statement where the plaint does not set forth the true facts, and the Court will allow an issue to be raised on it.—21 W. R., 407; 23 W. R., 172.

It is competent to a Judge to determine a case on the day when the issues are settled, if he is satisfied that the evidence then before him is decisive of the matter in dispute, unless one of the parties makes a distinct objection to the Judge proceeding to a decision, and asks for an opportunity to produce evidence in support of his case.—22 W. R., 426.

In a suit by a person claiming as the ultimate heir in reversion to the estate of a deceased widow, it was held that the plaintiff was bound, before he could be allowed to succeed against the minor in possession, to pledge himself to a specific case and to prove that case, and the lower Court was held to have done wrong in raising an issue which was not based and moulded upon some specific affirmative allegation made as part of the plaintiff's case, thus putting the minor to the peril of such an issue merely on a general negative statement made by his guardian.—22 W. R., 469.

Where the lower Court had omitted to frame proper issues, the High Court refused to send the case back with a view to this being done, because the parties had not been prejudiced at all by the omission, both of them having adduced evidence upon all the questions upon which they were at difference.—24 W. R., 275.

See I. L. R., 17 Cal. 840, noted under sec. 112.

Allegations from which  
issues may be framed.

**147.** The Court may frame the issues from all or any of the following materials :—

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties or persons ;

(b) allegations made in the plaint or in the written statements (if any) tendered in the suit, or in answer to interrogatories delivered in the suit ;

(c) the contents of documents produced by either party.

**Note.**

A Court, in framing issues, is not bound down to the language of the plaint and written statement ; but may frame them not only from the pleadings, but also from the statements of the parties and their pleaders made before the Court.—I. L. R., 11 Cal. 407.

**148.** If the Court be of opinion that the issues cannot be correctly framed without the examination of some person not before the Court, or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, to be fixed by the Court, and may (subject to the rules contained in the Indian Evidence Act) compel the attendance of any person or the production of any document by the person in whose hands it may be, by summons or other process.

**149.** The Court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed.

The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

#### Notes.

A Court is not authorized by sec. 149 of the Code of Civil Procedure (Act XIV of 1882) to frame new issues which have the effect of altering the nature of the suit. A Court's power of raising additional issues is co-extensive with its power of amending pleadings, and is subject to the same restrictions. The plaintiff originally sued the defendant as a trespasser, claiming damages for wrongful occupation and for injury done to the land in dispute. Sometime after the issues had been framed, the plaintiff applied for an amendment of the plaint, and sought to recover rent for the land in suit, on the basis of a subsisting tenancy. The Subordinate Judge, without making the amendment, framed two additional issues, viz, (1) whether the suit was based on the relation of landlord and tenant, and (2) whether the *thikans* in dispute were let to the defendant, and what rent the plaintiff was entitled to recover in respect of the same. The Subordinate Judge found on these issues that the tenancy was still subsisting, and passed a decree for the rent claimed. *Held* that the Subordinate Judge had no authority, under sec. 149 of the Code of Civil Procedure (Act XIV of 1882), to frame the new issues.—I. L. R., 13 Bom. 664.

A Judge is not bound to make any amendment in the issues of a case, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy as disclosed by the pleadings on either side. *Bizjie Bebee v. Manohar Doss* (2 Ind. Jur., N. S., 118), *Wilkin v. Reed* (15 C. B., 192), *Lucas v. Tarleton* (3 H. and N. 116), followed. Where no injustice would be done to either party, the Courts, in the exercise of their discretion, under special circumstances, may allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings. The power to allow such amendments is given by the first of sec. 149 of Act X of 1877, corresponding with the first part of sec. of Act VIII of 1859.—I. L. R., 5 Cal. 64.

**150.** When the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing—

Questions of fact or law may by agreement be stated in form of issue.

(a) that upon the finding of the Court in the affirmative or the negative of such issue, a sum of money specified in the agreement, or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) that upon such finding some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) that upon such finding one or more of the parties shall do or abstain from doing some particular act, specified in the agreement, and relating to the matter in dispute.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

**151.** If the Court be satisfied, after making such inquiry as it deems proper,—

(a) that the agreement was duly executed by the parties,  
(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided,  
it may proceed to record and try the issue, and state its finding or opinion thereon in the same manner as if the issue had been framed by the Court;

and may, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement;

and, upon the judgment so given, decree shall follow, and may be executed in the same way as if the judgment had been pronounced in a contested suit.

## CHAPTER XII.

### DISPOSAL OF THE SUIT AT THE FIRST HEARING.

**152.** If, at the first hearing of a suit, it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

If parties not at issue on any question of law or fact.

**153.** Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or fact, the Court may at once pronounce judgment for or against such defendant, and the suit shall proceed only against the other defendants.

**154.** When the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court be satisfied that no further argument or evidence than the parties can at once supply is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues ;

and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit :

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present, and none of them object.

If the finding is not sufficient for the decision, the court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument, as the case requires.

#### Notes.

When a day is fixed for the settlement of issues in a case, the Court ought not to proceed to dispose finally of the case except with reference to the specific circumstances detailed in sec. 145, Act VIII of 1859.—1 N.-W. P. H. C. R., 97 ; Ed. 1873, 147.

When the issues are framed and the plaintiff and defendant are ready and willing to proceed, the Sitting Judge has power under sec. 145 to proceed to the hearing and final disposal of the case.—1 Ind. Jur., O.S., 14.

Although a case may have been set down for final disposal, if it be a case in which further evidence is required, the Judge is bound, under sec. 145, Act VIII of 1859, to adjourn the case, unless he is satisfied that the plaintiff has, without sufficient cause, failed to produce his evidence.—7 W. R., 84.

**155.** If the summons has been issued for the final disposal of the suit, and either party fails, without sufficient cause, to produce the evidence on which he relies, the Court may at once pronounce judgment,

or may, if it thinks fit, after framing and recording issues under section 146, adjourn the suit for the production of such evidence as may be necessary to its decision upon such issues.

**Note.**—This section applies to Provincial Small Cause Courts.

## CHAPTER XIII.

### OF ADJOURNMENTS.

**156.** The Court may, if sufficient cause be shown, at any stage of the suit, grant time to the parties or to any of them, and may, from time to time, adjourn the hearing of the suit.

Court may grant time, and adjourn hearing.

In all such cases the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Costs of adjournment.

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing to be necessary for reasons to be recorded by the Judge with his own hands.

#### Notes.

This section applies to Provincial Small Cause Courts.

Without defining what is the right mode of exercising the discretion vested in the Judge with regard to adjournments, the High Court held that the Judge ought, under sec. 146 of the Code, to have granted an adjournment in this case when it was applied for, on the first day after the Judge's return to the district that the applicant really had an opportunity of appearing before the Judge, in order to enable the applicant to file his documents and produce his witnesses; sec. 147, Act VIII of 1859, not applying to a case where no day has been fixed for the hearing of the case.—18 W. R., 325.

Where defendant had known for some time previously that his case was coming on and what evidence was necessary, a medical certificate, to the effect that he was confined to his bed by lumbago, was held to be no sufficient ground for adjournment.—24 W. R., 202.

A Court ought not to adjourn a case for the production of a document, much less (when it does so) to allow witnesses and several of the parties who were interested in the result, and who had been previously examined, to be recalled and to add to and vary the evidence which they had previously given, in order to prove a case which they had not set up.—(P. C.) 3 P. C. R., 304; 26 W. R., 55; L. R., 3 I. A. 259.

**157.** If, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to

Procedure if parties fail to appear on day fixed.

dispose of the suit in one of the modes directed in that behalf by Chapter VII., or make such other order as it thinks fit.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 10 Madr. 270, noted under sec. 98.

**158.** If any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance, of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Court may proceed notwithstanding either party fails to produce evidence, &c.

**Notes.**

This section applies to Provincial Small Cause Courts.

When a case is remanded by an Appellate Court for trial under sec. 148, Act VIII of 1859, the Court of first instance has no authority to receive new evidence, nor the lower Appellate Court to decide thereupon.—3 B. L. R., App. 91 ; S. C. 12 W. R., 23.

The first hearing of a suit took place on the 16th November, when issues were settled, and the final hearing of the suit was fixed for the 22nd January following. On the 22nd of January the plaintiff changed her vakil, and applied by the new vakil for a summons for a witness, and on the 23rd, the new vakil stating that owing to the absence of his witnesses he was not prepared to go on with the case, the Judge dismissed the suit. *Held* that, under sec. 148 of the Civil Procedure Code, the Judge was justified in dismissing the suit.—4 M. H. C. R., 56.

The first hearing of a suit was fixed for the 10th July 1867. Neither of the parties nor their vakils appeared. Thereupon the Court dismissed the suit under sec. 148 of the Civil Procedure Code, but afterwards, upon the application of the plaintiff's vakil, restored it to the file for hearing under sec. 119. Plaintiff obtained further adjournments to produce witnesses, the last being an adjournment to the 28th September. On that day the vakils of both parties appeared, but no witnesses, and the Court again dismissed the suit under sec. 148 for failure to produce witnesses. On the 22nd of October the suit was again, under sec. 119, restored to the file on the application of the plaintiff's vakil, and a decision was afterwards come to, for the plaintiff, upon the merits. On appeal the last-mentioned decree was reversed, and the decree passed under sec. 148 (whether the first or second decree was not specified) upheld, upon the ground that, as sec. 119 was inapplicable to a decree passed under sec. 148, the Court of first instance had acted without jurisdiction in restoring the suit to the file. *Held* on special appeal, reversing the decision of the lower Appellate Court, that the first decree of dismissal, being a decree which might have been made under sec. 147, was one to which sec. 119 might be applied ; that the second decree of dismissal was one to which sec. 148 alone applied, consequently one subject only to review or to an appeal, and the proceeding had in October 1867, being substantially an application for review, was one which the Court had power to grant.—6 M. H. C. R., 262.

The Court of first instance refused to grant plaintiff's application to be allowed to examine 2nd defendant as a witness on her behalf, thinking



the grounds of such application insufficient for the exercise of its discretion under sec. 162 of the Civil Procedure Code. On the adjourned date of hearing, plaintiff failed to produce any other witness, and the suit was dismissed under sec. 148. On regular appeal, the Civil Judge considered that the Court of first instance ought not to have refused plaintiff's application; but held that the refusal was a final order not open to question in appeal. On special appeal, *held* that the Civil Judge was wrong on the latter point. That if the plaintiff had been prevented from examining the 2nd defendant on insufficient grounds, she had not committed default under sec. 148; that the decree on the finding of the Civil Court was not maintainable without enabling plaintiff to examine 2nd defendant; and that that finding was conclusive in the special appeal. The decrees of both the lower Courts were consequently set aside, and the case remanded.—6 M. H. C. R., 299.

The plaintiff, upon whose application the Court of first instance adjourned the hearing of the suit, failed to cause the attendance of his witnesses on the day fixed for the further hearing, and the Court of first instance threw out the suit, stating that it did so under sec. 110, Act VIII of 1859. Both parties to the suit were represented on that day by their pleaders. The Court of first instance subsequently entertained and rejected an application under sec. 119 for a rehearing. The lower Appellate Court admitted and allowed an appeal against the order of the Court of first instance. Both the orders of the lower Courts were reversed, it being held that the Court of first instance must be regarded as having acted under sec. 148 of the Code.—7 N.-W. P. H. C. R., 77.

The terms of sec. 148, Act VIII of 1859, do not prevent an Appellate Court, on good and sufficient cause shown, from remanding a case disposed of thereunder, in order that justice may be done between the parties.—13 W. R., 464.

When adjournments are made by a Court, in order to give effect to its processes for compelling the attendance of the witnesses being thus made as much on its own motion at the instance of the defendant as at the instance of the plaintiff, the case cannot be said to come under Act VIII of 1859, sec. 148, which contemplates a case where a party has obtained time to produce his witnesses and has failed to do so.—19 W. R., 34.

The Code of Civil Procedure does not authorize the dismissal of a suit on refusal or failure of a party to deposit the amount ordered by the Court as remuneration to a Commissioner appointed under sec. 394 to examine accounts. The remuneration of a Commissioner appointed by the Court to examine accounts should, as a rule, be a definite amount, and not at a monthly allowance.—I. L. R., 3 Madr. 259.

See I. L. R., 7 Madr. 41, noted under sec. 103; 10 Madr. 270, noted under sec. 98; 13 Madr. 510, noted under sec. 13.

## CHAPTER XIV.

### OF THE SUMMONING AND ATTENDANCE OF WITNESSES.

**159.** The parties may, after the summons has been delivered "or sent"\* for service on the defendant, whether it

\* The words quoted have been inserted by the Civil Procedure Amendment Act (VII of 1888), sec. 15.

be for the settlement of issues only, or for the final disposal of the suit, obtain, on application to the Court or to such officer as it appoints in this behalf, before the day fixed for such settlement or disposal, as the case may be, summonses to persons whose attendance is required either to give evidence or to produce documents.

**Notes.**

This section applies to Provincial Small Cause Courts.

The 20th of March 1877 having been fixed for the final hearing of a suit, the plaintiff on the 17th of March, and defendant on the 19th, filed their lists of witnesses to be summoned. Both lists were ordered merely to be put up with the record. When the suit came on for hearing, it was dismissed on the ground that, when the plaintiff filed his list, there was not sufficient time left to summon the witnesses. *Held* that the Judge was not justified in dismissing the suit on this ground, unless he found that it would have been absolutely impossible to secure the attendance of the witnesses, had the summonses been granted on the 17th instant. Sec. 149 of Act VIII of 1859, and sec. 159 of Act X of 1877, discussed.—9 C. L. R., 569.

Under sec. 159 parties are entitled to summonses for their witnesses at any time before the final hearing ; but if there has been delay and want of diligence in consequence of which witnesses, not having been served in good time, are not present, the Court may properly refuse to adjourn the hearing.—I. L. R., 9 Bom. 308.

Under sec. 159 of the Civil Procedure Code (Act XIV) of 1882, a party to a suit is entitled, as of right, to obtain summonses for his witnesses any time before the day fixed for the disposal of the suit.—15 Bom. 86.

**160.** The party applying for a summons shall, before the summons is granted, and within a period to be fixed by the Court, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned, in passing to and from the Court in which he is required to attend, and for one day's attendance.

If the Court be subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to the rules (if any) laid down by competent authority.

Scale of expenses.

**Notes.**

This section applies to Provincial Small Cause Courts.

Under sec. 151, Act VIII of 1859 (extended to Revenue Courts by sec. 67, Act X of 1859), the defendant was not bound to pay into Court the costs of summoning and defraying the expenses of the witnesses, until the Court had fixed what was reasonable.—9 W. R., 128.

An order was made directing the realization (under sec. 151, Civil Procedure Code, 1859) by attachment and sale of the expenses of a witness after he was discharged without being required to give evidence. A miscellaneous appeal having been filed from the order, the High Court issued

a rule to show cause why the appeal should not be allowed. On no cause being shown, the appeal was filed.—12 W. R., 430.

**161.** The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness.

**Note.**—This section applies to Provincial Small Cause Courts.

**162.** If it appear to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid.

Procedure where insufficient sum paid in.

If it be necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of the party at whose instance he was summoned; or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid.

Expenses if witness detained more than one day.

**Note.**—This section applies to Provincial Small Cause Courts.

**163.** Every summons for the attendance of a person to give evidence or produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document which the person summoned is called on to produce shall be described in the summons with reasonable accuracy.

Time, place, and purpose of attendance to be specified in summons.

**Note.**—This section applies to Provincial Small Cause Courts.

**164.** Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned

Summons to produce document.

merely to produce a document shall be deemed to have complied with the summons, if he cause such document to be produced instead of attending personally to produce the same.

**Note.**—This section applies to Provincial Small Cause Courts.

Power to require persons  
present in Court to give  
evidence.

**165.** Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his actual possession or power.

**Note.**—This section applies to Provincial Small Cause Courts.

**166.** Every summons to a person to give evidence or produce a document shall be served as nearly as may be in manner hereinbefore prescribed for the service of summons on the defendant; and the rules contained in Chapter VI. as to proof of service shall apply in the case of all summonses served under this section.

Summons how served.

**Note.**—This section applies to Provincial Small Cause Courts.

**167.** The service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Time for serving sum-  
mons.

**Note.**—This section applies to Provincial Small Cause Courts.

**168.** If the serving-officer certify to the Court that the summons for the attendance of a person, either to give evidence or to produce a document, cannot be served, the Court “shall, if the certificate of the serving-officer has not been verified by affidavit, and may if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court,”\* touching the non-service;

Attachment of property  
of absconding witness.

and upon being satisfied that such evidence or production is material, and that the person for whose attendance the summons has been issued is absconding or keeping out of the way for the purpose of avoiding the service of the summons, may issue a proclamation requiring him to attend to give evidence, or produce the document, at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door of the house in which he ordinarily resides.

If he does not attend at the time and place named in such

\* The words quoted have been substituted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 16, for the words, “shall examine the serving-officer on oath,” as originally enacted.

proclamation, the Court may, in its discretion, at the instance of the party on whose application the summons was issued, make an order for the attachment of the property of the person whose attendance is required, to such amount as the Court thinks fit, not exceeding the amount of the costs of attachment and of the fine which may be imposed under Section 170 :

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

#### Notes.

This section applies to Provincial Small Cause Courts.

Sec. 159, Code of Civil Procedure, gives a Civil Court a discretion as to the issue of proclamation and subsequent orders for attachment ; but such Court is bound to exercise a reasonable discretion.—8 W. R., 505.

The proclamation issuable under sec. 159, Act VIII of 1859, could not be legally affixed to the mal cutcherry of a defaulting witness. Before the provisions of that section can come into play, personal service of summons must be attempted. In the absence of process of legal service, the magistrate's order of imprisonment for contempt, under sec. 174 of the Penal Code, and sec. 168 of the Code of Criminal Procedure, was quashed.—7 W. R., Cr. 58.

On application being made under secs. 159 and 168 of Act VIII of 1859 for issue of process against an absconding witness, the Court, if satisfied (as it was bound to be) that the witness had absconded, and that he was a material witness, ought to grant the application, unless the applicant had placed himself in such a position by his conduct that it would be inequitable to grant it.—1 W. R., 26.

A Court was not authorized to issue the proclamation and attachment mentioned in sec. 159, Code of Civil Procedure, unless it was proved to its satisfaction that the evidence of the witness was material, and that he was avoiding the summons ; and, after these circumstances have been shown, it was a matter of discretion to issue the proclamation and attachment, and after issue to let the case stand over.—13 W. R., 416.

Where an application was made at a very late stage of a case to enforce the provisions of sec. 159 of the Code of Civil Procedure, without proffer of any proof that the witness was absconding or keeping out of the way for the purpose of avoiding the service of the summons, the lower Appellate Court was held to have been justified in not postponing the case to secure the attendance of the witness, although material.—15 W. R., 176.

**169.** If, on the attachment of his property, such person appears, and satisfies the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

If witness appears, attachment may be withdrawn.

**Note.**—This section applies to Provincial Small Cause Courts.

**170.** If such person does not appear, or, appearing, fails to satisfy the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court may impose upon him such fine, not exceeding five hundred rupees, as the Court thinks fit, having regard to his condition in life and all the circumstances of the case, and may order the property attached, or any part thereof, to be sold for the purpose of satisfying all costs incurred in consequence of such attachment, together with the amount of the said fine (if any):

Provided that, if the person whose attendance is required pays into Court the costs and fine as aforesaid, the Court shall order the property to be released from attachment.

**Note.**—This section applies to Provincial Small Cause Courts.

**171.** Subject to the rules of this Code as to attendance and appearance, and to the provisions of the Indian Evidence Act, 1872, if the Court at any time thinks it necessary to examine any person other than a party to the suit, and not named as a witness by a party to the suit, the court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness, or require him to produce such document.

**Note.**—This section applies to Provincial Small Cause Courts.

**172.** Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit must attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document must either attend to produce it, or cause it to be produced, at such time and place.

**Note.**—This section applies to Provincial Small Cause Courts.

**173.** No person so summoned and attending shall depart unless and until (a) he has been examined or has produced the document and the Court has risen, or (b) he has obtained the Court's leave to depart.

**Note.**—This section applies to Provincial Small Cause Courts.

**174.** If any person on whom a summons to give evidence or produce a

Consequences of failure to comply with summons.

Court may of its own accord summon as witnesses strangers to suit.

Duty of persons summoned to give evidence or produce document.

When they may depart.



document has been served fails to comply with the summons, or if any person so summoned, and attending departs in contravention of Section 173, the Court may order him to be arrested and brought before the Court :

Provided that no such order shall be made when the Court has reason to believe that the person so failing had a lawful excuse for such failure.

When any person so brought before the Court fails to satisfy it that he had a lawful excuse for not complying with the summons, the Court may sentence him to fine not exceeding five hundred rupees.

*Explanation.*—Non-payment or non-tender of a sum sufficient to defray the expenses mentioned in section 160 shall be deemed a lawful excuse within the meaning of this section.

If any person so apprehended and brought before the Court cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him.

Procedure when witness apprehended cannot give evidence or produce documents.

#### Notes.

This section applies to Provincial Small Cause Courts.

Sec. 168 of the Civil Procedure Code requires that there should appear to the Court to be satisfactory ground for believing that the default on the part of witnesses summoned to give evidence is without lawful excuse before issuing a warrant for the arrest of such witnesses. But it is not necessary for this purpose to institute a formal investigation, and come to a determination on the evidence adduced.—5 M. H. C. R., 104.

Where a lower Appellate Court, by the terms of its order on a petition for the apprehension of witnesses, under sec. 168, Code of Civil Procedure, undertook to see that proper orders should be passed, it was bound to pass such orders as might, in its judicial discretion, be necessary under that section.—9 W. R., 359.

Where witnesses do not appear on summons, it is for the parties to move the Court, not for the Court to proceed, *suo motu*, to further the production of the witnesses, though the Court may issue attachment under sec. 168, Code of Civil Procedure, if it is shown that the witnesses are absconding or keeping out of the way.—13 W. R., 324.

**175.** If any person so failing to comply with a summons absconds or keeps out of the way, so that he cannot be apprehended and brought before the Court, the provisions of sections 168, 169, and 170, shall, *mutatis mutandis*, apply.

Procedure when witness absconds.

—This section applies to Provincial Small Cause Courts.

**176.** No one shall be bound to attend in person to give evidence or to be examined in Court unless he resides—  
Persons bound to attend in person.

within the local limits of its ordinary original jurisdiction, or

(b) without such limits and at a place less than fifty or (where there is railway-communication, for five-sixths of the distance between the place where he resides and the place where the Court is situate) two hundred miles distance from the Court-house.

**Note.**—This section applies to Provincial Small Cause Courts.

**177.** If any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his actual possession or power, the Court may, in its discretion, either pass a decree against him, or make such order in relation to the suit as the Court thinks fit.  
Consequence of refusal of party to give evidence when called on by Court.

#### Notes.

This section applies to Provincial Small Cause Courts.

A defendant failed to appear when ordered to attend under sec. 170, Act VIII of 1859. The Judge did not at once pass judgment against him, but called the plaintiff's witnesses, and refused to allow the defendant's vakeel, who was present, to cross-examine them. *Held* that the Judge ought to have allowed the defendant's vakeel to cross-examine the plaintiff's witnesses.—2 B. L. R., App. 12.

The discretion which a Court has, under sec. 170 of Act VIII of 1859, of passing judgment against a party for non-compliance with the Court's order to attend and give evidence, or produce documents in a suit, is not confined to cases where the party summoning him cannot prove his case otherwise than by the evidence of such other party, or where the fact to be proved is solely and exclusively within the knowledge of such other party. A bare allegation by a defendant in his written statement, without any proof in support of it, that a certain person is his inveterate enemy, is not sufficient to discredit that person's testimony.—9 B. L. R., 215 ; 17 W. R., 550 ; 9 B. L. R., 218 note ; 12 W. R., 369.

In a suit to recover the balance alleged to be due on a partnership transaction, the 1st defendant, who was examined as a witness for the plaintiff, refused to produce certain accounts relating to the partnership which he was directed to produce by the Civil Judge. Thereupon, judgment was given against the 1st defendant under sec. 170 of the Civil Procedure Code. On appeal, the High Court, holding that the accounts were relevant and material evidence in the suit, and that the Civil Judge was justified in requiring the 1st defendant to produce them, and being satisfied that the accounts were in the possession or control of the 1st defendant, affirmed the judgment of the Civil Judge.—4 M. H. C. R., 142.

The provisions of sec. 170 of the Code of Civil Procedure ought to be

exercised with the most temperate discretion. Where the Court might have treated one of the defendants as in default, and passed judgment against him under the above section, instead of doing so, passed over the default, and made an order adjourning the further hearing of the suit, and on the day to which the hearing was adjourned disposed of the suit under sec. 170, *held* that the Court by its own act was not in a position to treat the defendant as in default.—4 M. H. C. R., 231.

A judgment passed against a plaintiff under sec. 126 of Act VIII of 1859 was reversed by the High Court in special appeal, as there was nothing on the record to show that the party refused “to answer any material question relating to the suit.”—2 Bom. H. C. R., (A. C.) 360; 2nd Ed. 340.

The non-attendance of the defendant, when cited as a witness to give evidence, is not alone sufficient to justify the decision of the suit against him under sec. 170 of the Civil Procedure Code. His absence may be an unfavourable circumstance, but the Court will not always be disposed to attach to it such weight as to regard it as justifying a decree in the plaintiff's favour.—2 N.-W. P. H. C. R., 67.

Sec. 170, Act VIII of 1859, was not intended to empower a Court to decree a claim which on the face of it is barred by limitation, simply because the defendants had been summoned and did not appear.—7 W. R., 46.

A Court may avail itself in an execution-case of the power given by sec. 170, Act VIII of 1859, to summon a party to give evidence, and, on his failing to comply with that order, to pass judgment against him.—8 W. R., 64.

To render a person liable to the penalty prescribed by sec. 170, Act VIII of 1859, it must be shown that notice had been duly served on him, and that he had failed to comply with the requisition contained in that notice.—11 W. R., 110.

Sec. 170 was applicable to the procedure in suits under the Bengal Rent Act.—4 W. R., Act X., 18; 4 W. R., Act X., 50.

Sec. 170, Act VIII of 1859, authorized dismissal for default only against the plaintiff who failed or refused to attend, not against the plaintiffs who appeared.—1 W. R., 25; 1 W. R., 168.

**178.** Whenever any party to a suit is required to give

Rules as to witnesses to evidence or to produce a document, the apply to parties summoned. rules as to witnesses contained in this Code shall apply to him so far as they are applicable.

**Note.**—This section applies to Provincial Small Cause Courts.

## CHAPTER XV.

### OF THE HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

**179.** On the day fixed for the hearing of the suit, or on

any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

**Explanation.**—The plaintiff has the right to begin, unless where the defendant admits the facts alleged by the plaintiff, and contends that, either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

**Notes.**

This section applies to Provincial Small Cause Courts

In a suit for partition of certain property and trading business, the defendants resisted the suit, admitted a nucleus of joint property, and claimed the right to begin, on the ground that the *onus* was on them to prove that the whole property and the trading business were not joint. *Held* that, unless the defendants admitted all the allegations, or all the material allegations, the plaintiff was entitled to begin.—7 C. L. R., 274.

At the hearing of a case on a preliminary issue, the defendant, by whom the issue is raised, has the right to begin. Two counsel for the same party may be heard in argument of a preliminary issue.—1. L. R., 12 Bom. 454.

Statement and production of evidence by other party.

**180.** The other party shall then state his case and produce his evidence (if any).

Reply by party beginning.

The party beginning is then entitled to reply.

Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues, or reserve it by way of answer to the evidence produced by the other party. In the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

**Note.**—This section applies to provincial Small cause Courts.

**181.** The evidence of the witnesses in attendance shall be taken orally in open Court in the presence, and under the personal direction and superintendence, of the Judge.

Witnesses to be examined in open Court.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where a will is contested, the proceedings should take, as nearly as may be, the form of a regular suit, as if brought by the party propounding the will; and where a judge granted a probate, it was held to be a serious defect with reference to Act XXIII of 1861, sec. 38, and Act VIII of 1859, sec. 172, that he took down only memoranda of the evidence, and not

their testimony in the language in ordinary use in proceedings before the Court.—24 W. R., 162.

Where a Court of first instance, considering it unnecessary to examine certain witnesses for the defence, dismissed the suit, and the lower Appellate Court, disbelieving the evidence of those witnesses for the defence who were examined, allowed the plaintiff's appeal, *held* that, before doing so, the lower Appellate Court should have afforded the defendants an opportunity of supplementing the evidence which they had given in the first Court by the testimony of those witnesses whom that Court had declared it unnecessary to hear, and that the case must be regarded as one in which the first Court had refused to examine the witnesses tendered by the defendants. The Court directed the first Court to examine the defendants' witnesses, and, having done so, to return their depositions to the lower Appellate Court, which was to replace the appeal upon its file and dispose of it, —I. L. R., 9 Al. 339.

**182.** In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and also in the presence of the parties or their pleaders, and the Judge shall, if necessary, correct the same, and shall sign it.

#### Notes.

This section applies to Provincial Small Cause Courts.

Failure to comply with the provisions of secs. 182 and 183 of Act X. of 1877 (Civil Procedure Code) in a judicial proceeding is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition; and under sec. 91 of Act I of 1872 (Indian Evidence Act), no other evidence of such deposition is admissible.—I. L. R., 6 Cal. 762.

**183.** If the evidence is taken down under section 182 in a language different from that in which it was given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it was given.

**184.** In cases in which the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record.

Memorandum when evidence not taken down by Judge.

**185.** Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as given in English taken down in English, the Judge may so take it down with his own hand.

**185A.\*** (1) The Local Government may, by notification in the official Gazette, direct, with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall, instead of being taken down in the manner prescribed in the foregoing sections, be taken down by him with his own hand in the English language.

(2) where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

(3) Evidence taken down under sub-section (1) or sub-section (2) shall be in the form mentioned in section 182, and be read over and signed, and, as occasion may require, interpreted and corrected, as if it were evidence taken down under that section.

(4) The Local Government may, by notification in the official Gazette, revoke or vary a direction notified under sub-section (1).

**186.** The Court may, of its own motion, or on the application of any party or his pleader, take down, or cause to be taken down, any particular question and answer, or any objection to any question, if there appear any special reason for so doing.

**187.** If any question put to a witness be objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection, and the name of the person making it, together with the decision of the Court thereon.

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\* Sec. 185A has been inserted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 17.



**188.** The Court may record such remarks as it thinks  
Remarks on demeanour of witnesses. material respecting the demeanour of any witness while under examination.

**189.** In cases in which an appeal is not allowed, it  
Memorandum of evidence in unappealable cases. shall not be necessary to take down the evidence of the witnesses in writing at length ; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record.

**Note.**—This section applies to Provincial Small Cause Courts.

**190.** If the Judge be rendered unable to make a memorandum as above required by this chapter, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.  
Judge unable to make such memorandum to record reason of his inability.

Every memorandum so made shall form part of the record.

**Note.**—This section applies to Provincial Small Cause Courts.

**191.** (1) where the Judge taking down any evidence, or causing any memorandum to be made, under this Chapter, is prevented by death, transfer, or other cause from concluding the trial of the suit, any successor to such Judge may deal with such evidence or memorandum as if he himself had taken it down or caused it to be made, and proceed with the suit from the stage at which his predecessor left it.  
Power to deal with evidence taken down by another Judge.

(2) The provisions of sub-section (1) shall apply, so far as they can be made applicable, to a suit transferred under section 25 :

Provided that a Court transferring a suit under that section may, if it thinks fit, direct that the Court to which the suit is transferred shall recall all or any of the witnesses who have been examined, and take their evidence afresh.\*

**Notes.**

A Subordinate Judge, having taken all the evidence in a suit before him, and having completed the hearing of the suit, except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case

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\* Sec. 191 has been substituted for the original by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 18.

from the point at which it had been left by his predecessor, and proceeded to judgment and decree:—*Held* that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides, and the arguments on behalf of both, and then finally decided the case which he had himself heard and tried; that he might, in accordance with the provisions of sec. 191 have allowed the depositions which had been taken before his predecessor to be put in; and that, in neglecting to take this course, and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and decree were nullities.—I. L. R., 7 Al. 857.

A Subordinate Judge, having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed, a further adjournment was made. The Subordinate Judge, at this stage of the proceedings, was removed, and a new Subordinate Judge was appointed. *Held* that the trial, so far as it had gone before the first Subordinate Judge, was abortive, and, as a trial, became a nullity. *Held* also that the duty of the second Subordinate Judge, when the case was called on before him, was to fix a date for the entire hearing and trial of the case before himself; that he might, at the request of the pleaders, have fixed the same day upon which the case was called on, and proceeded to try it at once; and that the trial should then have proceeded in the ordinary way, except that the parties would be allowed, under sec. 191 to prove their allegations in a different manner. *Jagram Das v. Narain Lal* (7 Al. 857) referred to.—8 Al. 35.

The trial of a suit was completed except for argument and judgment, and a date was fixed for hearing argument. At this point a new Subordinate Judge was appointed, and he adjourned fixing a particular date for disposal of the case. After some further adjournments, the Subordinate Judge delivered judgment, having heard argument on both sides upon the evidence taken by his predecessor. The District Judge on appeal upheld the decision, a second appeal preferred to the High Court, and an objection was raised on the appellant's behalf that the proceedings taken before the Subordinate Judge were void, and he could not be said to have tried the case, inasmuch as no evidence was taken before him, and his judgment was based solely on evidence recorded by his predecessor. No objection of this kind was taken in either of the Courts below:—*Held* by the Full Bench that with reference to the grounds of appeal, and under the circumstances of the case, the officer who passed the decree in the Court of first instance had jurisdiction to deal with and determine the suit in the mode in which he did. *Jagram Dos v. Narain Lal* and *Afzal-ul-nissa Begam v. Al Ali* discussed.—8 Al. 576.

**192.** If a witness be about to leave the jurisdiction of the Court, or if other sufficient cause be shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of either party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Power to examine witness immediately.

Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and may then be read at any hearing of the suit.

**Note.**—This section applies to Provincial Small Cause Courts.

**193.** The Court may, at any stage of the suit, recall any witness who has been examined, and who has not departed in accordance with section 173, and may (subject to the provisions of the Indian Evidence Act, 1872) put such questions to him as the Court thinks fit.

Court may recall and examine witness.

A Court continuing a suit under section 191 may recall and re-examine a witness who has departed in accordance with section 173.

—This section applies to Provincial Small Cause Courts.

## CHAPTER XVI.

### OF AFFIDAVITS.

**194.** Any Court of first instance and any Appellate Court may, at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Power to order any point to be proved by affidavit.

Provided that, where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

**Note.**—This section applies to Provincial Small Cause Courts.

**195.** Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance, for cross-examination, of the declarant.

Power to order attendance of declarant for cross-examination.

Such attendance shall be in Court, unless the declarant is exempted under this Code from personal appearance in Court, or the Court otherwise directs.

—This section applies to Provincial Small Cause Courts.

**196.** Affidavits shall be confined to such facts as the declarant is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that reasonable grounds thereof be set forth.

The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party producing the same.

**Note.**—This section applies to Provincial Small Cause Courts.

**197.** In the case of any affidavit under this Code—

- (a) any Court or Magistrate, or
  - (b) any officer whom a High Court may appoint in this behalf, or
  - (c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,
- may administer the oath of the declarant.

.—This section applies to Provincial Small Cause Courts.

## CHAPTER XVII.

### OF JUDGMENT AND DECREE.

**198.** The Court, after the evidence has been duly taken, and the parties had been heard either in person or by their respective pleaders or recognized agents, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

**Note.**—This section applies to Provincial Small Cause Courts.

**199.** A Judge may pronounce a judgment written by his predecessor, but not pronounced.

**Note.**—This section applies to Provincial Small Cause Courts.

**200.** The judgment shall be written in the language of the Court, or in English, or in the Judge's mother-tongue.

**Note.**—This section applies to Provincial Small Cause Courts.

**201.** Whenever the judgment is written in any language other than that of the Court, the judgment shall, if any of the parties so re-

Matters to which affidavits shall be confined.

Oath of declarant by whom to be administered.

Power to pronounce judgment written by judge's predecessor.

Language of judgment.

\* Translation of judgment.

quire, be translated into the language of the Court, and the translation shall also be signed by the Judge or such officer as he appoints in this behalf.

**Note.**—This section applies to Provincial Small Cause Courts.

**202.** The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and shall not be altered or added to, save to correct verbal errors or to supply some accidental defect not affecting a material part of the case, or on review.

Judgment to be dated and signed.

**Note.**—This section applies to Provincial Small Cause Courts.

**203.** The judgments of the Courts of Small Causes need not contain more than the points for determination and the decision thereupon.

Judgments of Small Cause Courts.

The judgments of all other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Judgments of other Courts.

#### Notes.

This section applies to Provincial Small Cause Courts.

Sec. 203 of the Code of Civil Procedure does not relieve the Judge of a Small Cause Court from the necessity of giving some indication in his judgment that he has understood the facts of the case in which such judgment is given. Where a judgment in a Small Cause Court suit stated merely that the suit was dismissed for reasons given in the Judge's decision in another suit, and the judgment in the suit so referred to was in the following words:—"Claim for recovery of money lent with interest. Reply. Defendant pleads that he has paid the debt to the plaintiff. Issue. Has the defendant paid the debt claimed to the plaintiff? Finding. It is not proved that the defendant paid the debt to the plaintiff. Ordered that the claim is decreed with costs"—*held* that this was, in fact, no judgment at all, and the case must be remanded for re-trial on the merits under the analogy of sec. 562 of the Code of Civil Procedure, read with sec. 647 *ib.*—13 Al. 533.

**204.** In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons thereof upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit.

Court to state its decision on each issue. Exception.

#### Notes.

In a suit for ejectment by a land-lord against his tenant the following amongst other issues were raised, *viz.*, whether the notice alleged was sufficient, and whether the defendant was entitled to a right of occupancy. The Court of first instance dismissed the suit, finding upon the admitted facts

that the notice alleged was insufficient, but also decided the other issues raised, and held that the defendant was not entitled to a right of occupancy. *Held*, that the finding upon the question of notice based upon the admitted facts being sufficient to dispose of the whole case, the Court erred in proceeding to determine any other issues raised in the suit.—I. L. R., 10 Cal. 1095.

See I. L. R., 4 Madr. 134, noted under sec. 18; 8 Bom. 368, noted under sec. 561.

**205.** The decree shall bear date the day on which the judgment was pronounced; and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Date of decree.

**Note.**

This section applies to Provincial Small Cause Courts.

The mere specification of costs in a decree without an allotment of responsibility is not a sufficient compliance with sec. 189, Act VIII of 1859.—15 W. R., 4.

A copy of the judgment, with the schedule of costs appended, does not constitute a proper decree such as is required under sec. 189, Code of Civil Procedure.—15 W. R., 326.

**206.** The decree must agree with the judgment: it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claims, as stated in the register, and shall specify clearly the relief granted or other determination of the suit.

Contents of decree.

The decree shall also state the amount of costs incurred in the suit, and by what parties, and in what proportions such costs are to be paid.

If the decree is found to be at variance with the judgment, or if any clerical or arithmetical error be found in the decree, the Court shall, of its own motion, or on that of any of the parties, amend the decree so as to bring it into conformity with the judgment, or to correct such error: provided that reasonable notice has been given to the parties or their pleaders of the proposed amendment.

Power to amend decree.

**Notes.**

This section applies to Provincial Small Cause Courts.

A Court has power to amend its decree by bringing it into conformity with the judgment after the said decree has been confirmed on appeal.—I. L. R., 9 Madr. 354.

In a suit for money against the karnavan and two anandravans of a Malabar tarwad, the judgment directed a "decree for the plaintiff as prayed" but the decree ordered payment by one anandravan only. Land be-



longing to the tarwad was attached and sold in execution, an objection by the other members of the tarwad having been overruled. After the sale, the decree was amended and brought into conformity with the judgment. In a suit brought by other members of the tarwad against the karnavan, the decree-holder and the execution-purchaser, it was found that the judgment-debt had been contracted for proper tarwad purposes, and that the land had been sold for its proper value :—*Held*, that the sale was binding on the plaintiffs.—14 Madr. 150.

The judgment in an appeal adjudged interest to be paid for the period prior to the institution of the suit only. The decree contained an order for payment of interest from the date of the suit on wards :—*Held* that no variance with the judgment, within the meaning of sec. 206, was involved in the additional order contained in the decree.—7 Al. 755.

When an original decree is amended under sec. 206 of the Civil Procedure Code, it, as amended, is the decree in the suit ; and an appeal, therefore, lies from it under the provisions of sec. 540, when the validity of the amendment can be questioned. The matter of amending a decree does not by itself constitute a “ case,” within the meaning of sec. 622 but forms part of the proceedings in the suit in which the decree is made :—*Held*, therefore, *per* OLDFIELD, J., that, where an original decree, which was appealable, was amended by the Court of first instance, under sec. 206, the High Court had no power to revise such amendment under sec. 622 of the Code. *Per* MAHMOOD, J.—An order passed under sec. 206 amending a decree is a separate adjudication, and is not merely a part of the original decree, and cannot alter its date, and such an order is not appealable under sec. 588 of the Code. Such an order, therefore, can be revised by the High Court under sec. 622.—7 Al. 276.

A District Judge, by an order passed under sec. 206 altered a decree passed by his predecessor in the terms, “ I dismiss the appeal.” to read “ I accept the appeal,” on the ground that his predecessor had obviously meant to say that he accepted the appeal, and that the decree as it stood failed to give effect to the judgment. *Per* OLDFIELD, J.—That the order passed by the Judge under sec. 206 could not be made the subject of revision by the High Court under sec. 622 because there was an appeal from the amended decree, which became the decree in the suit, and superseded the original decree. *Per* MAHMOOD, J.—That an order passed under sec. 206 constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under sec. 588. Also that, in saying that by “ dismissed,” his predecessor meant “ decreed,” the Judge had altered the decree in a manner not warranted by the terms of sec. 206, that he had, therefore, exercised his jurisdiction “ illegally and with material irregularity,” within the meaning of sec. 622 of the Code, and that the Court was consequently competent to revise his order. *Raghunath Das v. Raj Kumar* (I. L. R., 7 Al. 276) referred to.—7 Al. 411.

The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment, and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282. Subsequently, on application by the decree-holder, and without giving notice to the judgment debtor, the Court which passed the decree, purporting to act under sec. 206, altered the decree, and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that

the decree was for Rs. 1,282 and had been improperly altered. The Court executing the decree disallowed the objection, on the ground that it was not such as could be entertained in the execution-department:—*Held* that the decree as it originally stood was in accordance with the judgment, and the Court had no power to alter it as it did, and the proceeding was further irregular, in that no notice was given to the opposite party as required by sec. 206 of the Code:—*Held* also that, when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed, and therefore not capable of execution; and that the judgment-debtor in this case could raise the question whether the decree, which was altered behind his back, was a valid decree, and fit to be executed.—8 Al. 377.

Art. 173 of schedule ii. of the Limitation Act (XV of 1877) applies only to applications made to a Court to exercise powers which, without being moved by such application, it is not bound to exercise, and not to applications made to a Court to do acts which it has no discretion to refuse to do. It does not govern an application under sec. 206 of the Civil Procedure Code, for amendment of a decree so as to bring it into conformity with the judgment, it being the bounden duty of a Court, of its own motion, to see that its decrees are in accordance with the judgments and to correct them if necessary. *Gaya Prasad v. Sikri Prasad* (I. L. R., 4 Al. 23), dissented from. The petition of *Kishan Singh* (Weekly Notes, 1883, p. 262) *Kylasa Goundan v. Ramasami Ayyan*, (I. L. R., 4 Madr. 172), and *Vithal Janardan v. Vithojirav Putlajirav* referred to.—9 Al. 364.

Where a decree for possession of immoveable property, passed by a lower Appellate Court, omitted to specify the plots of land to which it related, and was upheld by the High Court by a decree which likewise gave no specification of those plots, and the lower Appellate Court subsequently, on the decree-holder's application, amended its decree, under sec. 206 of the Civil Procedure Code, by inserting the required specification, *held* that, inasmuch as the effect of the amendment was not to alter the effect of the High Court's decree, or to effect property other than that actually claimed and decreed, the amendment was not contrary to law. *Shohrat Singh v. Bridgman* (I. L. R., 4 Al. 376), *Gobardhan Das v. Gopal Ram* (I. L. R., 7 Al. 366), *Kristo Kinkur Roy v. Rajah Burrodacant Roy* (14 Moore's I. A., 465), and *Sundara v. Subbana* (I. L. R., 9 Madr. 354), referred to.—10 Al. 51.

The effect of sec. 579 of the Civil Procedure Code is to cause the decree of the Appellate Court to supersede the decree of the first Court, even where the appellate decree merely affirms the original decree, and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended under sec. 206 of the Code is the decree to be executed, and the decree to be executed is that of the Appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree. The only Court which has jurisdiction to amend the appellate decree is the Court of appeal. So *held* by the Full Bench, MAHMOOD, J., dissenting. *Shohrat Singh v. Bridgman* (I. L. R., 4 Al. 376) explained and followed. *Kistokickur Roy v. Raja Burrodanaunt Roy* (11 Moore's I. A. 465) discussed. The insertion of the word "not" in the last line but one of the judgment, and also in the head-note in *Shohrat Singh v. Bridgman* (I. L. R., 4 Al. 376) was a clerical error. *Per* MAHMOOD, J.—When a decree has been simply affirmed on appeal, sec. 579 of the Code does not imply that the appellate decree supersedes the original decree, so as to render it ineffective

for purposes of execution. In such a case the lower Court continues to have jurisdiction to entertain an application for amendment of its own decree under sec. 206 of the Code; and such application is not governed by any article of the Limitation Act, and may be made at any time. It may be granted under sec. 206, even where an application for review of judgment under sec. 623 upon the same grounds would be barred by sec. 624. A decree, awarding the plaintiff's possession of immoveable property, did not comply with sec. 206 of the Code by containing the particulars of the claim or specifying clearly the relief granted. On appeal by the defendant, the High Court, in general terms, confirmed the decree, and dismissed the appeal. The decree-holders then applying for execution, the judgment-debtors objected that the decree was incapable of execution, and this objection was allowed by the High Court on appeal. The decree-holders applied to the High Court to amend its decree, but the application was refused; and they then made a similar application to the first Court to amend its original decree which had been affirmed on appeal. This application was granted by a Judge who was not the Judge who had passed the original decree. *Held* by the Full Bench (MAHMOOD, J., dissenting) that the Court below had no jurisdiction to make such amendment, the original decree having been superseded by the High Court's appellate decree. *Held* by MAHMOOD J., *contra*, that the Court below had jurisdiction to make such amendment, and could make it any time; that the High Court's decree could not be amended, because the former order refusing amendment had become final and operated as *res judicata*; that the amendment of the original decree under sec. 206 was not barred by sec. 624; and that it would be denying justice on account of technicalities to hold that the original decree, though affirmed on appeal, could be neither executed nor amended.—11 Al. 267.

The decree of a Court of first instance having on appeal been affirmed, by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor, on the ground that that was not the decree which could be executed. *Held* by the Full Bench that the objection must prevail, on the grounds that the decree sought to be executed was not that of the Appellate Court, and that the decree had been altered by the first Court, which had no power to alter it. *Abdul Hayai Khan v. Chunia Kuar* (I. L. R., 8 Al. 377) referred to. *Held* by the Division Bench that the order of the first Court, disallowing the objection, and directing that execution of the decree as altered should proceed, could not be regarded as passed under sec. 206 of the Civil Procedure Code, but was an order passed in execution of decree, and as such was appealable.—11 Al. 314.

Applications to the Court under sec. 206 of the Code of Civil Procedure are not governed by the Limitation Act. A Small Cause Court rejected an application made under sec. 206 of the Code of Civil Procedure to bring a decree into conformity with the judgment, on the ground that a former application had been dismissed for default, and the petitioner was bound to apply within one month from the date of dismissal, and was now too late. On an application to the High Court under sec. 622 of the Code to set aside this order:—*Held*, that the High Court could not interfere.—10 Madr. 51.

An application, under sec. 206 of the Civil Procedure Code (Act XIV of 1882), to correct errors in a decree, not being one within the purview of

article 178 of Schedule II of the Limitation Act XV of 1877, is not governed by any limitation, and can be made at any time such errors are discovered.—11 Bom. 284.

An application to amend a decree, which is found to be at variance with the judgment, in accordance with the provisions of sec. 206 of the Civil Procedure Code, is an application of the kind mentioned in No. 178 of sch. ii. of Act XV of 1877, and as such subject to the limitation of three years.—4 Al. 23.

The plaintiff sued on a bond in which real property was hypothecated. In his claim the property hypothecated was detailed, and the property itself was impleaded as a defendant, and he obtained a decree in the following terms: "Decree for plaintiff in favour of his claim, and costs against defendant." *Held* that the decree was to be regarded as simply for money, and not for enforcement of lien.—2 Al. 342.

Where the plaintiff by his claim sought for a decree for money and enforcement of lien on the property hypothecated in the bond on which the claim was based, and he obtained a decree for the "claim as brought," without any specification in it as to the relief he sought by charging the property hypothecated: *Held* that such a decree was a decree for money only, and did not enforce the charge on the property. *Muluk Fuqueer Bakhsh v. Manohar Dass* (H. C. R., N.-W. P., 1870, p. 29) followed.—2 Al. 345.

Any order made upon an application for a review of judgment—except an order absolutely rejecting the application—becomes, if it in any way modifies or alters the original order (although the modification or alteration extends only to the rectification of a clerical mistake), the final order in the case; and party aggrieved by the original decree is entitled, although the modification or alteration was made in his favour, to treat the order upon review of judgment as the final decree or order in the case; and if it was made by a Court, an appeal from which lies in the Court of a District Judge, he is entitled to prefer his appeal at any time within thirty days from its date. When an application for a review of judgment is made upon several grounds, one of which refers only to the question of adjudication of costs, and the Court to whom the application is made holds all the other grounds to be untenable, but is of opinion that there has been a clerical mistake in that part of its order or judgment which refers to costs, it may reject the application absolutely, and permit the applicant to apply, under sec. 206 of the Civil Procedure Code, for a rectification of the clerical mistake; but if it does not do so, but, on the application for a review of judgment, amends the clerical mistake in its original order, the decree drawn up in conformity to his order becomes the final decree, and an appeal will lie against it if brought within the time prescribed for bringing an appeal against any other similar decree.—6 Cal. 22.

The plaintiff in a suit claimed possession of villages said in the plaint to be "detailed below." No details of the villages were given in the plaint itself, but a separate paper containing a list of villages was filed with the plaint. The plaintiff obtained a decree for possession of "all the villages claimed," but there was no indication in the decree what those villages were. *Held* that the Court executing the decree was not justified in reading the contents of the list of villages attached to the plaint into the decree, and awarding the decree-holder possession of the villages named in such list. *S. A. No. 310 of 1882*, decided 11th August 1882, (not reported), followed. *Debi Charan v. Pirbhu Din Ram* (I.L.R., 3 Al. 388) referred to.—6 Al. 30.

Where a Court improperly refused to amend a decree, which was at variance with the judgment, *held* that in so acting the Court had acted in the exercise of its jurisdiction illegally and with material irregularity, within the meaning of sec. 622 of the Civil Procedure Code, and its order was consequently subject to revision under that section. On the question whether the High Court should refrain from exercising its powers under sec. 622 by reason of the long time which had elapsed from the date of the decree, *held* that the petitioner was not fairly chargeable with laches.—6 Al. 125.

Whether an order made by a single Judge of the High Court directing the amendment of a decree passed in appeal by a Division Bench of which he had been a member is an order made under sec. 206 read with secs. 582 and 632 of the Code of Civil Procedure, or by virtue of the inherent power which the High Court has in the exercise of its Appellate Civil jurisdiction to amend its own decrees, it is one to which the provisions of Chapter XLIII of the Code of Civil Procedure are applicable, and from such order no appeal under sec. 10 of the Letters Patent will lie. *Hurrish Chunder Chowdry v. Kali Sunderi Debia* discussed.—14 Al. 226.

See I. L. R., 13 Al. 124, noted under Art. 179 of the Limitation Act ; 15 Madr. 403, noted under sec. 13.

**207.** When the subject-matter of the suit is immoveable property, and such property is identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

**208.** When the suit is for moveable property, if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had.

**Note.**—This section applies to Provincial Small Cause Courts.

**209.** “When a decree is for the payment of money,”\* the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other ear-

\* The words quoted have been substituted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 20, for the words, “When the suit is for a sum of money due to the plaintiff,” as originally enacted.

lier date, the Court shall be deemed to have refused such interest, and a separate suit therefore shall not lie.\*

#### Notes.

This section applies to Provincial Small Cause Courts.

A creditor having stipulated for interest at a certain rate is entitled to a decree for interest at that rate up to the date of decree. *Mangniram. Marwari v. Dhowtal Roy* (I. L. R., 12 Cal. 569) dissented from.—I. L. R., 12 Madr. 485.

Interest after date of suit is in the discretion of the Court, notwithstanding that a fixed rate of interest is mentioned as payable "up to realization" in the bond sued upon.—12 Cal. 569.

The contract rate of interest must be allowed up to the date of decree in accordance with Act XXVIII of 1855, sec. 2. The Civil Procedure Code, sec. 209, does not expressly refer to suits in which interest has been contracted for, and does not repeal the former Act.—3 Madr. 125.

A decree for money directed that its amount should be payable "according to the terms of the judgment-debtor's written statement." In his written statement the judgment-debtor had promised to pay interest on the judgment-debt if the same were not discharged by a certain day. *Held*, having regard to the decision of the full Bench in *Debi Charan v. Pirbhu Din* (I. L. R., 3 Al. 388), that the judgment-debtor having failed to discharge the judgment-debt by such day, he was bound by the terms of the decree to pay interest on its amount.—3 Al. 775.

A decree directed accounts to be taken of what was due for principal and interest under a mortgage, such interest to be allowed "up to the time of payment hereinafter mentioned, or until six months from the date of the decree," whichever first should happen; and further directed the plaintiff to pay what should be reported due for principal and interest up to the date of payment and costs, with interest at 6 per cent. from the date of taxation until payment, within six months after the Registrar should make his report. The plaintiff tendered a sum sufficient to cover the principal and interest due, but insufficient to cover costs, at a time prior to the drawing up of the Registrar's report. *Held* that the payment of principal and interest "hereinafter mentioned" referred to a time after the Registrar had made his report, because the sum to be paid was a sum reported to be due by the Registrar, and that, therefore, a tender made before the Registrar's report was given was not a sufficient tender to stop interest from the date of the tender.—9 Cal. 33.

See I. L. R., 18 Cal. 164, noted under sec. 266.

**210.** In all decrees for the payment of money, the Court may, for any sufficient reason, order that the amount shall be paid by instalments, with or without interest.

And, after the passing of any such decree, the Court may, on the application of the judgment-debtor, and with the consent of the decree-holder, order that the amount decreed be paid instal-

\* This clause has been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 20.



ments on such terms as to the payment of interest, the attachment of the property of the defendant, or the taking of security from him, or otherwise, as it thinks fit.

Save as provided in this section and section 206, no decree shall be altered at the request of parties.

**Notes.**

This section applies to Provincial Small Cause Courts.

When the lower Courts ordered the decree to be paid by instalments which were hardly sufficient even to cover the interest, and did not provide for the interest and penalty conditioned in case of default, *held* that they had exercised the discretion vested in them by sec. 194, Act VIII of 1859, arbitrarily and without due caution, and their order could be interfered with and set aside on special appeal.—1 Agra H. C. R., 116; 1 Agra H. C. R., 270.

*Held* that, when the not ordering the amount of the decree to be paid by instalments has arisen from any error or omission, or it is otherwise requisite for the ends of justice, the Court which passed the decree has power to review it, and to make an order for payment by instalments. Otherwise the Court has no power to make such an order subsequent to the decree without the consent of the judgment-creditor.—4 Bom. H. C. R., (A. C.) 77.

The discretion vested in Courts by sec. 194 of Act VIII of 1859 should not be exercised without sufficient reason.—2 Hay's Rep., 68.

It should not be applied to an action for money due on an instalment-bond, the terms of which had been broken.—2 Hay's Rep., 95.

A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years; and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884 the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887, he made another application for execution, in which he relied on the same default. *Held* that the default, if it was one, had been waived by the decree-holder, and that such waiver was a good defence to the present application. *Mumford v. Peal* (I. L. R., 2 Al. 857) and *Asmutullah Dalal v. Kally Churn Mitter* (I. L. R., 7 Cal. 56) distinguished.—I. L. R., 11 Al. 482.

A simple money decree was passed in 1871, and was transferred to another Court for execution, and in June 1882, an application was made for execution; and, shortly afterwards, the Court to which the decree had been transferred sanctioned an agreement between the parties for satisfaction of the decree by instalments. In June 1885, an application was made to the Court which passed the decree to again transfer it for execution, and this application recited the previous agreement and certain payments which had been made, and it was granted. A further application for execution for the remaining instalments was made in April 1883. *Held* by EDGE, C. J., that the Court to which the decree was transferred had no power in 1882, to sanction the agreement under sec. 257A of the Civil Procedure Code; that if the order in June 1885, of the Court passing the decree were regarded as a sanction (which it would be very difficult to hold), that order nevertheless could not operate as one under sec. 210 altering the decree; that if any decree in the case were capable of execution it was the decree of 1871, which had never been altered by a Court and that inasmuch as a previous

application for execution had been made in June 1882, that decree was dead, as well under sec. 230 of the Code as under art. 179, sch. ii. of the Limitation Act (XV of 1877). *Held* by STRAIGHT, J., that the order of June 1885 was not, and could not be, an order sanctioning the agreement of June 1882, and the decree consequently stood unaltered; and, an application to execute it having been made and granted since Act XIV of 1882 came into operation, the decree was now dead under sec. 230 of the Code. *Per* EDGE, C. J.—The Court to which a decree has been transferred for execution has no power to sanction an agreement under sec. 257A of the Code for satisfaction of the decree by instalments, but such sanction can be given only by the Court which passed the decree. An agreement sanctioned under sec. 257A cannot be treated, without anything more, as a decree of the Court, and cannot operate as an order under sec. 210, though an order under sec. 210 would operate as a sanction under sec. 257A. The decree in a suit which must be executed is the decree as originally passed or as altered by a proper order for that purpose, as *e. g.*, by an order under sec. 210.—12 Al. 571.

On the 23rd February 1878, an application was made for execution of a decree, dated the 3rd December 1877, in which the decree-holder stated that the judgment-debtor had agreed to pay the balance then due on the 13th August 1878. The application was then struck off on the 26th June 1878. On the 30th June 1881, the decree-holder again applied for execution, and on the 11th July 1881, the judgment-debtor, with the consent of the decree-holder, applied for time to pay the balance due till the 8th September 1881, and that application was also struck off. On the 1st March 1883, the decree-holder again applied for execution. *Held* that the application was not barred by limitation upon the ground that the application by the judgment-debtor, made on the 11th July 1881, alleging that he had come to an arrangement with the decree-holder for the payment of the amount due by instalments, having resulted in its being registered and the proceedings struck off, amounted to a direction that the decretal amount be paid by instalments as stipulated in the petitions, and that, this being so, there was a decree passed on that date under the provisions of the second paragraph of sec. 210 of which the decree-holder was entitled to have execution.—11 Cal. 143.

Act X of 1877, sec. 210, is not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the property hypothecated by such bond. In such a suit, therefore, the Court cannot direct that the amount of the decree shall be payable by instalments.—2 Al. 320.

There is nothing in Act X of 1877, sec. 210, or elsewhere in that Act, authorizing a Court to direct that the amount of a decree should be paid within a fixed time from its date. *Seemle*.—That sec. 210 is not applicable in a suit for the recovery of the amount of a bond-debt by the sale of the *nankar* allowance hypothecated by such bond.—2 Al. 649.

The word “debt” in secs. 20 and 21 applies only to a liability for which a suit may be brought, and does not include a liability for which judgment has been obtained. Therefore, where the last application for execution of a decree had been made on the 14th December 1872, and a notice under Act VIII of 1859, sec. 216, issued on the 19th January 1873, and on the 28th April 1873, the judgment-debtor filed a petition notifying part-payment, which petition was signed by the judgment-creditor, *held*, in an application for execution made on the 27th April 1876, that further execution was barred by Limitation (Act IX of 1871).—2 Cal. 468.

*Quære.*—Whether “a decree for the payment of money” means merely what is commonly known as a money-decree, or includes, a decree in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting such property, within the meaning of sec. 194 of Act VIII of 1859 and sec. 210 of Act X of 1877. Where a Court, on the ground that the defendant was “hard pressed,” directed the amount of a decree to be paid by instalments extending over ten years, and allowed only one-half of the usual rate of interest, *held* that there was no sufficient reason for directing payment of the amount of the decree by instalments, and that such Court had exercised its discretion injuriously to the plaintiff, by the length of the period over which the instalments were extended, and by allowing a rate of interest less than the ordinary rate.—2 Al. 129.

In exercise of the discretion given by sec. 194 of the Code of Civil Procedure (Act VIII of 1859), the Court of first instance gave a decree to the plaintiff making the amount awarded payable by instalments, but gave no interest after the institution of the suit. The Appellate Court amended the decree by awarding the interest from the institution of the suit at six per cent. per annum, the rate originally contracted for being 24 per cent. per annum. *Held*, although the stipulated rate was properly awardable, the award of the lower rate was not illegal or beyond the competency of the Court below, with whose discretion the High Court will not interfere. A mortgagee is, as a general rule, entitled to the costs of enforcing his security; but where the Court, in consideration of his usurious bargain, declines to award them wholly or in part, the High Court will not interfere.—3 Bom. 202.

Where a decree was passed by consent in 1872 for payment to plaintiff through the Court of Rs. 300 by fifteen annual instalments on the 20th February in each year, and in default of payment of any instalment, the whole amount became recoverable, and four years’ instalments were paid out of Court, and default made on the 20th February 1877, and plaintiff applied to recover the instalment of 1877 by execution on the 17th November 1879 and the first March 1880, *held* that the application of November 1879 was not barred under cl. b, art. 179, sch. ii. of the Limitation Act of 1877. inasmuch as, when the Indian Limitation Act, 1877, came into force (1st October, 1877), the application was not barred under cl. 6, art. 167, sch. ii. of the Indian Limitation Act, 1871. *Held* also that the provision as to the whole amount becoming recoverable at once if default was made did not affect the admissibility of the application for execution, because that provision had not been enforced, and the obligation to pay by instalments was still subsisting —3 Madr. 256.

A Collector, to whom a decree for sale of mortgaged property has been transferred for execution under sec. 320 of the Civil Procedure Code, is limited to one of the three courses specified in sec. 321, and may not depart from them; much less may he do what the Court itself could not do in such a case—allow payment of the debt to be made by instalments. A Collector, to whom a decree has been so transferred for execution, acts ministerially, and, when he delegates his functions to an Assistant or a Mamlatdar, incurs a risk of having to answer in damages to the person who is by any error or mistake deprived of the fruits of his judgment; and this risk attaches independently of malice or negligence. The Court that has made a decree or judicial order, which has been transmitted to the Collector for execution, is not deprived of the judicial powers with respect to it, which may still at any particular time be competent to such Court, and which it

would have had the order been placed in the hands of its own ordinary officer, the nazir. In the exercise of such powers the Court has authority to recall its own record transmitted to the Collector.—7 Bom 332.

The words “decree passed against an agriculturist” in sec. 20 of the Dekkhan Agriculturists’ Relief Act (XVII of 1879) mean a decree passed against an agriculturist personally, and do not include decree for the recovery of money by the sale of mortgaged property. The effect of that section must be taken to be an enlargement of the indulgence granted by sec. 210 of the Civil Procedure Code (Act X of 1877), but only in those cases to which the latter section applies. By sec. 210 of the Civil Procedure Code, the Court may, after the passing of a decree in money-suits, order the amount to be paid by instalments, provided the decree-holder consents. By sec. 20 of Act XVII of 1879 the Court may make the same order in similar suits, without the consent of the decree-holder. In the case of a debt secured by a mortgage, the agriculturist’s remedy lies in a suit, not for an account, but for redemption; and the only decree which can be made in such a suit, in the absence of any special provision in the Act, is the ordinary decree for payment of the whole amount within six months, or, in default, for foreclosure. *Hardeo Das v. Hukam Singh* (I. L. R., 2 Al. 320) referred to and approved.—5 Bom. 604.

A judgment-debtor, whose property was about to be sold, appeared before the officer appointed to conduct the sale, and applied for its postponement, producing a surety and a bond, in which such surety promised to pay the amount of the decree within one year, if the judgment-debtor did not do so. Such officer thereupon applied to the District Judge to postpone the sale, stating that such surety was willing to pay the amount of the decree by instalments within one year, and forwarding such bond. The District Judge ordered the sale to be postponed, and the papers to be sent to the Munsif who had made the decree and ordered the sale of the property. The Munsif made no order regarding the security, but merely made an order that the amount of the decree should be paid by instalments within one year. The judgment-debtor did not pay the amount of the decree within the time fixed, and the decree-holder therefore applied for execution of the decree against such surety. *Held* that, inasmuch as the decree-holder had not been a party to the proceedings of the sale officer or of the District Judge, and as the parties had not appeared before the Munsif, and as such surety had not agreed to pay the amount of the decree by instalments, the provisions of sec. 210 of Act X of 1877 were not applicable, and such surety had not become a party to the decree as altered by the Munsif; that such surety had not made himself a party to the decree by promising to pay its amount within one year; and that therefore his liability was not one which could be enforced in execution of the decree under sec. 253 of Act X of 1877.—3 Al. 809.

Where a bond is payable by instalments, and expressly stipulates for the payment of the whole debt on failure in the payment of any instalment, the law of limitation runs on the whole amount of the bond against the obligee from the day on which the obligor first makes default in the payment of any instalment, unless the obligee waive the default, and afterwards from the day on which any fresh default is made in respect of which there is no waiver. The obligee may waive the default under Acts IX of 1871 and XV of 1877, sch. ii., art. 75, but the Courts may have no authority to compel him to waive it. Neither Act VIII of 1859, sec. 194, nor Act X of 1877, sec. 210, confers any authority on the Courts to relieve a

contracting party from such an express stipulation in a bond payable by instalments as to the consequence of default in punctual payment of the instalments. A debt being presently due, an agreement to pay it by instalments, with a stipulation that, on default, the creditor may demand immediate payment of the whole balance due with interest, is not to be relieved against in equity. Such a stipulation is not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner. The defendant executed to the plaintiff a bond payable by instalments, and expressly stipulating for the payment of the whole amount on failure to pay any instalment on the day fixed. He paid the first instalment, but made default in paying the second, which fell due on the 3rd August 1878. On the 20th August plaintiff sued to recover the whole balance due on the bond. Defendant admitted the bond, but pleaded tender of the amount of the second instalment soon after the due date, and prayed for payment by instalments without any interest. The first Court passed a decree in the plaintiff's favour for the amount claimed with costs, but ordered defendant to pay Rs. 100 and the costs at once, and the balance by yearly instalments of Rs. 100 each with interest at 6 per cent. till payment. The District Judge, in appeal, affirmed the decree, with a slight variation as to interest, which he directed the defendant to pay on overdue instalments only. *Held* by the High Court on second appeal that neither of the lower Court has jurisdiction, without the consent of the parties, to substitute, for the contract made by them, terms which the Court preferred. *Held* also that plaintiff was entitled to sue on the day after that on which the default was made, viz., on the day after that fixed for the payment of the instalment, and that the Subordinate Judge had no power to rule the contrary.—4 Bom. 96.

On the 26th of June 1873, a judgment debtor applied under sec. 210 of the Code of Civil Procedure for two years' time to pay the amount of the decree, which was dated 12th March 1878. Notice having been given to the judgment-creditor, an *ex-parte* order was made allowing the judgment-debtor two years' time to pay, but the decree itself was not altered in accordance with this order. On the 9th of July 1882, the decree-holder applied for execution of the decree. *Held*, that the application was not barred by limitation.—7 Madr. 152.

The parties to a decree for money, dated the 14th July 1871, entered into a compromise, whereby, in lieu of a portion of the decretal money, the decree-holder was placed in possession of certain property, and the remainder of the decretal money was to be paid by fixed annual instalments, and, in case of default in the payment of any instalment, it was agreed that the entire amount should become immediately realizable by execution of the decree. On the 11th December, 1882, the decree-holder, alleging default in payment of the instalments, applied for execution of the compromise. *Held* that such an agreement could not be treated as an instalment-decree, and, as such, capable of execution. *Debi Rai v. Gokal Prasad* (I. L. R., 5 Al. 585) followed.—6 Al. 623.

**211.** When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne-profits in respect of such property from the institution of the suit until the delivery of possession to the party

In suits for land, Court  
payment of  
with interest.

in whose favour the decree is made, or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit.

*Explanation.*—“Mesne-profits” of property mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received therefrom, together with interest on such profits.

#### Notes.

Mesne-profits are in themselves simply damages which do not exist as an obligation to be discharged until they have been awarded by a Court competent to do so. Therefore, according to sec. 11 of Act XXIII of 1861, mesne-profits payable at the time of execution” must mean mesne-profits which have been at that time directed to be paid by a decree of Court. The two portions of sec. 11 of Act XXIII of 1861 are in direct connection with secs. 196 and 197 of Act VIII of 1859. A obtained a decree against B for recovery of possession of certain property, and for mesne-profits up to the date of the suit, but the decree was silent as to mesne-profits after that time. *Held* that A was not barred by the provisions of sec. 11 of Act XXIII of 1861 from bringing a suit against B for mesne-profits during the time that A was kept out of possession after the decree.—1 B L.R., (A.C.) 138.

A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held* that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon divested, it would be right for her to continue to defend, but only as guardian of the minor. Also that, it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made, formally, a party thereto. The principle of the decision in *Dhurm Dass Pandey v. Shamasoondery Debia* (3 Moore's I. A. 229) referred to, and applied in this case. *Held*, also, that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne-profits, brought after the decree upon title, it being made clear that the suit for mesne-profits was substantially brought against the minor. *Sureshchunder Wum Chowdhry v. Jugutchunder Deb* (I. L. R., 14 Cal. 204) approved.—I.L.R., 16 Cal. 40.

In a suit for recovery of possession and mesne-profits, the Court has power under sec. 211 of the Civil Procedure Code either to award mesne-profits up to the date of the institution of the suit or up to the date of delivery of possession. And where a decree for possession is silent as regards mesne-profits which have accrued between the date of the institution of the suit and delivery of possession, a separate suit will lie for such subsequent mesne profits, secs. 13 and 244 of the Code being no bar to it. *Sadasiva Pillai v. Ramalinga Pillai*. L. R., 2, I. A., 219; 15 B. L. R., 383; *Fakharuddin Mahomed Ashan Chowdhry v. Official Trustee of Bengal*, L. R., 8 I. A., 197; I. L. R., 8 Cal. 178; *Byjnath Pershad v. Badhoo Singh*, (10 W. R., 486; *Pratap Chandra Burna v. Swarnamayi*, 4 B. L. R., F. B., 113; 13



W. R., F. B., 15; and *Haramohini Chowdhrari v. Dhamani Chowdhrani*, 1 B. L. R., A. C., 138, referred to.—I. L. R., 17 Cal. 968.

Land was put up for sale and purchased in execution of a decree. The sale was confirmed, and the purchaser was put into possession. On appeal against the order confirming the sale, the High Court held that the sale had been vitiated by certain irregularities and set it aside. The purchaser preferred an appeal to the Privy Council against the judgment of the High Court. While the appeal was pending, he was compelled to deliver up possession of the land, but security was furnished under an order of the Court by persons not being parties to the suit for its redelivery to him, and for the payment of mesne profits, in the event of his appeal being successful. Meanwhile, the land in question was placed in charge of a receiver on the motion of other persons holding decrees against the judgment-debtors. On appeal the Privy Council reversed the order of the High Court. The purchaser was accordingly replaced in possession of the land; and he applied for execution in respect of the mesne profits against the respondents in the Privy Council and the sureties. The Court of First Instance dismissed the application as against the sureties and limited the applicant's claim against the others to the net income of the land, less the cost of management by the receiver, and allowed him no interest:—*Held*, (1) the order must be taken to have been made under Civil Procedure Code, sec. 610, and an appeal lay therefrom; (2) although the appeals to the High Court and the Privy Council related to the order confirming the sale and not to that by which possession was awarded, and the order in Council did not direct payment of mesne profits, yet such payment was within its purview as being a benefit by way of restitution fairly and reasonably consequential upon it. *Rodger v. The Comptoir D'Escompte de Paris* (L. R., 3 P. C., 465) followed; (3) the application was rightly dismissed against the sureties. (4) the charges involved by the appointment of the receiver should not have been allowed against the petitioner, since they were not necessary in the ordinary course of prudent management: (5) interest at 6 per cent should have been allowed to the petitioner on the mesne profits for each year from the end of the year to the date of payment.—15 Madr. 203.

Where the parties to a suit for certain land and for the payment of mesne-profits in respect of the same were co-sharers in the estate comprising such land, and the defendants had themselves occupied and cultivated such land, *held* that the most reasonable and fitting mode of assessing such mesne-profits was to ascertain what would be a fair rent for such land if it had been let to an ordinary tenant and had not been cultivated by the defendants. Both parties appealed from the decree of the Court of first instance, and both the appeals were dismissed by the lower Appellate Court. The plaintiff appealed to the High Court from the decree of the lower Appellate Court dismissing his appeal, whereupon the defendant took objections to the decree of the lower Appellate Court dismissing his appeal. *Held* that such objections could not be entertained.—2 Al. 651.

See I. L. R., 14 Madr. 328, noted under sec. 13; 19 Cal. 132, noted under art. 178 of Act XV of 1877—(Limitation Act.)

**212.** When the suit is for the recovery of possession of immoveable property and for mesne-profits which have accrued on the property during a period prior to the institution of the suit, and the amount of

Court may determine amount of mesne-profits prior to suit, or may reserve inquiry.

such profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property, and direct an inquiry into the amount of mesne-profits, and dispose of the same on further orders.

**Notes.**

In the Course of a suit for declaration of right to property, and for partition, a compromise was entered into, by which it was agreed that certain property already ascertained should be divided in certain proportions, and that certain other property, not yet ascertained, should, on being ascertained, be partitioned on the same basis. The Court merely recorded the compromise, and declared that the decree should be according to terms therein set out. *Held* that this decree could be only executed as to the property which had been ascertained as divisible, and that as to the other property the decree must be taken as declaratory only. The Court executing a decree is bound by the terms of the decree, and it is only in cases provided for by secs. 211 and 212 of Act X of 1877, corresponding with secs. 196 and 197 of Act VIII of 1859, that it is at liberty to determine the rights of the litigants in proceedings taken after decree.—4 C. L. R., 97. See I. L. R., 8 Madr. 137.

See I. L. R., 19 Cal. 132, noted under art. 178 of the Limitation Act, 19 Cal. 159, noted under sec. 13.

**213.** When the suit is for an account of any property and for its due administration under the decree of the Court, the Court, before making the decree, shall order such accounts and inquiries to be taken and made, and give such other directions, as it thinks fit.

Administration-suit.

In the administration by the Court of the property of any person who dies after this Code comes into force, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being with respect to the estates of persons adjudged insolvent;

and all persons, who, in any such case, would be entitled to be paid out of such property, may come in under the decree for its administration, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

**Note.**

On the 22nd July 1886, one R. L. obtained a money decree against one P. C. On the 5th November 1886, P. C. died; and on the 18th Dec. 1886, R. L. applied to attach certain properties belonging to the estate of his judgment-debtor, which properties were actually attached on the 8th

and 12th January, 1887. On the 21st December, 1886, one S. filed a suit to administer the estate of the deceased, and on the 20th January 1887 obtained the usual administration-decree. On the 5th May 1887, S. applied for an order staying all proceedings taken by R. L. against the estate of P. O., and directing him to come in should he think fit so to do, and prove his claim in the administration-suit. *Held* that the attachment did not create any interest in, or charge upon, the properties in favour of the attaching creditor as against other creditors, and that the order asked for ought to be granted.—I. L. R., 15 Cal. 202.

**214.** When the suit is to enforce a right of pre-emption

Suit to enforce right of pre-emption. in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court the decree shall specify a day on or before which it shall be so paid, and shall declare that, on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that, if such money and costs are not so paid, the suit shall stand dismissed with costs.

**Notes.**

In two rival suits for pre-emption each pre-emptor was made a defendant in the other's suit. The suits were tried together upon the same evidence and were disposed of by a single judgment, but by separate decrees. In one of the suits the pre-emptor obtained a decree in the terms of sec. 214 of the Civil Procedure Code. In the other, the pre-emptor obtained a decree, subject to the condition that, in the event of the first pre-emptor failing to execute his decree, the second pre-emptor should be entitled to execute it. The decree in the first suit was not appealed, and became final. The second pre-emptor appealed from the decree in his own suit, upon the grounds that the amount ordered to be paid was excessive, and that the first pre-emptor had lost his right, and the decree in the second suit should not have been made subject to the condition above stated. *Held* that the appellant, if he desired to get rid of the decision regarding the first pre-emptor's preferential right, should have appealed against the first pre-emptor's decree, but that, that decree having become final, the questions between the two pre-emptors could not be re-opened on appeal from the second pre-emptor's decree.—I. L. R., 10 Al. 123.

A suit for pre-emption was decreed conditionally on the plaintiff paying Rs. 1,595, which the Court determined was the amount of the sale-consideration. He paid the amount to the vendees, and the payment was certified under sec. 258 of the Civil Procedure Code. Subsequently the decree was modified on appeal by increasing the amount of sale-consideration to Rs. 1995, which the plaintiff was required to pay as the condition of pre-emption. He never paid the difference between the amount fixed by the first Court and the sum fixed as the true price by the Appellate Court, and the suit consequently stood dismissed. He then assigned to the plaintiff in the suit his right to recover the amount, Rs. 1,595, from the vendees, who, after unsuccessful application made to the Court of first instance, under sec. 244 of the Civil Procedure Code, to recover the amount, instituted this suit. *Held* that the assignee was a representative of the plaintiff in the pre-emption suit within the meaning of sec. 244 of the Civil Pro-

cedure Code, and the suit was therefore barred under the provisions of that section.—10 Al 354.

A Court of first instance decreed a claim for pre-emption conditionally, on the pre-emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-0 as his costs in the suit. Within the specified period the pre-emptor paid into Court the Rs. 125, and subsequently executed his decree for costs, by drawing out therefrom the Rs. 39-9-0. After this the decree was modified on appeal, the Appellate Court raising the Rs. 125 payable as the condition of pre-emption to Rs. 200, and reversing the first Court's order as to costs. Within the period specified in the Appellate Court's decree the pre-emptor paid into Court the further sum of Rs. 75. Subsequently the vendee, defendant, applied to the Court under sec 583 of the Code of Civil Procedure to have the property in suit restored to him, contending that the pre-emptor had failed to pay the full Rs. 200 within the prescribed period. *Held* by Straight, J., affirming the judgment of Mahmood, J., that this contention must fail; that the payment of Rs. 125 due under the first Court's decree could not be said to have been reduced by the pre-emptor subsequently executing against the amount so paid the order of that Court in his favour for costs, and that the subsequent payment of Rs. 75 within the period prescribed by the Appellate Court satisfied the requirements of that Court's decree, subject to the judgment debtor's right to recover the cost realized in execution of the first Court's decree. *Held* by Tyrrell, J., *contra*, that, although the pre-emptor had once made a payment, which for a few days was a compliance with the first Court's decree, such compliance became immaterial when that decree was modified on appeal, and as he had never had in any Court a credit for Rs. 200, as required by the Appellate Court's decree, which alone was the decree in the cause, he had failed to fulfil the condition essential to pre-emption, and therefore the defendant's application should be allowed.—10 Al. 400.

In a suit for pre-emption, the decree of the Court of first instance was conditional upon payment of the purchase-money within one month from its date. After this period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree affirmed, and no fresh period for payment was expressly allowed by the decree of the Appellate Court. *Held* that the decree of the Appellate Court must be taken to have incorporated the terms of the decree of the Court of first instance, that the period of one month allowed for payment of the purchase-money must be calculated from the date of the Appellate Court's decree, and that payment by the decree-holder within one month from that date was in time. *Shohrat Singh v. Bridgman* (I. L. R., 4 Al. 376), *Luchman Persad Singh v. Kishun Persad Singh* (I. L. R., 8 Cal. 218), *Gobardhan Das v. Gopal Ram* (I. L. R., 7 Al. 306), *Noor Ali Chowdhuri v. Koni Meah* (I. L. R., 13 Cal 13), and *Daulat v. Bhukandas Manekchand* (I. L. R., 11 Bom. 172), referred to.—11 Al. 346.

Where in a suit for pre-emption the decree, while decreeing the plaintiff's right to pre-emption upon payment of the pre-emptive price within one month from the date of the decree, omitted to state what would be the effect on the plaintiff's suit of non-payment within the prescribed period:—*Held* that the plaintiff, unless he had paid the pre-emptive price before the expiry of the said month, could not enforce his decree for pre-emption. *Kodai Singh v. Jaisri Singh* referred to.—*Bandhu v. Shah Muhammad Taqi* dissented from.—14 Al. 529.

The decree of the Court of first instance in a suit to enforce a right of pre-emption directed that the sum which that Court had ascertained to be the purchase-money should be deposited within one month from the date of the decree. Plaintiff appealed, contending that such sum was not the purchase money. While the appeal was pending, the time fixed by the decree of the Court of first instance expired without any deposit having been made. The Appellate Court dismissed the appeal, fixing by its decree, of its own motion, a further time for the deposit. *Held* that the Appellate Court was competent to extend the time for making the deposit, and its action and order did not contravene the provision of Act X of 1877, sec. 214.—2 Al. 744.

M sued K and J to enforce a right of pre-emption in respect of property which he alleged K had sold to J. K denied that she had sold such property to J. J set up as a defence that M had waived his right of pre-emption. The Court of first instance dismissed the suit, on the ground that the alleged sale had not taken place. J appealed, making M and K respondents. The lower Appellate Court dismissed the appeal, also holding that the alleged sale had not taken place. J then appealed to the High Court, making K the respondent. *Held* that neither the appeal from the original decree in the suit, nor the appeal from the appellate decree therein, was admissible. *Held* also that the finding as to the alleged sale was one between the plaintiff and defendants in the suit, and not between the defendant-vendor and the defendant-vendee who were litigating, and would not bar adjudication of the matter in issue between them in a suit brought by the latter for the establishment of the sale.—3 Al. 152.

The decree in a suit to enforce a right of pre-emption, dated the 12th December 1879, declared that the plaintiff should obtain possession of the property on payment of the purchase-money "within thirty days," but that, if such money was not so paid, the suit should stand dismissed. The period specified in the decree for the payment of the purchase-money, the day on which the decree was made not being computed, expired on the 11th January following. That day was a Sunday. The plaintiff paid the purchase-money into Court on the next day, the 12th January. *Held* that, inasmuch as the day on which the decree was made should not be taken into account in computing the period specified in the decree for the payment of the purchase-money, nor the last day of that period, that day being a Sunday, the plaintiff had complied with the condition imposed on him by the decree. *Semle*.—That, if the plaintiff had actually failed to deposit the purchase-money within thirty days as directed by the decree, his suit would have been liable to be dismissed, as he could not have claimed to have such period computed from the date the decree became final.—3 Al. 850.

The plaintiff in a suit to enforce a right of pre-emption obtained a decree to the effect mentioned in sec. 214 of the Civil Procedure Code. On payment by him of the purchase-money into Court, the defendants objected, in the execution-department, to such payment, on the ground that it had not been made within time. The Court which made the decree disallowed the objection. The defendants appealed from the order disallowing the objection. They had previously appealed from the decree. The Appellate Court heard both appeals together, and, holding that the purchase-money had not been paid into Court within time, reversed the decree, and allowed the objection. The plaintiff preferred a second appeal to the High Court from the Appellate Court's decree, which was admitted. He also preferred an appeal from the appellate order allowing the objection,

but this appeal was rejected as being beyond time, and such order became final. *Held* that, inasmuch as the question whether the plaintiff had paid the purchase-money into Court within time was not one relating to the execution of the decree within the meaning of sec. 244 of the Civil Procedure Code, but was one which should be decided in the suit itself, and therefore the proceedings in the execution-department touching that question were ill-founded, such order was not a bar to the hearing of the second appeal preferred by the plaintiff.—4 Al. 420.

The decree in a suit to enforce a right of pre-emption directed, in accordance with the provisions of sec. 214 of the Civil Procedure Code, that the plaintiff should obtain possession of the property and recover costs of the suit from the defendants (vendor and vendee) on payment of the purchase-money within a fixed time, but that, on default of such payment, the suit should stand dismissed. The plaintiff deposited within time the purchase-money with the exception of a sum less than the amount of costs awarded to him. He subsequently applied for delivery of possession of the property in execution of the decree and for the recovery of the costs awarded to him, deducting from such costs the unpaid portion of the purchase-money. *Held*, applying, by analogy of secs. 221 and 247 of the Civil Procedure Code, the equitable doctrine of set-off, that the plaintiff was entitled, when depositing the purchase-money under the decree, to deduct therefrom the sum the decree awarded to him as costs, and that, therefore, the decree did not become null and void by reason that he had not deposited the full amount of the purchase-money within time. *Degumburee Dabee v. Eshan Chunder Sein* (9 W. R., 230), *Jugo Mohun Bukshee v. Soorendro Nath Roy Chowdhry* (3 W. R., 106), and *Brijnath Dass v. Juggarnath Dass* (I. L. R., 4 Cal. 742), referred to —6 Al. 351.

K and R, two co-sharers of a village, instituted separate suits in which each claimed to enforce the right of pre-emption, based on the *wajibularz*, in respect of the same sale of a share in a village to a stranger. The Court of first instance made the plaintiff in one suit a defendant in the other. The suits were tried together, and R. being held to have a better right under the terms of the *wajibularz* than K, his suit was decreed, contingent upon payment by him of the purchase-money within one month from the date of the decree. K's suit was dismissed absolutely. *Held*, that decrees in cases where two rival pre-emptors of the same decree seek to enforce pre-emption, as each necessarily must do, in respect of the *whole* property conveyed by one transfer, are defective if they dismiss the suit for any proportion of the property without providing for the contingency of the rival pre-emptor decree-holder omitting to enforce his decree in respect of the share decreed to him. *A fortiori*, where the rival decree-holders possess different decrees of pre-emption, the decree, in at least one of the rival suits, must be essentially defective if no provision is made for the contingency of the superior pre-emptor never enforcing his right. The question what should be the form of the decree in such cases, can be dealt with only by exercising the vast and flexible jurisdiction possessed by the Courts of Equity in adopting their decrees to the exigencies of each case, so as to grant the actual relief required by the parties. *Held*, applying the principles of equity to the present case, that the Court of first instance acted rightly in adding the name of each rival pre-emptor as party-defendant in the suit of the other, and in decreeing the claim of the superior pre-emptor, but that the decree in K's suit was defective and inequitable, inasmuch as it dismissed the suit *in toto*, disallowing pre-emptive claim wholly irrespective of the contingency of R's omission to enforce the pre-emption decreed to him by depositing



the purchase-money within time. As K admittedly had pre-emptive right as against the vendee, his suit should have been decreed against the latter in the terms of sec. 214 of the Civil Procedure Code ; subject ; however, to the condition that the decree should not take effect, so far as the enforcement of pre-emption was concerned, in the event of R's enforcing the superior pre-emptive right decreed to him.—6 Al. 370.

See I. L. R., 14 Madr. 328, noted under sec. 13.

**215.** When the suit is for the dissolution of a partnership, the Court before making its decree, may pass an order fixing the day on which the partnership shall stand dissolved, and directing such accounts to be taken and other acts to be done as it thinks fit.

#### Notes.

In a suit for an account of partnership-transactions, the Subordinate Judge, in whose Court the suit was instituted, framed certain issues with the object of ascertaining who managed the business ; with whom the partnership-property was ; whether the defendants ought to account ; what was the capital, and what the expenditure and profits of the firm ; and, after taking evidence on those points, dismissed the suit. *Held* that the Subordinate Judge should have followed the course pointed out in forms 132 and 133 of sch. iv. of the Civil Procedure Code, and at the first hearing should have determined whether there had been a partnership ; what were its conditions ; was it dissolved, or ought it to be dissolved ; and who were the parties interested, and in what shares ; and, upon determining these questions, should have directed accounts to be taken ; and, after the accounts had been taken, should have made a final decree. *Held*, also that the suit should not have been instituted in the Court of the Subordinate Judge, and the case was transferred to the Court of the District Judge. The plaint in a partnership-suit ought to be framed on the lines of form 113 in sch. iv. of the Code, and the accounts should be taken as prayed in that form. Under ordinary circumstances, the costs of a partnership-suit should be paid out of the assets of the partnership, or, in default of assets, by the partners in proportion to their respective shares, unless any partner denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing.—I. L. R., 7 Cal. 428.

T, B, R, and W, the owners of a certain estate in equal shares in 1863, entered into a partnership " for the cultivation of tea and other products " upon such estate. In 1864, H, E, and I, joined the firm. In 1870 H died ; and in 1871 T purchased his share and those of E and I, and in 1873 of R. In 1875, T gave the Delhi and London Bank a mortgage on such estate as security for the repayment of money which he had borrowed from the Bank ostensibly for the purposes of the estate. The Bank obtained a decree against him personally for the money, in execution of which his rights and interests in the estate were put up for sale on the 20th June 1877, and were purchased by the Bank, which obtained possession of the estate in August 1877. In August 1879, B and W's executor sued T and the Bank, claiming a declaration that they were or had been partners with T in the estate ; that, if the partnership should be held to be subsisting, it might be dissolved, or that, if it had ceased to exist, the date of its termination might be fixed ; and that, in either event, a liquidator might be appointed to



and shall be for the recovery of any sum which appears to be due to either party.

The decree of the Court with respect to any sum awarded to the defendant shall have the same effect, and be subject to the same rules in respect of appeal or otherwise, as if such sum had been claimed by the defendant in a separate suit against the plaintiff.

The provisions of this section shall apply whether the set-off is admissible under section 111 or otherwise.

#### Notes.

This section applies to Provincial Small Cause Courts.

Application for execution of a decree was made on the 10th November 1869, and on the 27th November 1869, notice issued under sec. 216 of the Civil Procedure Code. Again on the 4th February 1873, application was made for execution, and notice was issued on the 19th February 1873, under sec. 216. A subsequent application for execution was made on the 31st August 1874, and the order for notice to issue, under sec. 216, was made on the same day. The question raised in appeal against the order to issue execution was whether the plaintiff's right to execution was barred, and had been so when the application, dated 31st August 1874, for execution, was made. *Held* on appeal by the High Court (Kernan and Kindersley, JJ.) that, as the application for execution of the 4th February 1873, being more than three years after the date of issuing the last prior notice under sec. 216, viz., 27th November 1869, was late under art. 167, para 5, Act IX of 1871, execution was barred by limitation at and before the date of that application, and that this bar was not removed by the circumstance that the judgment-debtor had allowed the service of the notice on him in February 1873 to pass unchallenged. *Raja Chilicany v. Ragavulu Naidu* (5 M. H. C. R., 100) distinguished. *Held* also, following *Chunder Coomar Roy v. Bhogobutty Prosonno Roy* I. L. R., 3 Cal. 235, that "applications to enforce a decree" in para. 4 of art. 167, Act IX of 1871, mean "applications under sec. 212 or otherwise by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings."—I. L. R., 2 Madr. 1.

**217.** Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

**Note.**—This section applies to Provincial Small Cause Courts.

## CHAPTER XVIII.

### OF COSTS.

**218.** When disposing of any application under this Code, the Court may give to either party the cost of such application, or may re-

serve the consideration of such costs for any future stage of the proceedings.

**219.** The judgment shall direct by whom the costs of <sup>Judgment to direct by</sup> each party are to be paid, whether by <sup>whom costs to be paid.</sup> himself or by any other party to the suit, and whether in whole or in what part or proportion.

#### Notes.

A L D and others, having got a decree in a suit in which S B D, a purdah-nashin, was plaintiff, a rule *nisi* was obtained by them against J C S, and another, on the ground that he was the real plaintiff, and S B D only a nominal one. It appeared that S B D had no means of her own, but lived in the house of J C S, who could explain nothing of her circumstances, or why she was residing in his house; but he stated that she had purchased the former plaintiff's right in the suit against a decree, she having been previously uninterested in the matter, and the only reason suggested for her doing so was that a small portion of the premises in question would serve for carrying out a religious purpose said to be entertained by her. The Court found that S B D was only a sham plaintiff, and that J C S was the real one, and the rule was made absolute. *Held* that the words "another party" in sec. 187 of Act VIII of 1859 should be read as if identical with "another party to the suit." *Held*, also, that the Court cannot, by its judgment in any given suit, deal directly with persons not before it in that suit; that the Court has the same power of directing that the costs of any party to a suit for the recovery of land shall be paid by a person who is not on the record, as the late Supreme Court had, and as the Courts at Westminster still possess and exercise; that the recovery of costs from the real plaintiff in a suit in which the plaintiff on the record is only a sham one, is not a step in the proceedings in any particular suit, nor can it be made the subject of a separate plaint, but is of the nature of a substantive proceeding *in personam*, and is within the equitable jurisdiction of the Court; that, if the plaintiff on the record in a suit be only a sham one, the defendant may proceed against the real plaintiff for costs; that the real plaintiff in a suit, in which the one on the record is a sham plaintiff, is liable for the costs.—Bourke's Rep., (O. C.) 44. Affirmed on appeal, Bourke's Rep., A. O. C., 96. S. C. 14 W. R., O. C., 1.

The costs in a partition-suit, where the property is of so small a value that it is likely to be wholly absorbed by the expenses, and where the suit by a joint-holder is therefore brought unjustifiably and to the detriment of the others, ought to be paid by the plaintiff.—1 Hyde's Rep., 122.

Portion of the costs awarded to the defendant in exercise of the discretion given by Act VIII of 1859, sec. 187, where in a suit for some jewels it appeared on the evidence of the plaintiffs that they were not worth so much as stated in the plaint, and the suit might have been brought in the Small Cause Court.—1 Hyde's Rep., 172.

If the Official Assignee defends a suit, he is liable, in the event of failure, to be ordered to pay the plaintiff's costs in the same way as any other defendant; and if the estate be insufficient to pay the costs, he will have to bear them personally. It is for him to protect himself by getting a guarantee of indemnity from the parties who set him in motion.—I. L. R., 7 Bom. 424.

**220.** The Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit, and the fact that the Court has no jurisdiction to try the case is no bar to the exercise of such power:

Power of Court as to costs.

Provided that, if the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing.

Every order relating to costs made under this Code, and not forming part of a decree, may be executed as if it were a decree for money.

#### Notes.

This section applies to Provincial Small Cause Courts.

Certain plaintiffs were the holders of the following decree obtained on a mortgage-bond: "It is ordered that the defendants shall pay to the plaintiffs the sum of Rs. 2,550 and costs Rs. 312, total Rs. 2,862, within two months from the date of the signing of the decree; interest will run on the said amount at the rate of 6 per cent. per annum up to realization. If the defendants do not pay the amount within the time prescribed, they will lose their right of redeeming the property mortgaged, and possession thereof will be given to the plaintiffs." On the judgment-debtors making default, the decree-holders applied for execution, the Subordinate Judge directed execution to issue, but held that execution could not be had for costs under the terms of the decree; and this order was upheld by the District Judge on appeal. *Held* that the decree-holders were entitled to their costs of the suit from the judgment-debtors personally, or from properties belonging to the judgment-debtors other than those mortgaged.—I. L. R., 14 Cal. 185.

Where the original Court has made an erroneous order for costs under a misapprehension of fact and law, an appeal lies from such order under the Civil Procedure Code, although the appellant complains of nothing else but the order for costs so erroneously made.—16 Bom. 676.

A decree for foreclosure containing a distinct and separate order for costs was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs. *Held* that the costs awarded could not be considered part of the money due upon the mortgage, and, as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must, therefore, be allowed. *Rutnessur Sein v. Jusoda* (I. L. R., 14 Cal. 185) referred to.—10 Al. 179.

See I. L. R., 8 Bom. 577, noted under sec. 412.

**221.** The Court may direct that the costs payable to one party by another shall be set-off against a sum which is admitted or is found in the suit to be former to the latter.

may be set-off  
it sum admitted or  
found to be due.

#### Notes.

This section applies to Provincial Small Cause Courts.

The decree in a redemption-suit directed the plaintiff (the mortgagor) to pay the mortgage-money and interest to the defendant, and directed the defendant to pay the plaintiff the costs of the suit. *Held* that the plaintiff was entitled to set-off the amount of his taxed costs against the mortgage-money which he was liable to pay under the decree, notwithstanding any claim that the defendant's attorney might have against the defendant in respect of the defendant's costs of suit.—I. L. R., 4 Cal. 742.

See I. L. R., 6 Al. 351, noted under sec. 214.

**222.** The Court may give interest on costs at any rate not exceeding six per cent. per annum, and may direct that costs, with or without interest, be paid out of, or charged upon, the subject-matter of the suit.

Interest on costs.  
Payment of costs out of  
subject matter.

#### Notes.

This section applies to Provincial Small Cause Courts.

On the 21st August 1876, certain immoveable property belonging to M was put up for sale, and was purchased by R. On the 20th April 1877, such sale was set aside under sec. 256 of Act VIII of 1859, on the ground that the order attaching such property and the notifications of sale had not, as required by sec. 222, been signed by the Court executing the decree, but by the munsarim of the Court. On the 27th June 1877, M conveyed such property to H, who purchased it *bona fide*, and for value, and satisfied the incumbrances existing thereon. On the 15th April 1878, R sued H and N to have the order setting aside such sale set aside, and to have such sale confirmed in his favor, on the ground that it had been improperly set aside under sec. 256 of Act VIII of 1859, the judgment-debtor not having been prejudiced by the irregularities in respect whereof such sale had been set aside. *Held* (by Oldfield, J.) that although such sale might have been improperly set aside, yet inasmuch as the order of attachment and the notifications of sale could have no legal effect, having been signed by the munsarim of the Court executing the decree, and not by the Court, as required by sec. 222 of Act VIII of 1859, and inasmuch as it would be inequitable, after the incumbrances on such property had been satisfied and the state of things changed, to allow R, after standing by for a year, and permitting dealings with the property, to come in and take advantage of the change of circumstances, and obtain a property become much more valuable at the price he originally offered, R ought not to obtain the relief which he sought. *Held* (by Straight, J.) that the fact that the Court executing the decree had not signed the order of attachment and the notifications of sale vitiated the proceedings in execution *ab initio*, and rendered the sale which R desired to have confirmed void, and R's suit therefore failed, and had properly been dismissed.—I. L. R., 3 Al. 701.

## CHAPTER XIX.

### OF THE EXECUTION OF DECREES.

*A.—Of the Court by which Decrees may be executed.*

**223.** A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution under the provisions hereinafter contained.

Court by which decree  
may be executed.



The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court—

(a) if the person against whom the decree is passed actually and voluntarily resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree, and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers, for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

The Court which passed a decree may, of its own motion, send it for execution to any Court subordinate thereto.

The Court to which a decree is sent under this section for execution shall certify to the Court which passed it the fact of such execution, or, where the former Court fails to execute the same, the circumstances attending such failure.

If the decree has been passed “in a suit of which the value as set forth in the plaint did not exceed two thousand rupees, and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes,” and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay, or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay, or Rangoon, as the case may be, the copies and certificate respectively mentioned in clauses (a), (b) and (c) of section 224; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

If the Court to which a decree is to be sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, if the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where a decree of one Court has been transmitted to another for execution under sec. 284 of Act VIII of 1859, the latter Court has jurisdiction to entertain an application to cancel its own order for striking off the case, whatever "striking off" amounts to.—1 B.L.R., (F.B.) 91; 10 W.R., (F.B.) 46.

A obtained a decree in the Nuddea Court against B, who had obtained a decree against C in the Beerbhoom Court. The latter was attached by the Nuddea Court, and sold to A in execution of his decree. A then petitioned the Beerbhoom Court for execution against C. *Held* that the Nuddea Court had jurisdiction to attach and sell B's decree against C, and A had a right to apply to the Beerbhoom Court for execution thereof.—2 B.L.R. (A. C.) 65; 10 W. R., 357.

A decree of the Court of the Subordinate Judge of Moorshedabad was sent to the Court of the Subordinate Judge of Rajshahye for execution, and certain property was attached in that district. A claimant of the attached property then obtained from the former Court an order on the second Court to send the record back again to Moorshedabad for the purpose of executing the decree there, on the ground that the judgment-debtor had property in that district; and also on the allegation, unsupported by oath, that the property sought to be attached in Rajshahye was his. *Held* that the Subordinate Judge of Moorshedabad had acted without jurisdiction, and the record must be sent back to the Court of the Subordinate Judge of Rajshahye for execution. *Held* also that the claimant had no *locus standi* in the Moorshedabad Court to make such application.—3 B. L. R., (A.C.) 181; 11 W. R., 557.

Where the High Court passes a decree on appeal from a Mofussil Court, the Court which has to execute the decree of the High Court is governed by the rules which govern the execution of its own decrees. An appeal prosecuted to a decree is a proceeding to enforce a decree within the meaning of sec. 20 of Act XIV of 1859. Also *held* there was such a proceeding where, on the judgment-debtor seeking to obtain leave from the High Court to appeal to the Privy Council, the execution-creditor intervened. The ruling in Chowdhry Wahid Ali v. Mullick Inayet Ali (6 B. L. R. 52) that, whether the decree of the lower Court is reversed or modified or affirmed, the decree passed by the Appellate Court is the final decree in the suit, and as such the only decree which is capable of being enforced by execution, not dissented from, except that it was suggested that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree. *Quære*.—Can the ruling in Anundmayi Dasi v. Purno Chandra Roy (Case No. 569 of 1865; 24th August 1866) be supported?—10 B.L.R., 101; 17 W.R., 292; 14 Moore's I.A. 465.

The plaintiff, as manager of the estate of her husband, a lunatic, obtained a decree, and attached and became the purchaser of the lands of the defendant in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed, but several months elapsed before she found security, and meanwhile the same lands were attached and purchased by other creditors under another decree against the said debtor, and possession was given to them. *Held* (reversing the decision of the High Court) the title of the plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his

manager ; it was not a proceeding affecting the judgment-debtor. The second sale ought not to have been ordered or confirmed. Under the Code of Civil Procedure, property may be attached without view to immediate sale. A Court has power to send its decree for concurrent execution into several places, although in its discretion it may refuse to exercise such power.—10 B. L. R., 214 ; 17 W. R., 289 ; 14 Moore's I. A. 529.

A money-decree was made by the Judge of the 24-Pergannahs against a mortgagor who was possessed of property in the 24-Pergannahs, and also of an estate called Kismut Kosdaha, 18 mouzahs of which lay in Zillah 24-Pergannahs, and 42 mouzahs in Zillah Nuddea. The whole estate was entered in the *taujih* of, and the Government revenue was payable in, the Collectorate of Nuddea. The Judge of the 24-Pergannahs, without selling the property of the judgment-debtor which was within his jurisdiction, transmitted a certificate, under sec. 285 of the Civil Procedure Code, to the Judge of Nuddea, stating that no portion of the amount of the decree had been realized by the Court of the 24-Pergannahs. Thereupon, Kismut Kosdaha was attached and sold by order of the Nuddea Court. In a suit brought against the purchaser for possession of the 18 mouzahs lying in the 24 Pergannahs by a person who claimed to have bought the right, title, and interest of the judgment-debtor in those mouzahs, but who, in fact, was not the real purchaser, *held* that the suit ought to have been dismissed because of the non-joinder as plaintiff of the real purchaser. *Held* further that "part of an estate" in sec. 249, Act VIII of 1859, means an aliquot part of an estate. *Held* also that, although the Court of the 24-Pergannahs strictly ought not to have granted the certificate until the property in the 24-Pergannahs had been sold, the error in so doing did not make the certificate void, or avoid the proceedings in the Nuddea Court, Kismut Kosdaha being substantially in the Nuddea District. *Maharajah of Burdwan v. Sreenarain Mitter* (9 W. R., 346) commented on.—11 B. L. R., 56 ; 19 W. R., 434.

An order passed by a Court to which a decree has been transferred for execution is not open to appeal, unless the order has been made in the course of the actual execution of the transferred decree. The Court to which a decree has been transferred can take cognizance of a question of limitation, but the question must be one arising from facts which are legitimately before the Court in the course of execution, and not a matter of limitation arising antecedent to transfer. *Quære*.—Whether, where a decree has been transferred to the Munsif's Court for execution, an appeal will lie to the Judge from the Munsif's order in the matter of the execution ?—13 B. L. R., App. 27. S. C., 21 W. R., 292.

The Transfer of a decree from one Court to another under sec 284 and the following sections of the Civil Procedure Code does not give the latter Court a jurisdiction to entertain and determine any question with regard to limitation, or otherwise which arose between the parties antecedent to the date of transfer.—13 B. L. R., App. 30. S. C., 21 W. R., 330.

When a decree has been transmitted by the Court which passed it to another Court for execution, the latter Court has jurisdiction to try whether or not execution of the decree is barred by the law of limitation. *Per* Peacock, C.J.—When there are different laws of limitation in force in the two Courts, the law applicable to the proceedings in execution of the decree should be the law of the Court to which the decree is transmitted for execution.—B. L. R., Sup. Vol., 970 ; 10 W. R., (F. B.) 10 ; 5 W. R., Mis., 14 ; 7 N. W. P. H. C. R., 115 ; 7 W. R., 19.

Process of execution against the person or personal property of a judgment-debtor may be issued on the decree of a Court of Small Causes by a Court in another district. Before issuing such process of execution, the Court receiving the decree is bound to see that the provisions in secs. 236 and 287 of the Civil Procedure Code have been strictly complied with. The documents required to be transmitted for the purpose of obtaining execution or a copy of the decree and a certificate of any sum remaining due under it, together with a copy of any order for execution that may have been passed. Act XXVI. of 1867 requires that copies of the decree and of the order for execution should be stamped. The certificate requires no stamp.—4 M. H. C. R., 331.

When an Assistant Judge is invested with all the powers of a District Judge within any part of the district of such Judge, the Court of the Assistant Judge must be considered, equally with the Court of the District Judge, the principal Civil Court of original jurisdiction, and a decree sent for execution in such part of the district is properly executed by or under the directions of such Assistant Judge. The functions of the Court executing a decree are judicial, and not merely ministerial.—7 Bom. H. C. R., (A. C.) 37.

A decree passed by a Principal Sadr Amin of the district of North Canara, before that district was transferred to the Bombay Presidency, should be executed by the First-class Subordinate Judge who has succeeded to the Court and function of such Principal Sadr Amin, and cannot by him be delegated for execution by a Second-class Subordinate Judge, though the amount of such decree be less than Rs. 5,000. The provision in the Bombay Courts' Act (XIV. of 1869), that in suits under Rs. 5,000 the Second-class Subordinate Judges only shall have jurisdiction, does not affect the execution of decrees passed before that Act came into force.—9 Bom. H. C. R., (A. C.) 113.

The Court to which a decree is sent for execution by another Court has the power to take the same steps, including the issue of a notice under sec. 216 of the Code of Civil Procedure, which it could take in execution of its own decree.—11 Bom. H. C. R., (A. C.) 19.

Under the authority of sec. 284 *et seq.*, the Court of the agent for Sirdars, not having jurisdiction over a Sirdar's son, who is not himself a Sirdar, cannot transfer a decree passed against the Sirdar to a Civil Court for execution against the son. To obtain enforcement in such a case against his heir of a decree against the Sirdar, the decree-holder may file a suit in the ordinary Civil Court on his decree.—12 Bom. H. C. R., (A. C.) 212.

A Zillah Judge has no power to transfer proceedings in execution of a decree to a Subordinate Court unless duly authorized under sec. 19 of Act XVI. of 1868.—1. N.-W. P. H. C. R., 113; Ed. 1873, 199.

A decree transmitted to a Court for execution is to be regarded as a decree of that Court for the purpose of execution, and an appeal, therefore, lies against the order of a District Judge passed in execution of a decree transmitted to his Court from a Small Cause Court.—3 N.-W. P. H. C. R., 168.

Where a decree-holder, who had obtained a decree in the Civil Court of Loodhiana, which had been transmitted to Seharunpore for execution, assigned his decree before the Seharunpore Court to a third party without the knowledge or consent of the Loodhiana Court, and monies were

paid to the purchaser, by the judgment debtor on such assignment, and the assignment was subsequently, on objection being taken, sanctioned by the Civil Court of Loodhiana, *held*, on an application for the refund of such monies, that, although they were paid under an irregular sanction of the Seharunpore Court, yet that, as at time of payment the purchaser was undoubtedly entitled to receive them, and the irregularity of the procedure of the Seharunpore Court had since been cured, and the purchaser was now in a position to execute the decree, that it would clearly be inequitable to order the refund of the money on the score of irregularities.—6 N.-W. P. H. C. R., 69.

Where a decree is transmitted by one Court to another for the purpose of execution, the latter Court has no jurisdiction to alter the decree, or the amount mentioned in the order for execution.—Marshall's Rep., 244; 2 Hay's Rep., 113; 9 W. R., 387; 10 W. R., 95; 1. B. L. R., (A.C.) 62.

Where a decree had been obtained in a Zillah Court, and sent to Calcutta for execution, the Court made an order directing a notice to issue, calling on the defendant to show cause why the decree should not be executed by the High Court. On appeal the order was upheld.—1 Ind. Jur., N. S., 189; 2 N.-W. P. H. C. R., 399.

The Court of the Principal Sadr Amin at K having been abolished after a decree was passed by it, and the case having been transferred to the Court of the Judge of the zillah by which execution was regularly issued, *held* that the Judge's Court had jurisdiction to entertain a subsequent application for execution, though made after the re-establishment of a Principal Sadr Amin's Court at K.—7 W. R., 124.

Every Court is bound to execute its own decree, if it can, by process (when necessary) issued against the property or person of the judgment-debtor: it is only when the decree cannot be executed within the jurisdiction of the Court whose decree it is, that it may be sent to another Court for execution. There is no intermediate procedure between these two executions.—9 W. R., 347.

Where a Subordinate Judge's Court in one district, executes the decree of a Subordinate Judge's Court of another district, it is bound by sec. 292, Act VIII. of 1859, to comply with a requisition from the latter Court to transmit to it the record of the case.—11 W. R., 230.

A judge has no jurisdiction to entertain a petition from, and order the release of, a judgment-debtor imprisoned in execution of a decree, while the execution-proceedings are before the Subordinate Judge.—12 W. R., 65.

Where a Judge had made an *ex-parte* order for transfer of a case in execution, it was held he had power to recall it.—13 W. R., 232.

*Held* that, after the orders of Government of 1867, dividing the whole of the jurisdiction of the Principal Sadr Amin of Rajshahye into two portions, the Small Cause Court Judge of Pubna alone had jurisdiction to perform in the district of Pubna the duties which, but for those orders, would have been performed by the Principal Sadr Amin of Rajshahye.—14 W. R., 396.

Where execution was sought of a decree which was passed in 1850, and which could not be executed by the revenue authorities in consequence of the transfer of its jurisdiction in such matters to the Civil Courts, *held* that the Civil Courts had jurisdiction to entertain the application.—17 W. R., 472.

The Judge had power, under Act XVI. of 1868, sec. 19, to transfer to the Subordinate Judge a case under Act IX. of 1861, an application under the latter Act not being a suit.—17 W. R., 551.

Act VIII. of 1859, sec. 284, does not restrict the granting of a certificate transferring a decree for execution to another Court to cases where such decree cannot be executed within the jurisdiction of the Court, whose duty it is to execute the same. A certificate may be granted upon its appearing to the latter Court that the decree could not have been completely executed by the sale of the property in its own district, but that it could be so executed by the sale of the property in the other district.—19 W. R., 307.

When a copy of a decree or order for execution is transmitted by the Judge of one district A to the Judge of another B for the purpose specified in Act VIII. of 1859, sec. 287, the Judge of B has no authority to transfer it to a third district. If complete, execution cannot be had in district B; it is the business of the decree-holder to have his decree re-transmitted to the Court, whose duty it is to execute it, and there to obtain a fresh certificate for transmission to any other district where execution may be practicable. 21 W. R., 337.

A Court having local jurisdiction is competent to sell in execution of a decree one or more outlying portions of an estate, even though the greater portion of that estate is not within its jurisdiction.—23 W. R., 154.

Under sec. 20 of Act XI of 1865, a Court of Small Causes may transfer a decree for execution to another Court, not only when there has been a sale of such moveables of the debtor as the judgment-creditor has been able to discover, and the proceeds of such sale have not been sufficient to satisfy the decree, but also when no sale has taken place at all, and the decree remains unsatisfied by reason of there being no moveable property of the judgment-debtor which can be found within the jurisdiction capable of being sold.—3 C. L. R., 558.

Two executions of the same decree, so far as attachment of different properties of the judgment-debtor is concerned, may proceed simultaneously, though ordinarily the sales in execution should not take place simultaneously.—7 C. L. R., 537.

A mortgage-decree was passed directing the sale of certain property wholly situate within the local limits of the jurisdiction of the Court which passed the decree. After the decree the district within which the property was situate was transferred and placed under the local jurisdiction of another Court. The judgment-debtor then applied to the first Court for execution of the decree, and thereupon the judgment-debtor objected that that Court had no jurisdiction to entertain the application or to direct the sale of the property. *Held* that that Court had authority to execute its own decree and bring the property to sale. *Held*, further, that sec. 223 (c) of the Code of Civil Procedure does not curtail the power of a Court to execute its own decree, but gives it a discretion either to execute the decree itself or, *on the application of the decree-holder*, to send it to another Court for execution, and thereby extends rather than limits the Court's power.—I. L. R., 15 Cal. 667.

The Court that has the power to pass a decree for sale of a property has also power to carry out its decree by selling that property, whether any portion of that property be within the local limits of its jurisdiction or not. *Per* GHOSE, J., sec. 223, clause (c) of the Civil Procedure Code leaves



it to the discretion of the Court to send the decree for execution of the Court having local jurisdiction.—19 Cal. 13.

Sec. 223 of the Code of Civil Procedure, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to *another Court*, should be interpreted to mean *another Court* having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. *Narasayya v. Venkata Krishnayya* (I. L. R., 7 Madr. 397) dissented from. 16 Cal. 465.

Where parties are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity.—18 Cal. 631.

The application by a decree-holder for a copy of a decree with intent to apply for execution is not a step in aid of execution within the meaning of cl. 4 of art. 179 of sch. 2 of the Indian Limitation Act, 1879, 11 Madr. 336.

Two decrees were passed against the same defendant in the Court of a District Munsif and on the small cause side of a Subordinate Court in the same District, respectively. The holder of the decree in the small cause suit attached and brought to sale the judgment-debtor's interest in a benefit fund. The other decree-holder applied for rateable distribution, his decree having been transferred for execution to the Subordinate Court directly and not through the District Court:—*Held*, (1) that the direct transfer of the decree of the District Munsif was not illegal; (2) that the Subordinate Judge had inherent jurisdiction to execute the decree of the District Munsif; (3) that the order for rateable distribution was right.—15 Madr. 345.

The plaintiff, having obtained a decree against the defendant in the Court at Bhusaval, sought to execute it by attaching a moiety of the defendant's pay. The defendant was a sorter in the Railway Mail Service, and travelled between Bhusaval and Nagpur, at which latter place he resided and received his pay. By an order of attachment issued, at the plaintiff's instance, by the Bhusaval Court to the defendant's disbursing officer at Nagpur, a moiety of the defendant's pay having been withheld by that officer, the defendant applied to the Bhusaval Court to cancel the order, contending that it was illegal, as neither he nor his disbursing officer resided at Bhusaval. On reference to the High Court, *held* that the order of attachment was *ultra vires*, as neither the defendant nor his disbursing officer resided within the jurisdiction of the Bhusaval Court. The proper procedure was to send the decree of the Bhusaval Court for execution to Nagpur, where the disbursing officer resided, and the defendant's pay was available for satisfaction of the decree.—12 Bom. 44.

The Courts of British India have no authority to send their decrees for execution to Courts not in British India.—12 Bom. 230.

Where a Court makes an order for execution of a decree and transmits the decree for execution to another Court, the latter Court has no power to determine whether execution is barred by limitation. The order for execution made by the transmitting Court is binding on the parties until reversed on appeal. It is otherwise, however, where the transmitting Court has made no order for execution, but has merely transmitted the decree and the certificate of non-satisfaction.—15 Bom. 28.

The Courts of British India have no power to execute a decree passed by the Court of a Foreign State. A decree of the Civil Court of Cooch Be-

has having been transferred for execution to the District of Rungpore :—*Held*, that the Courts of Rungpore had no jurisdiction to execute the decree.—13 Cal. 95.

Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject-matter of the suit does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto, whether such proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. *Nazar Husain v Kesri Mal* approved.—12 Al. 579.

The plaintiff, having obtained a money-decree against H. and others in a suit in the Subordinate Judge's Court at Dhulia, applied for execution by attachment and sale of their immoveable property. That property was accordingly sold, but before the realization of the assets the defendant, who also had obtained a money decree against the same judgment-debtors in the same Court in its Small Cause jurisdiction, applied for the execution of his decree by attachment and sale of the immoveable property, which had already been attached at the instance of the plaintiff. The Court under sec. 295 of the Civil Procedure Code Act (XIV of 1882) rateably distributed the proceeds of the sale between the plaintiff and the defendant. The plaintiff now brought this suit in the Small Cause jurisdiction of the Subordinate Judge's Court at Dhulia to recover from the defendant the amount paid to him, alleging that it had been illegally paid, as the procedure laid down in sec. 223 of the Code had not been followed :—*Held*, that, as ruled in *Bhagyvan Dayalji v. Balu*, a Subordinate Judge invested with Small Cause Court powers has generally to follow the procedure prescribed in the Code of Civil Procedure. This governs his proceedings both in trial and execution, whether the suit is a Small Cause or not. If the two jurisdictions assigned to the Subordinate Judge's Court and to the Subordinate Judge personally are locally co-extensive, there is no distinction of sides or branches. But where, as in some cases, the ordinary jurisdiction is wider locally than the Small Cause jurisdiction, the Court is, in that part of its territory which lies outside the Small Cause Court jurisdiction, to be regarded as a separate Court, so far, that a decree in a Small Cause should not generally be executed on property beyond the Small Cause jurisdiction without a transfer, *i. e.*, a dealing with the execution as in a suit tried in the usual way, for reasons to be recorded in writing. As all is done by the same Judge, a suggestion and an order recorded in the case are sufficient without a formal transmission as to a distant Court.—9 Bom. 237.

Small Cause Courts in the mofassal are not at liberty to execute decrees against moveable property beyond their local jurisdiction.—2 Bom. 532.

On the 15th May 1876, a judgment-creditor obtained a decree in the Civil Court of the Chittagong Hill Tracts, which are included amongst the Scheduled Districts, and on or about the 15th May 1876, at his instance, it was sent with a certificate of non-satisfaction to the Court of a Munsiff in the Regulation District of Chittagong for execution. After sundry unsuccessful attempts to execute the decree, an application was made on the 17th September 1886 for its execution. The judgment-debtor objected that under sec. 229 of the Code of Civil Procedure (Act XIV of 1882) the Munsiff's Court had no jurisdiction to execute the decree, as it could only act under that section, and the Code had never been extended to the Chitta-

gong Hill Tracts. *Held* that, as at the time the decree was passed and sent to the Munsif for execution Act VIII of 1859 was in force, and by sec. 284 of that Act the judgment-creditor had a right to have his decree sent to any Civil Court for execution, he was entitled now to have it executed, as neither Acts X of 1877 or XIV of 1882, by express words or implication deprived him of that right. *Held*, further, that the intention of the Legislature was, with regard to decrees obtained in Scheduled Districts after the Code of 1877 came into force, that such decrees should not be executed by Courts in British India unless and until, under the provisions of sec. 5 of the Scheduled Districts Act (XIV of 1874), the Government had issued the notification therein referred to applying to the Scheduled Districts such portion of the Code of Civil Procedure as they thought proper to apply. *Quære*.—Whether a decree passed by a Court in a Scheduled District, and sent for execution to a Court in a Regulation District after Act X of 1877 came into force, can be executed by the latter Court in the absence of such a notification extending the provisions of the Code of Civil Procedure to the Scheduled Districts.—15 Cal. 365.

Whether a decree for rent, under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction," under 24 and 25 Vic., c. 104, sec. 15. Decrees for rent made by the Collector under sec. 23 of Act X of 1859 can be executed by a Civil Court to which they may be transferred under the sections of the Code of Civil Procedure relating to "the execution of a decree out of the jurisdiction of the Court by which it was passed."—9 Cal. 295.

The holders of a decree, made in 1866, against K and certain other persons jointly, applied to recover mesne-profits in execution thereof. K paid the decree-holders the mesne-profits claimed, and then sued his co-judgment-debtors for contribution, and in 1878 obtained a decree against them. Subsequently the holders of the decree of 1866 again applied to recover mesne-profits in execution thereof, and in the proceedings which followed it was decided that mesne-profits were not recoverable under the decree. After this K's representatives applied for execution of the decree of 1878. The lower Courts refused to execute the decree, on the ground that, as under the decree of 1866, on which the decree of 1878 was based, mesne-profits were not recoverable, it would not be equitable to allow a decree for contribution passed on a contrary supposition to be executed. *Held* that the lower Courts were not competent to go behind the decree of 1878, but must deal with it as it stood.—5 Al. 53.

A Mufussal Court of Small Causes must adopt the machinery of sec. 223 of the Civil Procedure Code in all cases where execution is sought against persons or property outside its local jurisdiction. Such a Court, therefore, cannot attach the salary of a public officer where the same is disbursed outside its local jurisdiction. *Hossein Ally v. Ashotosh Gangoolly* (3 C. L. R., 30 followed).—6 Al. 243.

Although by the Madras Civil Courts' Act, 1871, the ordinary jurisdiction of Munsifs is limited in suits and applications of a civil nature to those in which the subject-matter does not exceed in value Rs. 2,500, sec. 223 of the Code of Civil Procedure gives jurisdiction to a Munsif's Court to execute a decree in a suit beyond its jurisdiction which has been transferred to it for execution by a District Court.—7 Madr. 397.

The Courts of Subordinate Judges invested with the jurisdiction of a Judge of a Small Cause Court under sec. 28 of Act XIV of 1869 does not thereby become "Courts of Small Causes constituted under Act XI of 1865." They merely exercise a similar jurisdiction. This makes their decisions final in the cases to which the jurisdiction extends, but it does not imply that the variations of procedure prescribed expressly for the Courts constituted under Act XI of 1865 are applicable to Courts constituted under a different Act and subject to different conditions. The Court of a Subordinate Judge exercising Small Cause Court powers is, under sec. 5 of the Code of Civil Procedure (Act XIV of 1882), one of the "other Courts exercising jurisdiction of a Court of Small Causes," and, as such, its procedure is governed by the Civil Procedure Code without the variations provided by Act XI of 1865. Under sec. 223 (*d*) of the Civil Procedure Code the Court which has passed a decree in its Small Cause Court jurisdiction may, for any good reason to be recorded in writing, transfer its decree to the other branch of the same Court, as it might to a different Court, for execution, without requiring a certificate under sec. 20 of Act XI of 1865. For this purpose the two branches or sides of the Subordinate Judge's Court may be regarded as different Courts.—8 Bom. 230.

See *I. L. R.*, 6 Cal. 513, noted under sec. 649; 14 Cal. 661, noted under sec. 19; 17 Cal. 699, noted under sec. 16.

Procedure when Court desires that its own decree shall be executed by another court.

**224.** The Court sending a decree for execution under section 223 shall send—

- (a) a copy of the decree ;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted ; and
- (c) a copy of any order for the execution of the decree, and, if no such order has been made, a certificate to that effect.

#### Notes.

This section applies to Provincial Small Cause Courts.

All orders passed by a Court between parties to the decree, and relating to the execution of the decree, are, unless they are specially barred, appealable. There is no special prohibition against an appeal from an order directing or refusing the issue of a certificate under sec. 285, Act VIII of 1859.—6 N.-W. P. H. C. R., 73.

The words "a copy of any order for the execution of the decree" in sec. 224, cl. c, of the Code of Civil Procedure (Act XIV of 1882) mean a copy of any *subsisting* order.—*I. L. R.*, 13 Bom. 371.

The jurisdiction of a Court to which a decree has been transferred for execution is strictly limited to carrying out such execution. Such Court has no power to issue a certificate under secs. 285, and 286 of Act VIII of 1859, transferring the decree, already transferred to it, to another Court for execution. The Court to which a decree has been properly transferred for execution having struck the case off the file, a subsequent application

for a further transfer of the Case to another Court for execution should be made to the Court which originally passed the decree sought to be executed. *Bagram v. Wise* considered.—3 Cal. 512.

See I. L. R., 6 Cal. 513; noted under sec. 649.

**225.** The Court to which a decree is so sent shall cause such copies and certificate to be filed, without any further proof of the decree or order for execution, or of the copies thereof, or of the jurisdiction of the Court which passed it, unless the former Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

Court [receiving] copies of decree, &c., to file same without proof.

**Note.**—This section applies to Provincial Small Cause Courts.

**226.** When such copies are so filed, the decree or order may, if the Court to which it is sent be the District Court, be executed by such Court or by any subordinate Court which it directs to execute the same.

Execution of decree or order by Court to which it is sent.

**Note.**—This section applies to Provincial Small Cause Courts.

**227.** If the Court to which the decree is sent for execution be a High Court, the decree shall be executed by such Court in the same manner as if it had been made by such Court in the exercise of its ordinary original civil jurisdiction.

Execution by High Court of decree transmitted by other Court.

**Note.**—This section applies to Provincial Small Cause Courts.

**228.** The Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Powers of Court in executing transmitted decree.

Appeal from orders in executing such decrees.

#### Notes.

This section applies to Provincial Small Cause Courts.

In execution of a decree for enforcement of hypothecation by sale of specific property, an objection by the judgment-debtor that the property is not transferable, with reference to sec. 9 of the N.-W. P. Rent Act, cannot be entertained.—I. L. R., 10 Al. 130.

The powers which the foreign Court has, under sec. 228 are confined to the execution of the decree, and the Court cannot question the propriety

or correctness of the order directing execution, nor can it, with reference to sec. 239 of the Code, stay execution except temporarily.—7 Al. 330.

See I. L. R., 9 Cal. 295 & 12 Al. 579, noted under sec. 223.

**229.** A decree of any Court established “or continued”\* by the authority of the Governor-General in Council in the territories of any Foreign Prince or State, which cannot be executed within the jurisdiction of the Court by which it was made, may be executed in manner herein provided within the jurisdiction of any Court in British India.

Decrees of Courts established by Government of India in Native States.

#### Notes.

This section applies to Provincial Small Cause Courts.

When a decree of one Court has been transmitted to another for execution under sec. 284 of Act VIII of 1859, the latter Court has jurisdiction to entertain an application to cancel its own order for striking off the case, whatever “striking off” amounts to.—1 B. L. R., (F. B.) 91; 10 W. R., (F. B.) 46.

It not being shown that the Court of the dewan ahilkar of Cooch Behar is a Court within the British territories, or a Court established by the Governor-General in a foreign state, *held* the Judge of Rajshahye had no jurisdiction, under sec. 284, Act VIII of 1859, to execute a decree of that Court.—4 B. L. R., (A. C.) 134; 13 W. R., 154.

When an Assistant Judge is invested with all the powers of a district Judge within any part of the district of such Judge, the Court of the Assistant Judge must be considered, equally with the Court of the District Judge, the principal Civil Court of original jurisdiction, and a decree sent for execution in such part of the district is properly executed by or under the directions of such Assistant Judge. The functions of the Court executing a decree are judicial, and not merely ministerial.—7 Bom. H. C. R., (A. C.) 37.

See I. L. R., 15 Cal. 365, noted under sec. 223.

**229A.†** So much of the foregoing sections of this Chapter as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any Foreign Prince or State to which the Governor-General in Council has, by notification in the *Gazette of India*, declared this section to apply.

Sending of decrees of British Indian Courts to British Courts in Native States.

**Note**—This section applies to Provincial Small Cause Courts.

\* The words quoted have been added by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 23.

† Sec. 229A has been added by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 24.



Execution in British India of decrees of Courts of Native States.

**229B.\*** The Governor-General in Council may, from time to time, by notification in the Gazette of India,—

(a) declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with Her Majesty, and not established “or continued” by the authority of the Governor-General in Council, may be executed in British India, as if they had been made by the Courts of British India, and

(b) cancel any such declaration.

So long as such declaration remains in force, the said decrees may be executed accordingly.

-This section applies to Provincial Small Cause Courts.

*B.—Of Application for Execution.*

When the holder of a decree desires to enforce it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or, if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.

The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Where an application to execute a decree for the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates (namely):—

(a) the date of the decree sought to be enforced or of the decree (if any) on appeal affirming the same, or

(b) where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.

Nothing in this section shall prevent the Court from granting an application for execution of a decree after the expiration of the said term of twelve-years, where the judg-

\* Sec. 229B was originally sec. 434, but it has been transposed to this place as sec. 229B by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 39. The quoted words, “or continued,” have been inserted by the same amending Act and section. Any reference made before the commencement of Act VII. of 1888 in any notification or other document to sec. 434 shall be read as a reference to sec. 229B.

ment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application.

“Notwithstanding anything herein contained, proceeding may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years.”\*

#### Notes.

This section applies to Provincial Small Cause Courts.

A and B obtained a decree against C. A obtained an order for execution of his share in the amount of the decree. C pledged immoveable property as security to A, who caused it to be sold. B applied to the Court for her share in the sale-proceeds. The Principal Sadr Amin refused the application. On appeal, *held* the order for execution ought, in express terms, to have reserved the rights of the other decree-holders to share in the proceeds of the execution. The case was sent back that the Principal Sadr Amin might apportion the amount realized amongst all the decree-holders.—1 B. L. R., (A. C.) 28.

Where two joint-decree-holders, each interested in an eight-anna share in a money-decree, issued joint-execution, and one of them, after the death of the other, received the whole amount due under the decree, *held* that this was only satisfaction as respects half of the decree, and that the representatives of the deceased were entitled to issue execution for the remaining half.—2 B. L. R., Ap. 43; 11 W. R., 262.

Two out of several co-decree-holders applied to the Judge's Court to execute their share of a decree. *Held* that this was not an application upon which the Court would proceed in execution, and that it could not in appeal be changed into an application for an execution of their whole decree. Although a Judge should, when necessary, direct notices to be served on judgment-debtors, he cannot proceed in execution on a mere application to issue such notices over the parties who are bound to apply under sec. 212 of Act VIII of 1859.—3 B. L. R., Ap. 21; 17 W. R., 19; 23 W. R., 342.

Where an application was made to the Civil Court under sec. 230 of the Civil Procedure Code by the petitioner disputing the right of a decree-holder to dispossess him of certain immoveable property, and the Civil Judge rejected the application, *held* that sec. 231 of the Civil Procedure Code did not give the petitioner a right of appeal to the High Court.—5 M. H. C. R., 183.

There is no provision of law which allows a decree-holder to apply for partial execution of a decree, nor any which allows several joint-decree-holders to put in separate applications for execution of a decree in respect of their several shares. An application made by one of several joint-holders of a decree enures for the benefit of all.—4 N.-W. P. H. C. R., 90.

If a Court thinks fit to grant an application made by an assignee of a decree, under sec. 208, Civil Procedure Code, he becomes a party within the meaning of sec. 11, Act XXIII. of 1861, and his name should be brought on the record.—4 N.-W. P. H. C. R., 90; 13 W. R., 244.

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\* See Act XII of 1891. (Repealing and Amending Act.)

Where a decree-holder, in the execution of a decree for the possession of land, mesne-profits, and costs, applied for and obtained possession of the land and costs, and afterwards, within three years, applied in execution of the decree for mesne-profits, the execution of the decree for mesne-profits was not barred by limitation by reason of more than three years having elapsed from the date of the decree. When a decree is of a complex nature, and grants different kinds of relief to be obtained by process of different kinds, there is no valid objection to separate applications for partial execution of the decree.—7 N.-W. P. H. C. R., 95.

When the judgment-debtors are jointly and severally liable to pay the decreed amount, the fact that one has paid his quota of an instalment will not modify his joint liability. If default be made by the other judgment-debtor, and an order protecting the estate of the former from proceedings to realise the whole sum decreed is improper.—1 Agra H. C. R., Mis. 14.

One of several joint-decree-holders is not bound by the acts of another who has compromised with the judgment-debtor, and agreed to receive payment by instalments.—1 Agra H. C. R., Mis., 16.

When a decree-holder having a joint-decree against several persons deals with some of them as severally liable for certain respective shares, he cannot execute the same decree as a joint one against the remaining judgment-debtors.—2 Hay's Rep., 297.

A joint-decree was passed in favour of A and B, and A subsequently applied for execution alone, alleging that B would not join with him in the application. The judgment-debtor stated, and B admitted, that more than half of the decretal money had been paid to the latter (out of Court), but the Court disbelieved the statement, and ordered execution to issue for the full amount of the decree. *Held* that the Court should, under sec. 207 of Act VIII of 1859, have allowed execution for half amount of the decree only.—3 C. L. R., 513.

Having regard to sec. 44 of the Contract Act, a release of one of two judgment-debtors who are made jointly liable for the amount of the decree does not discharge the other from liability; execution can be taken out against him.—6 C. L. R., 212.

In executing a joint decree against several debtors, it is not open to a Court to stay the sale of the property of certain of the debtors, upon their offering to pay what they consider their share of the amount due under the decree; nor can a Court, in such a case, upon proper action taken by the judgment-creditor, refuse to attach and sell the property of any one of the judgment-debtors in satisfaction of the entire judgment-debt. The liabilities of joint-debtors as amongst themselves, if not settled privately can be determined only in another suit.—8 C. L. R., 34.

On the third June 1879, an application was made for execution of a decree passed in 1836, and upon that application certain property was attached. On the 23rd October following, the proceedings were struck off, an order, however, being made at the same time that the attachment should continue. On the 31st December 1880, the decree-holder applied that the property under attachment should be sold. The preceding application for execution previous to that of 3rd June 1879 was made on the 8th August 1877. It was objected that the proceedings upon the applications of the 31st December 1880, and 3rd June 1879, were barred under sec. 230 of the Code of Civil Procedure. *Held* that these proceedings were not barred, inasmuch as the previous application had not been made under sec. 230 of the Code. *Anandray Chimuji Avati v. Thakurchand* (I. L. R., 5 Bom. 245)

followed. *Held* also that the application of 3rd December 1880 could not be treated as a fresh application for execution within the meaning of the 3rd paragraph of the section referred to.—9 C. L. R., 297.

An application for execution of a decree, which was more than twelve years old, having been made on the 4th August 1880, under sec. 230 of the Code of Civil Procedure, an order was made for the attachment of the moveable property of the judgment-debtor. No moveable property having been found, the Court was asked to attach his immoveable property, but, refusing to do so, struck off the proceedings. The application for execution having been renewed on the 13th September 1880, it was *held* that the former application for execution must be treated as having been granted within the meaning of sec. 230 of the Code, and, consequently, that the further application was barred under that section, the decree being more than 12 years old.—9 C. L. R., 321.

A decree for possession and wasilat having been made in 1854, it was, by an order in January 1881, directed upon the report of an amin that the decree-holder should recover a particular sum for wasilat. On the 14th March 1881 the decree-holder filed a petition, praying that certain properties of the debtor might be attached and sold, and the proceeds applied in payment of the wasilat. *Held* that, under sec. 230 of Act X of 1877, the application of 14th March 1881 was not barred. The decree of 1854, so far as the wasilat was concerned, might be taken to be merely interlocutory, and did not become final until January 1881.—11 C. L. R., 17.

A mortgaged property, burdened with the payment of an entire debt to two share-holders, is liable to sale at the instance of both creditors separately so long as their claims remain unsatisfied. The act of one of two holders of a bond cannot destroy the lien of the other on property pledged to both as security for a joint debt.—3 W. R., 130.

Joint decree-holders are not entitled to apply separately for execution of the decree limited to what they consider their respective interests in it.—6 W. R., Mis., 65 ; 6 W. R., Mis., 76 ; N.-W. P. H. C. R., 413.

Though one of two or more decree-holders may, with the permission of the Court, take out execution of a joint-decree under sec. 207, the execution must be for the whole decree, and not for any fractional share to which the decree-holder may consider himself entitled, the Court making such orders as may be necessary for protecting the interest of other decree-holders.—7 W. R., 10 ; 22 W. R., 354.

One out of several decree-holders cannot execute a decree in respect of his own separate interest, or otherwise than the decree as a whole. In this case, however, the decree-holder was allowed to amend his application to execute the decree for his own share, and to convert it into an application to execute the whole decree.—7 W. R., 535.

The rule of law which forbids application for execution of part of a decree does not bar application for all that remains due upon a decree where the rest has been previously satisfied.—12 W. R., 370.

On an appeal from an order passed in execution of a decree for possession and mesne-profits, the High Court laid down the principle that, though the decree was in words a joint and several decree for mesne-profits, yet where it could be proved incontestably that out of a number of defendants any one had been in possession only of particular lands or a distinct mouzah or lease, his liability to satisfy the decree would in equity extend no further than to such particular land, mouzah, or lease, and for such land

the decree-holder could take out execution as against lessor and lessee; the principle was then applied to the case under appeal. *Held*, in explanation of that opinion, that, as the appellant was the lessee of one village, he could be held jointly and severally liable with the proprietors (co-defendants, and the decree-holder could proceed against him either severally or jointly with those defendants, and realise the wasilat due on that village.—14 W. R., 175.

Where some of the decree-holders in a joint-decree apply for execution, the application may be refused or granted at the discretion of the Court, which is bound to see that injury is not done to the rights of absent decree-holders; but whether the Court does so or not, all recoveries in execution so made must be for the benefit of all the decree-holders.—16 W. R., 29.

The fact of a decree-holder giving a release to one or more of the judgment-debtors who were jointly and severally liable, cannot prevent his proceeding against the others for the balance due.—16 W. R., 49.

A joint-decree remains a joint-decree, notwithstanding the acts of the decree-holder in realising his money from one or more of the judgment-debtors separately, for he is entitled to realise his debt from any one of the debtors, and by proceeding against one he does not relieve the other debtors from their joint liability to him.—17 W. R., 497.

A judgment-debtor, on being arrested in execution of a decree, presented a petition asking for fifteen days' time to pay the amount of the decree, and, the decree-holders consenting, the Court made an order in the terms, "Let the petition be filed." *Held* that this order did not amount to one directing payment of money to be made at a certain date within the meaning of sec. 230, cl. b, of the Civil Procedure Code. *Bal Chand v. Raghunath Das* I. L. R., 4 Al. 155) followed.—I. L. R., 16 Cal. 16.

An application to the Court which passed a decree, for a certificate to allow execution to be taken out in another Court, is not an application for the execution of the decree within the terms of sec. 230 of the Code of Civil Procedure. The "granting" of an application under that section includes the issue of process for execution of the decree.—16 Cal. 744.

Future maintenance awarded by a decree when falling due can be recovered in execution of that decree without further suit.—19 Cal. 139.

An application was made in 1886 for execution of a decree dated 1873. In the interval *viz.*, in October 1879, the judgment-debtor was arrested on an application in execution by the decree-holder, but execution was not proceeded with further. *Held* that the application made in 1886 was time-barred under sec. 230 of the Code of Civil Procedure.—11 Madr. 132.

An application for execution of a decree obtained against the judgment-debtor in 1870 was presented by the applicant on the 26th January 1885. Several previous applications for execution had been made, and the last two, *viz.*, on the 29th July 1881 and 29th June 1882, had been granted. The judgment-debtor was arrested and brought before the Court. He contended that execution of the decree was barred. Both the lower Courts were of opinion that the decree was not barred, and allowed execution to issue. On appeal by the judgment-debtor to the High Court, *held*, that the application for execution was too late. As there had been an application made and granted on the 29th July 1881 under the Code of 1877, and twelve years from the date of the decree would have elapsed before June, 1885, the application in question was barred, and was not saved by the concluding clause of sec. 230 of the Code (Act XIV of 1882).—11 Bom. 524.

The words "law in force" include the Civil Procedure Code, 1887, as well as the Limitation Act then in force:—*Held*, therefore, where an application for execution of a decree of 1872 had been made and granted in January 1882, and under sec. 230 of the Code of Civil Procedure, 1877, further execution became barred, before the date on which the Code, 1882, came into force, that no application within three years from such date could be granted under sec. 230 of that Code.—9 *Madr.* 454.

A decree, passed in April 1872, was kept alive by various applications for execution up to 1883. In February and December of that year two such applications were made, but the proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November 1884, the decree-holder again applied for execution, the application being the first made after the decree had become twelve years old, and being made within three years from the passing of the Code, 1882:—*Held* that the application must be entertained in accordance with the ruling of the Full Bench in *Musharaf Begam v. Ghalib Ali* (I. L. R., 6 Al. 189). *Tufail Ahmad v. Sadhu Saran Singh* (Weekly Notes, 1885, p. 193) dissented from. *Jokhu Ram v. Ram Din* (I. L. R., 8 Al. 419) referred to.

*Per MAHMOOD, J.*—That the previous execution proceedings, initiated by the applications of February and December 1883, having terminated in those applications, being struck off, it could not be said that the applications were 'granted' within the meaning of sec. 230 of the Civil Procedure Code. *Paraga Kuar v. Bhagwan Din* (I. L. R., 8 Al. 301) referred to.—8 Al. 536.

The judgment-debtor, on seeing the Court's bailiff approach his house to attach his property, left the verandah, went inside the house, chained the door, and refused to open it when called on to do so by the bailiff:—*Held*, that the conduct of the judgment-debtor amounted to a prevention by fraud of the execution of the decree within the meaning of sec. 230 of the Civil Procedure Code (at the application of 1892).—9 *Bom.* 318.

The effect of the decision of the Full Bench in *Shohat Singh v. Bridgman* is nothing more than that a decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms: but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred to, and the mandatory part of it so affirmed should be executed as though it were the decree of the appellate Court. *Kristo Kinkur Roy v. Rajah Burrodacount Roy* referred to. Where the first Court of appeal affirmed the decree of the Court of first instance, and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal, and the decree-holder made an application of which the object clearly was to have execution taken under the decree of the appellate Court, by carrying out the mandatory part of the decree of the Court of first instance:—*Held* that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of last instance was under the circumstances a mere technical objection, and there was no reason why the execution asked for should not be allowed.—7 Al. 366.

In 1868 a decree was obtained for Rs. 1,100, which provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments should be Rs. 100 at the end of each subsequent year, and that in the event of failure to carry this out, and 2½ months after the fallings due of the in-



instalment, and whole amount should be exigible in a lump sum with interest, at 8 annas per cent. per mensem. In 1877, the decree-holder applied for execution of the decree, asserting that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200, and four of Rs. 100 each, and that default had been made in payment of the fifth instalment of Rs. 100, and he asked to recover the whole amount due on the decree. No order was passed on this application, and eventually the case was struck off. In 1880, the decree-holder again applied for execution of the decree, upon the same grounds as those upon which the previous application was based. Notice was issued and served, and a warrant issued for the arrest of the judgment-debtor, but eventually the case was struck off. In 1883, the decree-holder, on the same grounds, made another application for execution. It was contended by the judgment-debtor that execution was barred by sec. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and, even if they had been paid, they could not be recognized, not having been certified. *Held* that the proper time from which to reckon the limitation of twelve years was the fifth year from the date of the bond, the whole claim from the beginning and the order passed in 1880 having gone upon that basis; that the Court could not go behind that order; and that consequently the decree-holder was within time, and might take out execution.—7 Al. 373.

A decree for money was passed on the 19th March, 1866. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December, 1878. On this application an order was made by the Court executing the decree (Munsif) for the sale of certain property belonging to the judgment-debtor. The latter objected to the execution of the decree, on the ground of limitation, and the decree-holders filed an answer to the objection. On the 14th July, 1879, the case was struck off because the decree-holder had not deposited certain process fees without the disposal of the objection. On the 1st October, 1879, the decree-holders again applied for the sale of the property, and it was ordered to be sold. On the 17th February, the judgment-debtor presented a petition repeating the objection, which, on the 13th March, 1880, the Munsif entertained and disallowed. This order was affirmed in appeal by the District Judge, and again by the High Court. Meanwhile, the Munsif had struck off the case from the file of execution cases pending in his Court, on the ground that the records had been despatched to the appellate Court. On the 18th September, 1882, the decree-holder again applied for execution of the decree, praying that "the suit might be restored to its number, and that the judgment-debt might be caused to be realized by attachment and sale of the judgment-debtor's property specified in the former schedule":—*Held* that the decree-holder was entitled to execution of the decree, and that he could get it under the application which was made on the 1st October, 1879 inasmuch as the matter was made *res judicata* by the decree of the High Court in appeal, and it must be taken that that decree was correctly passed, and that the order for sale passed upon it was properly made and that the sale ought to have taken place:—*Held* also that the proper application for the decree-holder to have made in September, 1882 was that the case might be restored to the Munsif, and that the present application might be so dealt with as to effect the same result, because the prayer contained therein referred to the number of the proceedings of October, 1879, and to the schedule of the property then ordered to be sold.—7 Al. 439.

Under sec. 230 after a decree is twelve years old, there is a prohibi-

tion against its being executed more than once, i.e., an application for execution should not be granted if a previous application has been allowed under the provisions of that section. The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not "granting" an application within the meaning of sec. 230 of the Code, and secs. 245, 248 and 249, show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in sec. 249. In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March 1877 various amounts were paid on account of the decree. In that month an application was made for execution of the decree, the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected, under which a certain sum had been paid by one of the said representatives in satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this, the application for execution was struck off. On the 5th March 1883, another application for execution was made, notice to appear was issued, and after this notice a petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again, on the 31st March 1884, the decree-holder applied once more for execution of the decree. *Held* that neither the previous application of the 9th March 1881, nor that of the 5th March 1883, could properly be said to have been "granted" within the meaning of sec. 230 and under these circumstances, the decree, though twelve years old and upwards, was not barred by that section, and the application for execution should be allowed.—8 Al. 301.

The holder of a decree, bearing date the 15th June 1872, applied for execution thereof on the 9th February 1885, the previous application being dated the 27th November 1883:—*Held*, that the application for execution was not barred by sec. 230. *Musherraf Begum v. Ghalib Ali* (I. L. R., 6 Al. 189) followed. *Goluck Chandra Mytee v. Harapria Debi*, (I. L. R., 12 Cal. 559) *Bhawani Das v. Daulat Ram* (I. L. R., 6 Al. 388), and *Sreenath Goocho v. Yusoof Khan* (I. L. R., 7 Al. 556), referred to. *Tufail Ahmad v. Sadhu Saran Singh* (Weekly Notes, 1885, p. 193) discussed and dissented from by MAHMOOD J.—The rule of construction being that a limited meaning can only be given to general words in a statute where the statute itself justifies such limitation, the words "any decree" in the proviso to sec. 230 must not be construed as confined to such decrees as would be barred on the date of the Code coming into force, inasmuch as no reason for so restricting the meaning of those words can be found in the Code or is suggested by the legislative policy, upon which clauses such as the proviso in question are based. This policy is to prevent a sudden disturbance of existing rights in consequence of new legislation; but it is beyond its object and scope to revive rights or remedies which have already expired before the new Act comes into operation; and although the Legislature may revive such rights or remedies, it can only do so by express words to that effect.—8 Al. 419.

In the last paragraph of sec. 230 the words, "the law in force immediately before the passing of this Code," refer to and include Act X of 1877, as amended by Act XII of 1879. *Musharraff Begum v. Ghalib Ali*, (I. L. R., 6 Al. 189) dissented from.—12 Cal. 559.

A decree was passed on the 6th September 1876, and on the 6th July 1888 an application for execution was made in the terms of sec. 235 of the Code of Civil Procedure which did not contain a list of property, as prescribed by sec. 237, and the decree-holder did not produce the same till the 11th September 1888. The application having been made and admitted, any further application would be barred after the 6th September 1888. *Held* BY THE FULL BENCH that the application of the 6th July 1888 was one within the meaning of sec. 230 of the Code of Civil Procedure, *Per* PRINSEP, PIGOT, and GHOSE, JJ.—*Held* that the application was defective as not complying with the provisions of sec. 237, and as it was not amended within due time or under the provisions of sec. 245, the decree-holder was barred. *Per* PRINSEP and PIGOT, JJ.—*Macgregor v. Tarini Churn Sircar*, I. L. R., 14 Cal. 124, should be overruled. *Per* PETHERAM, C. J.—The application could not be carried out without amendment, and no amendment could be made after the application had been admitted and registered under sec. 245. So much of the decision in *Macgregor v. Tarini Churn Sircar* as decides that an application may be amended after admission and registration should be overruled. *Per* O'KINEALY, J.—The original application was defective, and the further application of the 11th September 1888 was barred. An application to execute a decree if admitted, and order for execution made under sec. 245, should be dealt with on its merits and decided accordingly.—17 Cal. 631.

The concluding clause of the same section refers to the question of limitation, and not that of due diligence.—2 Al. 281.

The words, "the last preceding application," in Act X of 1877, sec. 230, cl. 3, mean an application under that section, and not an application under Act VIII of 1859.—2 Al. 275.

After a sale of land in execution of a decree, and before its confirmation, the judgment-debtor cannot object to the validity of the sale, on the ground that the execution of the decree is barred by the provisions of sec. 230 of the Code of Civil Procedure, 1877.—6 Madr. 237.

Under the Civil Procedure Code (Act VIII of 1859), an application to the Court to continue the attachment of immoveable property, but to stay the sale of it, *held* to be a proceeding to keep in force the decree.—2 Madr. 218.

*Per* INNES, J.—The right to execute decrees having been curtailed by sec. 230 of the Code of Civil Procedure, 1877, the provisions of the Limitation Act should be construed as far as possible so as to prevent the defeat of *bona fide* endeavours to secure the fruits of a decree once obtained.—5 Madr. 141.

A judgment-debtor, who, though able to pay his judgment-debt, dishonestly evades payment for more than twelve years by eluding service of warrants and making applications to the Court (which had the effect for the time of staying execution), is guilty of fraud within the meaning of sec. 230 of the Code of Civil Procedure.—6 Madr. 365.

The date referred to in the last paragraph of sec. 230 of the Civil Procedure Code (Act X of 1877) as the date of "the passing of" that Act *held* to be the 30th March 1877, the date when that Act received the assent

of the Governor-General, and not the 1st October 1877, the date of the coming into force of that Act.—7 Bom. 214.

An order under sec. 230 of Act X of 1877 by a Court executing a decree refusing an application to execute it at the same time against the person and property of the judgment-debtor, being a “decree” under sec. 2 of the Act, an Appeal lies against such order, and the Appellate Court is bound to consider whether the lower Court has properly exercised the discretion vested in it by sec. 230 of that Act.—7 Bom. 301.

Where an application to execute a decree was made under sec. 230 of the Code of Civil Procedure before the Amendment Act (XII of 1879) came into force, but was not disposed of until after sec. 230 was altered by that Act, *held* that the rule in *Wright v. Hale* (6 H. and N. 227) applied, and that the Act, as amended, was the law to be applied.—3 Madr. 98.

Under sec. 230 of Act X of 1877, an application for execution is said to be ‘granted,’ when it is made regularly and formally. The expression ‘granted,’ is equivalent to the expression ‘admitted’ as used in sec. 245. Where, therefore, an application for execution under sec. 230 of Act X of 1877 is not ‘granted,’ a subsequent regular and formal application under the same section may be allowed if made within time.—8 Cal. 297.

Where an application to execute a decree of 1862 was made under sec. 230 of the Code of Civil Procedure, 1877, on the 14th of December, 1877, and a notice was issued to the judgment-debtor under sec. 248 but no further steps were taken:—*Held* that a subsequent application made within three years from that date was not affected by the twelve years’ rule, as the last preceding application had not been granted within the meaning of sec. 230.—6 Madr. 172.

The parties to a decree presented a petition to the Court executing the decree, stating that it had been agreed between them that the amount of the decree should be paid by ten monthly instalments of Rs. 500 each. The Court made an order directing that such petition should be filed. *Held* that this order did not amount to one directing payment of money to be made at a certain date, which would give a fresh period of limitation under sec. 230 (b) of the Civil Procedure Code.—4 Al. 155.

No process can legally issue upon an application for the execution of a decree already barred by limitation, nor can an application made under such circumstances be a valid application, or one which, under the Act, would give the execution-creditor a fresh period of limitation. Unless it can be shown that such was the express intention of the Legislature, none of the provisions of the present Limitation Act (XV of 1877) can be made applicable to any matter which, at the time when such Limitation Act came into force, had already become barred by the operation of the prior Limitation Act.—5 Cal. 894.

On the 1st June 1880, several decree-holders applied to the subordinate Civil Court of Parner for execution of their decree. They had taken out execution several times previously—the date of their last preceding application being 1st June, 1877. The Subordinate Judge was of opinion that the applications were barred under the last clause of sec. 230 of the Civil Procedure Code (Act X of 1877). On his referring the cases to the High Court, *held* that the applications were not barred, inasmuch as the previous applications for execution had not been made under sec. 230 of Act X of 1877, that Act not being then in force.—5 Bom. 245.

An application, under Act VIII of 1859, for execution of a decree, was rejected by the Judge, on the ground that the judgment-creditor had withdrawn the former application. This order was reversed on appeal, and the case was sent back for disposal on its merits. The Judge then held that Act X of 1877, which had just come into force, applied, and, on the ground that the decree-holder had failed to get execution upon his former application, dismissed the petition. The Judge referred the case to the High Court upon the question whether he was, under the circumstances, at liberty to grant the application. *Held* that he was. The application should have been dealt with under the law which was in force at the time of execution was sought. The effect of the provisions of Act X of 1877, sec. 230, considered.—1 Madr. 403.

The transferee of a decree applied, while an application by the original holder of such decree to execute it was pending, to be allowed to execute it. The Court, in accordance with Act X of 1877, sec. 232, directed notice of the transferee's application to be given to the transferor and the judgment-debtor. The transferee failed to pay the court-fee leviable for the issue of such notice, and the Court dismissed his application. The transferee subsequently made a second application to be allowed to execute the decree. *Held* that such application could not be rejected, with reference to sec. 230, on the ground that due diligence had not been used on the former application to procure complete satisfaction of the decree, because such application had not been granted, and, therefore, the question whether "on the last preceding application" due diligence was used to procure such satisfaction did not arise.—2 Al. 384.

In execution of a decree passed more than twelve years before the date of the Civil Procedure Code (Act X of 1877), certain judgment-creditors applied for the attachment and sale of certain specified property belonging to their judgment-debtor, previous to the date on which the three years allowed for such execution under sec. 230 would have expired. Subsequently, after the three years had elapsed, they filed a fresh application, praying that certain other property of their judgment-debtor might be attached and sold in lieu of that specified in their former application, and that the latter might be released. *Held* that execution of the decree was barred by limitation. *Per* PRINSEP, J.—Under sec. 230 of the Civil Procedure Code, it was intended by the Legislature that a decree-holder, seeking to execute a decree passed more than twelve years before, should have one opportunity to execute that decree, and that, if he fails to satisfy it on that application, any further application becomes barred.—7 Cal. 556.

The holder of a decree applied for execution under sec. 230 of Act X. of 1877, and the application was granted. Within three years after the passing of Act XIV. of 1882, by which Act X, of 1877 was repealed, he applied, for the first time, under sec. 230 of the former Act, for execution of the decree. At the time this application was made, more than twelve years had elapsed from the date of the decree. *Held* by STRAIGHT, BRODHURST, and TYRRELL, JJ., that the application might be granted, it being the first made under sec. 230 of Act XIV. of 1882, and the first made after the expiration of twelve years from the date of the decree, and not being barred by the last paragraph of sec. 230 of that Act, read in conjunction with the 3rd paragraph of sec. 230 of Act X of 1877, the "law in force" mentioned in the last paragraph of sec. 230 of Act XIV. of 1882 referring to the law of limitation in force at the time the Act was passed, and not to the third paragraph of sec. 230 of Act X. of 1877. *Held* by



STUART, C. J., and OLDFIELD, J., that the application should not be granted, the effect of the last paragraph of sec. 230 of Act XIV. of 1882 being to bar any proceedings to enforce a decree under that Act which would have been barred under sec. 230 of Act X. of 1877, if taken thereunder, on the ground that the period of twelve years had elapsed from the dates specified in that section.—6 Al. 189.

Where an application was made under sec. 230 of the Civil Procedure Code, 1877, as amended by Act XII. of 1879, for execution of a decree more than twelve years old, and the application was granted, *held* that a subsequent application for execution of the decree, under sec. 230 of the Civil Procedure Code, 1882, should have been refused, since the decree had been once allowed the benefit of the three years' grace under the last paragraph of sec. 230 of the Code of 1877, and then became dead or un-executable. *Held* that there is nothing in the Code of 1882 to justify the conclusion that it was intended to revive decrees which had become dead before it became law, and that here the decree-holder's right having already become dead before the enactment of the present Code, the passing of that Code could not bring that right into existence again. *Musharraf Begam Ali v. Ghalib Ali* (I. L. R., 6 Al. 189) distinguished.—6 Al. 388.

A decree which directs payment to be made annually to be decree-holder is not a decree, which directs payment of money to be made at a certain date within the meaning of sec. 230 of the Code of Civil Procedure or clause 6 of Article 179 of Schedule II of the Indian Limitation Act, 1877. Where a decree directed annual payments to be made, and the decree-holder applied for and obtained payment of the money due for 1877 and 1878 in March 1879 by execution, and then applied in July 1882 for the sums due for 1880 and 1881:—*Held*, that this application was barred by limitation.—7 Madr. 83.

Sec. 230 of the Code of Civil Procedure, 1882, does not affect the period of limitation prescribed by article 180 of schedule II of the Indian Limitation Act, 1877.—7 Madr. 540.

See. 3 C. L. R., 513; 4 C. L. R., 70; I. L. R., 10 Cal. 417, noted under sec. 108; 12 Al. 571, noted under sec. 210; 6 Cal. 504, 6 Bom. 258, noted under Art. 180 of the Limitation Act.

**231.** If a decree has been passed jointly in favour of more persons than one, any one or more of such persons, or his or their representatives, may apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the representative in interest of the deceased.

If the Court sees sufficient cause for allowing the decree to be executed on an application so made, it shall pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

#### Notes.

This section applies to Provincial Small Cause Courts.

The circumstance that the petition of one of several decree-holders in applying for execution requires amendment because of the list of property



being incomplete, is no ground for declaring such application to be superseded by a latter application made before the completion of the necessary amendment by another co-decree-holder for execution. Two executions of the same decree, so far as attachment of different properties of the judgment-debtor is concerned, may proceed simultaneously, though ordinarily the sales in execution should not take place simultaneously.—7 C. L. R., 537.

A Hindu obtained in 1878 a decree for partition of certain property and applied in 1888 to have it executed. It appeared that the decree holders' son, having obtained against him in 1881 a decree for a share of whatever he should acquire under the decree of 1878, had applied for execution of the last-mentioned decree; and reliance was now placed on that application to save the bar of limitation:—*Held*, that assuming the decree of 1881 had effected an assignment by operation of law of the decree of 1878, the father and son were not joint decree-holders within the meaning of Civil Procedure Code, sec. 231, and the father's application for execution was barred by limitation.—I. L. R., 13 Madr. 347.

A Hindu obtained in 1878 a decree for partition of certain property, and he now applied in 1888 to have it executed. He relied in bar of limitation on an application for execution made by his son, who had obtained a decree against him in 1881 in a partition suit, whereby his right was established to one-fifth of whatever should be acquired by the father by virtue of the decree of 1878. The father's application for execution in 1888 was held to be barred by limitation in *Ramasami v. Anda Pillai* (I. L. R., 13 Madr., 347). On review it appeared that the son had applied for execution of the whole decree, stating that his father would not join him in such application, and that notice was given to the father:—*Held*, (1) that the son was an assignee by operation of law of one-fifth of the judgment-debt in the suit of 1878; (2) that his application accordingly kept the decree alive under Limitation Act, 1877, sched., 11, art. 179, cl. 4, and the father's application in 1888 was not barred by limitation.—14 Madr. 252.

Although the Civil Procedure Code does not allow one of several decree-holders to apply for the partial execution of a joint-decree, yet an application by one of such decree-holders for execution of the decree in respect of so much of the relief granted to all as he considers appertains to him individually may keep in force the decree as being an application according to law.—3 Madr. 79.

One of two holders of a joint decree applied for execution of the decree to the full amount. It appeared that the other decree holder had received a certain sum from the judgment-debtor on account of the decree out of Court, but this payment had not been certified:—*Held*, that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance.—15 Madr. 343.

A decree passed jointly in favour of more persons than one can only be legally executed as a whole for the benefit of all the decree-holders, and not partially to the extent of the interest of each individual decree-holder. *Held*, therefore, where one of two persons in whose favour a decree for money had been passed jointly applied, on the 27th April 1880, for execution of a moiety of such decree, and the other of such persons made a similar application on the 30th April 1880, that such applications, not being in

accordance with law, were not sufficient to keep the decree in force. Also that the illegality of such applications could not be cured by a subsequent amended application for the execution of the decree as a whole preferred after the period of limitation had expired.—4 Al. 72.

A joint-decree cannot be executed by one of the several joint-holders in respect only of his share of the decree. *Ram Autur v. Ajudhia Singh* (I. L. R., 1 Al. 231). *The Collector of Shahjahanpur v. Surjan Singh* I. L. R., 4 Al. 72), and *Haro Sanker Sandyal v. Tara Chandra Bhattacharjee* (3 B. L. R., 114), followed. When, by operation of law, one of several joint judgment-debtors acquires the position of the decree-holder in respect of the whole judgment-debt, the effect is to extinguish the liability of the other judgment-debtors, and the decree cannot be executed against them. But when one of them so acquires only a partial interest in the decree, the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has so acquired. *Wise v. Abdool Ali* (7 W. R., 136), *Pogose v. Fakurooddeen Mahomed Ashan* (25 W. R., 343), *Degumburee Dabee v. Soroop Chunder Hazra* (9 W. R., 230), and *Koshallee v. Nund Lall* (N.-W. P. H. C. R., 1874, p. 1), referred to. *Held*, therefore, where one of several joint decree-holders applied for execution in respect of his own share only, and the joint judgment-debtors under the decree had inherited the right therein of one of the joint decree-holders, that the application was contrary to law; that so much of the judgment-debt as had devolved upon such persons had been extinguished; and that application should have been made for execution in respect of the entire unextinguished portion of the judgment-debt. *Brojeswari Chowdhranee v. Tripoora Soonderee Debi* (3 C. L. R., 513) and *Mussammut Bibee Budhun v. Mussammut Hafezah* (4 C. L. R., 70) followed.—5 Al. 27.

See I. L. R., 9 Cal. 831, noted under sec. 244; 13 Madr. 236, noted under sec. 7 of the Limitation Act.

**232.** If a decree be transferred by assignment in writing, or by operation of law, from the transferee of decree. decree-holder to any other person, the transferee may apply for its execution to the Court which passed it; and, if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Provided as follows:—

(a) where the decree has been transferred by assignment, notice in writing of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution:

(b) where a decree for money against several persons has been transferred to one of them, it shall not be executed against the others.

#### Notes.

This section applies to Provincial Small Cause Courts.

The assignee of a decree should apply to the Court which passed the

decree, and not to the Court to which the decree had been forwarded under sec. 285, Act VIII. of 1859, for execution, for the purpose of being substituted in the place of the original decree-holder. The word "Court" in sec. 208, Act VIII. of 1859, does not include the Court to which a decree has been transferred for execution.—5 B. L. R., 497; 14 W. R., 65.

Where S obtained a decree for possession against D P, the person in possession, and subsequently, in a suit brought by J P claiming the property against S, a decree was passed in the terms of a compromise, whereby S consented that J P should execute his (S's) decree, *held* that J P was entitled, under sec. 208, Civil Procedure Code, to recover possession in execution of S's decree from D P, although D P had not been made a party to the second suit.—1 N.-W. P. H. C. R., 34; Ed. 1873, 31.

A person claiming to be the assignee of a decree should apply for recognition of his title to the Court which pronounced the decree and for leave under sec. 208 of the Civil Procedure Code to have his name substituted in lieu of that of the plaintiff.—9 Bom. H. C. R., (A. C.) 46; 9 Bom. H. C. R., 49; 4 N.-W. P. H. C. R., 90.

By a deed, dated 2nd July 1876, Y mortgaged properties Nos. 1 and 2 to A, and subsequently by separate deeds he again mortgaged the same properties respectively to B and C. C afterwards purchased Y's equity of redemption in property No. 2, and on the 19th November 1880 A obtained a mortgage-decree against Y which he sold to B, who now sought to execute it. C was merely benamidar for B. *Held* that, on B consenting to allow property No. 2 to be first sold free of all incumbrances, it was necessary for B to proceed by regular suit.—13 C. L. R., 272.

Sec. 208, Act VIII. of 1859, put a party, to whom a decree is transferred, into the position of the original decree-holder, and entitled him to have the decree executed, as if application were made by the original decree-holder.—7 W. R., 205.

A Court charged with the execution of a decree has no other discretion with regard to noticing a transfer thereof than that which is given to it by sec. 208, which only applies to cases where the transferee can and does come forward to claim execution for himself, instead of the original decree-holder.—10 W. R., 354.

Can the purchasers of a share in a decree be added upon the record under Act VIII. of 1859, sec. 208, as co-decree-holders?—24 W. R., 11.

The discretion given to a Court under sec. 232 of the Code of Civil Procedure as to allowing execution of decrees by assignees must be exercised reasonably. The mere fact of the existence of a cross claim against the assignor of a decree by his judgment-debtor is no reason for refusing issue of execution on the application of the assignee.—I. L. R., 15 Cal. 446.

Upon the death of the full owner, the mother took out probate of a will in which she was appointed executrix. The will was afterwards disputed by the minor son of the testator, and probate was revoked; but, while the mother was in possession of the estate as executrix, she sued and obtained a decree for rent under Beng. Act VIII. of 1869. Upon the application of the minor for the execution of the decree, *held* that the minor was in a position to execute the decree, his succession to the estate of his father being a succession or *transfer by operation of law* within the meaning of sec. 232 of the Code of Civil Procedure. *Held* also that the mode in which the decree was executed under the old Rent Act, Beng. Act VIII. of 1869, was, in so far as it was a right at all that belonged to the judgment-credi-

tor, not a private right, but a mere right of procedure, and the execution was therefore to be governed by Act VIII. of 1885.—16 Cal. 347.

A petition, by one claiming to be the purchaser at a Court-sale of the interest of a decree-holder under a decree, for execution of the decree was rejected. *Held* no appeal lay from the order rejecting the petition.—12 Madr. 511.

A decree for damages and costs having been obtained against P and C, A, to whom P was indebted, and was about to assign property as security, in order to prevent P being adjudicated an insolvent, and with a view to execute the decree against C if possible, purchased the decree. A applied, under sec. 232 for leave to execute the decree. This application was rejected by KRENAN, J., on the ground that the decree was certain to be executed against C, and not against P, under whose orders and for whose benefit C acted when he infringed the right of, and became liable in damages to, the plaintiff in the suit :—*Held*, on appeal, that the benefit likely to be gained by P by this transaction was no sufficient ground for refusing leave to A to execute the decree.—8 Madr. 455.

The transferee of a decree for costs, associating with him the transferor, made an application under sec. 232 to be allowed to execute the decree. The application was opposed by the judgment-debtor, and was rejected, and the Court referred the transferee to a regular suit. After taking various proceedings ineffectually, he instituted a suit for the recovery of the sum to which he was entitled as costs under the decree transferred to him :—*Held* that the plaintiff, as the holder of the decree by assignment, could only recover the amount under it by executing the decree, and not by a separate suit; but that he was entitled to have a decree declaring that the assignment to him of the decree-holder's rights under the decree was valid, and gave him a right to execute it, and that the Court's order under sec. 232, which disallowed the execution, was an improper one, a suit for this relief being maintainable; for, there being no appeal from orders under sec. 232, there would otherwise be no remedy, and that, looking at the plaint and the issues on which the parties were divided, and the fact that the Court which refused the plaintiff's application for execution referred him to a regular suit, this relief might properly be given in the present suit. *Per* MAHMOOD, J., that the suit was maintainable, inasmuch as the present plaintiff never having been accepted on the record as holder of the decree, the questions which were disposed of by the Court executing the decree, as between the plaintiff and the judgment-debtor, could not be regarded as questions within sec. 244.—7 Al. 457.

Three out of six decree-holders sold their share in the decree to A., who thereafter made an application to the Court under sec. 232. This application was dismissed, on the ground that A's purchase was made *benami* for some of the judgment-debtors. In a subsequent suit brought by A and the persons who were said to be the real purchasers, it was contended that a separate suit was barred under the provisions of sec. 244, cl. (c) :—*Held*, that A was not a party to the suit in which the decree was passed, nor the representative of any such party, and that the suit was not barred.—12 Cal. 105.

Certain property was mortgaged by A to B. Subsequently, this property was purchased by C at a sale held in execution of a decree obtained by a third person against A. B then brought a suit on his mortgage-bond against A and C, and obtained a decree for the sale of the mortgaged properties, and also a personal decree against A; B assigned his rights under

this decree to C, who applied for execution under sec. 232 of the Code. A objected to execution issuing, relying on proviso (b) to sec. 232:—*Held* that proviso (b) to sec. 232 applies only to decrees for money personally due by two or more persons; and that the decree obtained by B against A and C not being a personal decree against C, (he having been made a defendant only by reason that he had purchased the mortgaged property subject to the mortgage-debt), C, as assignee of B, was entitled to take out execution.—11 Cal. 393.

A person attaching a decree is a representative of the decree-holder within the meaning of that term as used in sec. 244, cl. (c) of the Civil Procedure Code, and in every case is entitled to enforce execution of the decree which he has attached. When the decree attached has been passed by the same Court as the decree in execution of which it has been attached, the Court has jurisdiction to execute the attached decree on the application of the attaching creditor.—15 Cal. 371.

No legislative prohibition exists to the transfer of a portion of a decree; and provided that the whole decree is executed, and the rights of all parties interested are cared for, there is no objection to the transferee being allowed to carry on the execution-proceedings. *Seetaput Roy v. Ali Hossein*, 24 W. R., 11, dissented from.—17 Cal. 341.

The person appearing on the face of the decree as the decree-holder is entitled to execution, unless it be shown by some other person, under sec. 232 of the Civil Procedure Code, that he has taken the decree-holder's place.—18 Cal. 639.

A holder of a certificate of administration granted under sec. 7 of Regulation VIII of 1827 is a transferee by law of a decree obtained by the deceased within the meaning of sec. 232 of the Civil Procedure Code (Act XIV of 1882), and is competent to apply for execution of such a decree.—11 Bom. 368.

An assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution of a decree, but, as regards one who claims to be an assignee in writing or by operation of law, the Court has a discretion under sec. 232 of the Code of Civil Procedure (Act XIV of 1882), whether to recognize such assignment or not. When an assignee of a decree applied for execution, and the judgment-debtors contended that the decree sought to be executed had been obtained by fraud, and was, therefore, a nullity and incapable of execution. *Held*, that it was not open to the judgment-debtors to raise the defence of fraud in the course of the execution proceedings.—15 Bom. 307.

The words of sec. 28 of the Registration Act (III of 1877), "some portion of the property," should not be read as meaning some *substantial* portion. *Sheo Dayal Mal v. Hari Ram* (I. L. R., 7 Al. 599) dissented from. The holders of a decree for the sale of mortgaged property transferred the same to M by instruments which were registered at a place where a small portion only of the property was situate. Subsequently M transferred the decree to other persons, and the co-transferees applied, under sec. 232 of the Civil Procedure Code, to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application, on the grounds that M's name had not been substituted for the names of the original decree-holders who had transferred to him, and that the transfers to M were inoperative, as the instruments of transfer had not been registered at the place where the substantial portion of the mortgaged property was situate in accordance with sec. 28 of the Registration Act (III of

1877). It appeared that no notice had been issued to M, under sec. 232 of the Civil Procedure Code, that he was dead, and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below. *Held* that the matter involved questions arising between the parties to the decree or their representatives within the meaning of sec. 244 (c) of the Code, and that the order allowing the application was therefore a decree within the definition of sec. 2, and was appealable as such. *Held* that, even assuming that the judgment debtor had a *locus standi* to raise the objection that notice had not been issued to the applicants transferor, he had no possible interest in the question, and could not be prejudiced by the passing of the order; that it was not necessary to cite the representatives of the transferor; and that the order not being one upon which execution of the decree could issue, but merely for a transfer of names, the objection that the transferor had not been cited under sec. 232 was not a substantial one. *Held* that the objection in reference to sec. 28 of the Registration Act could only properly be raised between the transferor and the transferee, and not by the judgment-debtor, and moreover had no force. *Held* that it could not be said that where a decree has been assigned by one assignor to another, the substitution of his name on the record in lieu of that of the original decree-holder was a condition precedent to the assignor's passing title under the assignment.—9 Al. 46.

R died in May 1859, leaving his property to his executors in trust for the appellant, Purmananddas, and he directed that the property should be assigned by them to the appellant as soon as he came of age. In August 1868, the executors filed this suit against Luckmidas Khimji as manager of certain landed property belonging to the Hallai Bhattia caste, and known as *Mahajan Wadi*, to recover certain loans made by them as executors to him as manager of the said *wadi*. On the 11th May 1870, while this suit was pending, the executors assigned all the property of their testator to the appellant, Purmananddas. By the deed of assignment they assigned to him (*inter alia*) "all moveable property, debts, claims, and things in action whatsoever vested in them as such executors." No steps were taken, subsequently to this assignment, to make the assignee, Purmananddas, a party to the suit, which proceeded without amendment. On the 23rd January 1873, a decree was passed for the plaintiffs on the record for Rs. 31,272-13-5, and it was declared that the said sum should be a first charge on the rents and income of the said *wadi*. Subsequently to this decree, Luckmidas Khimji opened an account in the name of the appellant, Purmananddas, and from time to time made payments to him on account of the decree. The last of these payments was made on the 19th November 1884. None of these payments were certified to the Court. In 1885 the respondent, Vallabdas Wallji, was appointed to the office of manager of the Hallai Bhattia caste in the place of Luckmidas Khimji, the original defendant in the suit. On the 4th January 1886, his attorneys wrote to the appellant's attorneys offering to pay the appellant the balance due to him under the decree. Subsequently, however, he refused to make any payment to the appellant, whereupon the appellant applied for execution of the decree against him as manager of the *wadi*. He claimed to be a transferee of the decree under sec. 232 of the Civil Procedure Code (Act XIV of 1882). His application was refused by the Judge in chambers. On appeal, *held*, that the decree was admissible, although not registered. *Held* also that the appellant was a transferee of the decree within the meaning of sec. 232 of the Civil Procedure Code (Act XIV of 1882). The decree had been transferred to him "by operation of law." As such he was entitled to sue out execution, and



was to be regarded as the representative of the original decree-holder within the meaning of clause (c) of sec. 244 of the Civil Procedure Code (Act XIV of 1882), and had a right of appeal against the order of the Judge in chambers refusing execution. *Held* also that the payments made to the appellant on account of the decree, although not certified to the Court under sec. 258 of the Civil Procedure Code (Act XIV of 1882), were effectual to prevent the appellant's application for execution from being barred by limitation. It would, however, be necessary for the appellant to certify these payments.—11 Bom. 506.

The transferee of a decree stands in the same position for getting execution as the transferor. If a decree is transferred by assignment after the death of the judgment-debtor, notice of the transfer, as required by sec. 232 of the Civil Procedure Code (Act XIV of 1882), may be served on the legal representative of the deceased judgment-debtor. This death of the judgment-debtor does not render the transferred decree incapable of execution. Under sec. 234 of the Civil Procedure Code, the legal representative of a deceased judgment-debtor is liable summarily only in respect of property *actually* received by him, or taken into his disposition. On the 27th March 1878, one Bai Bhicaiji obtained a decree for Rs. 2,100 against one Phirozsha, who died in July of that year, leaving his son Hormazsha his legal representative. Subsequently one Homjibhai sued Hormazsha as the legal representative of Phirozsha upon a mortgage executed by the latter in his life-time, and obtained a decree, in execution of which he sold the mortgaged property by auction, and bought it in himself for Rs. 810. On appeal, this decree was reversed on the 3rd August, 1883. Instead of thereupon, recovering the property which had been sold in execution, Hormazsha on the 16th November 1883 agreed with Homjibhai that the latter should retain it on payment of Rs. 240 as costs of the suit. Shortly before this compromise was effected, Bai Bhicaiji sold her decree to the appellant, Khushrobhai, who in 1884 applied for execution against Hormazsha. The Subordinate Judge made an order for execution against Hormazsha, personally to the extent of Rs. 810, holding that Hormazsha had fraudulently adjusted the decree in Homjibhai's suit, and that, even if there was no fraud, he, as administrator of Phirozsha's estate, ought to have recovered back the money realised by the sale, instead of accepting a compromise. On appeal, the order of the Subordinate Judge was reversed by the District Judge. On appeal to the High Court, *held* confirming the order of the District Judge, that Hormazsha was not personally liable. Under sec. 234 of the Civil Procedure Code (Act XIV of 1882) a representative of a deceased judgment-debtor, who has failed purposely or negligently to recover some debt due to the estate of the deceased, or some property belonging to it, is not liable in the same way as for property of the deceased which has come to his hands. In that section, property is not defined as identical with assets, and so to include mere rights of action. Nor is it provided that in an execution proceeding the representative shall be made answerable as well for what with diligence on his part would have come to his hands, as what actually has come to his hands. It may well be that, while the Legislature intended to bring the representative under the control of a summary inquiry where he had actually received property, it did not intend to make him answerable in other cases except through the medium of a suit for administration or other regular action.—11 Bom. 727.

To enable the heir of a deceased person to apply, under sec. 208 of Act VIII of 1859, for the execution of a decree held by such person, a certificate under Act XXVII of 1860 is not indispensable.—1 Al. 686.

Where a decree was sent to a Court for execution, and was subsequently transferred by assignment, and the transferee applied for the execution of the decree to the Court to which the decree was sent for execution, *held* that such application should be made, not to such Court, but to the Court which passed the decree—2 Al. 283.

See I. L. R., 2 Al. 384, noted under sec. 230; 13 Madr. 347 and 14 Madr. 252, noted under sec. 231; 11 Bom. 153, noted under sec. 2.

**233.** Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment debtor might have enforced against the original decree-holder.

Transferee to hold subject to equities enforceable against original holder.

**Note.**—This section applies to Provincial Small Cause Courts.]

**234.** If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

If judgment debtor die before execution, application may be made against his representative.

Such representative shall be liable only to the extent of the property of the deceased which has come to his hands, and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion, or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where it was sought to execute a decree obtained against a person who had died since the date of the decree, by attaching certain immoveable property in the possession of the personal representative of the deceased judgment-debtor, and such personal representative claimed to hold the property, not in her representative character, but in her own right, *held* that her claim was not a claim under sec. 246, Act VIII of 1859, but that the case came under secs. 210 and 211. It was a matter between the parties to the suit relating to the execution of the decree, and, as such, was, under sec. 11, Act XXIII of 1861, to be determined by the Court executing the decree, and not to form the subject of a regular suit. The order rejecting the claim was therefore open to appeal.—12 B. L. R., 65. S. C. 20 W. R., 280.

Plaintiff, alleging that he is owner in possession of one-third of an eight-anna share of a specified mauza, and that his enjoyment thereof is menaced by reason of the defendant having attached it, caused it to be sold, and then himself purchased it, in execution of a decree held by him against a third person, prays for a declaration of his (plaintiff's) right of ownership and possession. The title which plaintiff sets up is as follows: The eight-anna share in question which formerly belonged to one S, who, by two deeds made in the years 1810 and 1813 respectively, mortgaged it, under the form of a conditional sale, to O. S had three sons, H, A, and N; and in 1819 he sold nearly all his property, including the premises

mortgaged by the deeds of 1810 and 1813, to his two eldest sons, H and A. In the following year 1820, these two sons, with the view to liquidating their father's debts, entered into a new arrangement with O, and, amongst other things, got him to accept a fresh mortgage from them of the eight-anna share, in lieu of the original two mortgages of the same given in 1810 and 1813. Afterwards, namely, in 1830, O took due steps for foreclosing the mortgage against H and A, and obtained his final decree for foreclosure in 1831. Subsequently to this again, it appearing that the mauza was being held free of payment of Government revenue, the Government revenued it, and in 1842, among other mahals, settled the eight-anna share with O's widow as representing the proprietor, her late husband, then deceased. From O's widows the plaintiff derived by purchase the one-third of the eight-anna share, in respect of which he sues. When the property in suit was attached in 1866 at the defendant's instance, in execution of his decree of 1836, the present plaintiff duly preferred his claim to it under the provisions of sec. 246, but this claim was disallowed by the Court which was charged with the execution of the decree, and thereupon the plaintiff brought this suit. *Held* that the onus was on the defendant to make out that he had an equitable right to this property, which originated either at the death of S, or which sprang up in consequence of the decree against S's representatives, and has survived the alienations of the last 30 or 40 years, so as to enable him to assert it against the present plaintiff.—12 B. L. R., 66 note ; 10 W. R., 199.

When a decree has been passed against a deceased person, execution of such decree cannot be had under the Civil Procedure Code against his legal representatives.—14 B.L. R., 334 note. S. C. 10 W. R., 455.

Where a Hindu died, leaving a childless widow and a separated brother, it was held that, until a legal representative is appointed to the deceased's estate, his widow is the only person who can defend a suit as his representative, and that, while a decree obtained against the widow will enable a creditor to attach and sell, not only the widow's lief-estate in the immoveable property, but also the reversionary estate of the remainder-man, yet a decree obtained against the remainder-man will not enable the creditor to touch the estate in the hands of the widow. When a decree has been obtained against A in his lifetime, and A dies before execution, A's estate is properly described in the proceedings in execution as the estate of A (sec. 210, Code of Civil Procedure) ; and in the certificate of sale, the purchaser is properly declared to have purchased the right, title, and interest of A in the property sold ; but this Procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such cases the representative, and not the deceased person, is the defendant (secs. 104 and 203) ; and in the notification of sale (sec. 249), and in the certificate of sale (sec. 259), it ought to be set forth that what is sold is the right, title, and interest of the representative on the record. A *bona fide* purchaser, without notice for valuable consideration at an auction-sale, is, as a general rule, entitled to protection, notwithstanding any irregularity or defect in the proceedings or decree in the suit. But when the decree is against the representative of a deceased person, the purchaser is bound to satisfy himself that the party sued as the representative of the deceased is his legal representative. The legal representative of a deceased person, though not a party to the suit, will be bound by the execution-sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or, if

knowing of the sale, he stood by and allowed the purchaser to pay in the belief that he acquired a good title. *Edabji Hormasji v. Mahabu Begum* (Special Appeal No. 266 of 1869) considered.—8 Bom. H. C. R., (A. C.) 37.

A right of second appeal, where it existed prior to Act X. of 1877, now exists in the case of any proceedings in execution which were commenced prior to, and were still pending on, the 1st of October 1877. An order was made under sec. 210 of Act VIII. of 1859, making the legal representatives of a deceased judgment-debtor parties to a suit in execution of a decree obtained against the deceased in his lifetime. Subsequently the decree-holder discovered that certain property which he claimed to be the property of the deceased was in the possession of a third person, C; and he applied to have C's name put upon the record, and to be allowed to execute the decree against him. *Held* that the Court had no power to put C's name on the record.—3 C. L. R., 437.

The representative of a deceased person, in whose favour a decree has been made, cannot claim execution as a matter of strict right; but must satisfy the Court, under sec. 210, Civil Procedure Code, that it is proper that he should be allowed satisfaction of the decree; and the Court cannot determine the question without hearing the opposite side.—21 W. R., 31.

V, a Muhommadan woman, died, leaving her husband and several minor children as her representatives. In execution of a money-decree obtained against V, the creditor attached certain land which belonged to V, and made her husband and two of her children parties to the execution-proceedings. The land was sold and purchased by the decree-holder. *Held*, in a suit brought by the children of V to set aside the sale on the ground, *inter alia*, that some of them were no parties to the proceedings in execution, and that the others, being minors at the time, had not been represented by a guardian appointed by the Court, that the sale was valid.—I. L. R., 12 Madr. 90.

A decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made; the judgment-debtor died and his legal representatives were not brought on to the record, but the execution proceeded to sale:—*Held*, that the sale should be set aside.—15 Madr. 399.

A decree-holder in a District Munsif's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment-debtor died. Possession was delivered on 28th August. The persons dispossessed presented a petition under sec. 332, of the Code of Civil Procedure disputing his right to be put into possession, on the ground, *inter alia*, that the judgment-debtor was not represented on the record. On appeal against the appellate order of the District Judge, *held*, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree-holder to bring any other person on to the record between the date of that order and the date on which the order was executed. *Ramasami v. Bagirathi* (I. L. R., 6 Madr. 180) distinguished.—12 Madr. 211.

An application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative. Accordingly, where the plaintiff, on the death of his sole debtor, sued out execution on the 18th June 1881, under a *dorkhast* No. 718 of 1878, against V, one of the three sons of the debtor, and the execution-proceedings continued till the death of V in March 1884, whereupon the plaintiff applied

on the 28th May 1884 to put M and N, the brothers of V, on the record as his representatives, *held* that the application was not too late against M and N regarded as joint representatives with their brother V of their father, the original judgment-debtor.—12 Bom. 48.

Where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which under sec. 244 (c) of the Civil Procedure Code must be determined in the execution department, and not by separate suit. There is no distinction in this respect between the positions of legal representatives added to the suit before, and those added after, the decree. Under the last paragraph of sec. 234, the Court executing the decree may try and determine the question whether property in the legal representative's hands formed part of the deceased judgment-debtor's estate, and finds this fact for the purpose of bringing the property to sale in execution, and giving the auction-purchaser a good title under the sale; and the Court's order is subject to appeal but not to a separate suit under sec. 283. Where the legal representative asserts that the property is his own, and has not come to him from the deceased judgment-debtor, he cannot set up a *jus tertii*, so as to come in under sec. 278 and the following sections of the Code. He can only do so where he opposes execution against any particular property on the ground that, although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgment-debtor, but as trustee or executor of some one else. In that case either party may have the question of *jus tertii* determined in a separate suit. So *held* by the Full Bench, TYRRELL, J., dissenting. *Held* by TYRRELL, J., *contra*, that where the legal representative of a deceased party to the decree appears, not in his capacity of legal representative contesting a question arising between the parties and relating to the execution, discharge or satisfaction of the decree, but in his personal character independent of the suit and decree, and prefers a claim under sec. 278 on the ground that the decree has no operation against certain property attached, for reasons personal to the objector and antagonistic to all the parties and their representatives as such, the objector is not debarred from bringing a separate suit by the mere accident that he is a legal representative in the execution proceedings. Observations by STRAIGHT, J., as to the necessity of conducting the proceedings in execution of decree with the same care, and, as far as practicable, in accordance with the same procedure as that adopted in regular suits. *Rajrup Singh v. Ramgolam Roy* approved. *Abdul Rahman v. Muhammad Yar* and *Awadh Kuari v. Raktu Tiwari* overruled. *Bahori Lal v. Gauri Sahai* distinguished.—12 Al. 313.

Sec. 234 of the Civil Procedure Code applies only to cases where, after the death of the judgment debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his life-time, and which was not at the time of his death under attachment at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment but before sale. An attachment would not abate on the death of the judgment-debtor, and his death would not render it necessary for the decree-holder to take any steps to keep in force an attachment of property made in the judgment-debtor's lifetime. Property under attachment must be considered as in the custody of the law. There is no provision in the Civil Procedure Code requiring notice to be given personally to a judg-



ment-debtor or his legal representative of a sale of property under attachment. If the legal representative is damnified by the sale, his remedy is by application under sec. 311 of the Code. So *held* by the Full Bench, MAHMOOD, J., dissenting. Where, subsequent to the attachment of immoveable property in execution of a simple money decree, the judgment-debtor died, and the property was then sold, without making the legal representatives of the judgment-debtor parties to the sale proceedings,—*held* by the Full Bench (MAHMOOD, J., dissenting) that the sale was regular and valid notwithstanding such omission. *Ramasami Ayyangar v. Bagirathi Ammal* dissented from. *Held* by MAHMOOD, J., that on the principle of *audi alteram partem*, and because the rules provided by the Civil Procedure Code for suits should, under sec. 647, be applied to execution proceedings (those proceedings including and terminating in the sale), the omission to make the legal representatives of the judgment-debtor parties to the sale proceedings was an irregularity; but that such irregularity would not invalidate the sale without proof of a substantial injury within the meaning of sec. 311; and that as in the present case no such substantial injury was either alleged or proved, the sale was valid. *Held* also by MAHMOOD, J., that a person claiming by title paramount to or independent of the judgment-debtor is within the meaning of sec. 311 of the Code. *Asmutunnissa Begum v. Ashruff Ali* dissented from. *Abdul Huq Mazoomdar v. Mohini Mohun Shaha* followed.—12 Al. 440.

In execution of a money decree passed against a Hindu, since deceased, ancestral property in the possession of his son was attached. A petition by the son objecting that the property was not liable to be attached in his hands was dismissed:—*Held*, that the order dismissing the petition was wrong, for when a judgment-creditor seeks to attach ancestral property after it has vested in the son by survivorship under Hindu law upon the father's death, he cannot be considered as executing the decree against the property of the deceased judgment-debtor within the meaning of sec. 234 of the Code of Civil Procedure.—13 Madr. 265.

In an undivided Hindu family, although the interests of the sons in the ancestral estate are liable to satisfy the father's debts, the holder of a money-decree against the father who has not attached the ancestral estate before the death of the father cannot execute the decree against the ancestral property as assets in the hands of the representatives of the judgment-debtor under sec. 234 of the Code of Civil Procedure, 1877. *Zemindar of Sivagiri v. Alwar Ayyangar* (I. L. R., 3 Madr. 42) followed.—I. L. R., 5 Madr. 232.

In a suit by the trustees to remove the defendant from the management of certain temples, a decree for mesne-profits was passed against the defendant, who was the karnavan of a Malabar tarwad. *Held* that the tarwad property in the hands of the deceased defendant's successor was not assets of the deceased in the hands of his successor liable to satisfy the decree under sec. 234. The share of a deceased father in an undivided Hindu family passes by survivorship to the sons, and is not assets in their hands to satisfy a decree against the father under sec. 234.—5 Madr. 223.

A Hindu widow instituted a suit to recover possession of certain property belonging to her deceased husband, and that suit was dismissed with costs. The widow having died before execution for the costs was taken out, the decree-holder sought to take out execution against the next heirs of the late widow's deceased husband. *Held* that the fact that the widow did not in her suit seek to recover any interest personal to herself, but that



she contracted the judgment-debt in the effort to recover a portion of her husband's estate, to which, in its entirety, the next heirs of her late husband had succeeded, was sufficient to make the whole estate liable, and would entitle the decree-holder to satisfy his decree against "the legal representatives" of the late widow's husband, under sec. 234 of Act X of 1877. In a decree against a Hindu widow, it should be stated whether the decree is a personal decree, or one against her as representing her deceased husband.—6 Cal. 479.

As the entire interest in an impartible zamindari passes upon the death of the father to the son, there is nothing in the estate itself which can be attached as assets of the father under a decree against him, or which can be made available in execution of the decree against his son as his representative. Though a son is bound, under Hindu law, to pay his father's just debts from any property he may possess, yet, when he is made a party to a decree as representative of his deceased father for the purpose of executing it, his liability is limited to the amount of assets of the deceased which may have come to his hands and has not been duly disposed of. An appeal lies from an *ex-parte* order directing attachment in execution of a decree.—3 Madr. 42.

The first mortgagee of certain immoveable property obtained a decree for the sale of the property, caused the property to be attached, and then ceased to prosecute the execution-proceedings. The second mortgagee then obtained a decree for the sale of the property, caused it to be attached and put up for sale, and purchased it himself. The first mortgagee then applied for the sale of the property, and the property was put up for sale, and was purchased by him. After the order for his sale was made, and before it took place, the judgment-debtor died, and the sale took place without his legal representatives being made parties to the execution-proceedings. The Courts which executed these decrees were of two different grades, the Court which executed the first mortgagee's decree being of the lower grade. In a suit by the first mortgagee against the second mortgagee, for possession of the property, *held* that the sale to the first mortgagee was not invalid, with reference to the provisions of sec. 285 of the Civil Procedure Code, because it had not been ordered and held by the Court of the higher grade, inasmuch as when such sale was ordered by the Court of the lower grade, the property was not under attachment in execution of the decree of the Court of the higher grade, that decree having been executed by the sale of the property, and therefore the provisions of that section were not applicable. *Badri Prasad v. Saran Lal* distinguished. *Per* OLDFIELD, J., that there was nothing in the provisions of secs. 285 or 295 of the Civil Procedure Code to support the contention that the first mortgagee, after allowing the property to be sold, was debarred from enforcing execution of his decree against it, and was only entitled to look to the assets realized at the sale for the satisfaction of his decree. *Per* OLDFIELD, J., that the sale to the first mortgagee was not void because the judgment-debtor had died before it took place, and it took place without his legal representatives being made parties to the execution-proceedings, inasmuch as the provisions of sec. 368 of the Civil Procedure Code were not applicable to the case of the death of a judgment-debtor, and there was nothing in sec. 234, even if that section is applicable to a case where the judgment-debtor dies while execution is proceeding and after sale of his property had been ordered, to imply that the sale is absolutely void, if no legal representative has been brought on the record. *Dulari v. Mohan Singh* and *Gulabdas v. Lakshman*

**Narhar** referred to. *Per* STRAIGHT, J., that there was no legal obligation on the first mortgagee to resort to the procedure of sec. 234 of the Civil Procedure Code since the sale to the second mortgagee had passed to him the rights and interests of the judgment-debtor, and the legal representatives of the judgment-debtor had none of his property in their hands, and there is no provision in the Code of Civil Procedure which required the first mortgagee to make the second mortgagee a party to the proceedings in execution of the former's decree, and the latter could not have successfully objected to the sale in execution of that decree, and therefore that sale was not voided by the death of the judgment-debtor antecedent to its taking place.—6 Al. 255.

S mortgaged four parcels of land to M. M obtained a decree against S directing the sale of the lands mortgaged. S died and K was brought in as his representative under sec. 234 of the Code of Civil Procedure. M applied for execution against the lands mortgaged as assets of S. K objected to the sale of three parcels, on the ground that one parcel belonged to himself (K) and two to the family to which S belonged and of which K was the manager. The District Munsif investigated these questions under sec. 244 of the Code of Civil Procedure, and directed that execution should proceed against all four parcels. The District Court on appeal reversed the order of the Munsif on the ground that he had no power to decide these questions under sec. 244, and that the proper course was for M to attach the properties and for K to make a claim. This course was adopted and K's claim was rejected and the four parcels were sold and brought by V. K thereupon brought a suit against M and V to cancel the sales to V:—*Held*, that, by virtue of sec. 244 of the Code of Civil Procedure, the suit would not lie.—7 Madr. 255.

A suit having been brought against the holder of an impartible zemindari upon a promissory note, a decree was passed by consent, whereby certain land was directed to be sold in the event of the debt not being paid in a certain way. After the death of the zemindar execution proceedings were taken against his son to obtain a sale of the said land:—*Held*, that the decree could be executed against the son.—7 Madr. 339.

See I. L. R., 11 Bom. 727, noted under sec. 232; 17 Cal. 711, noted under sec. 244.

**235.** The application for the execution of a decree shall be in writing verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain, in a tabular form, the following particulars (namely):—

- (a) the number of the suit ;
- (b) the names of the parties ;
- (c) the date of the decree ;
- (d) whether any appeal has been preferred from the decree ;
- (e) whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree ;

(*f*) whether any and what previous applications have been made for execution of the decree and with what result;

(*g*) the amount of the debt or compensation with the interest (if any) due upon the decree, or other relief granted thereby;

(*h*) the amount of costs (if any) awarded;

(*i*) the name of the person against whom the enforcement of the decree is sought; and

(*j*) the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, by the arrest and imprisonment of the person named in the application, or by the attachment of his property, or otherwise as the nature of the relief sought may require.

#### Notes.

This section applies to Provincial Small Cause Courts.

An application for execution of a decree need not be accompanied with either the original decree or a copy.—9 W. R., 362; 11 W. R., 271; 16 W. R., 25.

The plaintiff obtained a decree on the 25th July 1882, which directed that he should give the defendant possession of certain parcels of land at the end of next *Margashirsha* (*i. e.*, 9th January 1883), and that, on his doing so, the defendant should remove certain hedges and sheds, and restore the land in suit to the plaintiff. On the 9th December 1885, the plaintiff applied to execute the decree. The defendant resisted the application as being time-barred. He contended that the plaintiff having failed to deliver up the land in his possession within the time specified in the decree, he had lost his right to execute the decree. *Held* that the application was not time-barred. The specification of the end of *Margashirsha* had merely the effect of postponing the operation of the decree till that time, and the plaintiff had three years from that date within which he might seek execution. The mention of a term when a particular right is to become enforceable is not a condition precedent, whether the enforcement be otherwise subject to a condition or not.—I. L. R., 12 Bom. 23.

An appeal lies from an order passed under sec. 243 of the Civil Procedure Code staying execution of a decree pending a suit between the decree-holder and judgment-debtor. The words "such Court" in sec. 243 of the Civil Procedure Code do not limit the exercise of the powers given by that section only to decrees passed by the Court in which the suit is pending, but with reference to secs. 235 (*d*), 581, and 583 that Court is empowered to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal. The plaintiff instituted a suit against defendant for recovery of money and other reliefs which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as cost of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad, and while it was pending defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court, but granted by the District Court. On appeal by defendant to the High Court,

*Held* that an appeal lies from the order, and the Judge's order was correct. *Mittun Bibi v. Buzloor Khan* (8 W. R., 392) disapproved.—10 Al. 349.

Upon a application under sec. 235 of Act X of 1877 (Civil Procedure Code) for the execution of a decree, which directed the judgment-debtor forthwith to pull down and remove such portion of a wall as had been erected by him upon the wall of the decree-holder, the mode in which the assistance of the Court was required to be given was stated in column (j) of such application to be by giving the decree-holder possession of his wall by pulling down the wall erected thereon. The Court directed an order to issue to the Nazir to remove the judgment-debtor's wall from the top of the decree-holder's wall. *Held* that the decree-holder's application could not be granted in that form, and that he should have asked the assistance of the Court to be given in the way provided for by sec. 260 of Act X of 1877, by the imprisonment of the judgment-debtor or the attachment of his property or both. *Held* also that the Court was wrong in passing the order it had, but that it should have pointed out to the decree-holder the manner in which he should have asked the assistance of the Court to be given and the remedy to which he was entitled; and that, upon such amended application being made, the proper course to pursue was to serve a notice on the judgment-debtor, directing him to comply with the order contained in the decree within a time to be fixed by such notice; and that, if he failed to comply with such order within the time so limited, the Court might then, at the instance of the decree holder, make an order, either for the judgment-debtor's imprisonment, or for the attachment of his property, due regard being had to the provision of sec. 260 in the latter case. *Held*, further, that the High Court, in special appeal, should not vary the order for execution which had been passed in such a way as to give the decree-holder that relief for which he did not ask.—8 Cal. 174.

See I. L. R., 7 Cal. 556, 17 Cal. 631, noted under sec. 230; 2 Madr. 216, noted under sec. 2.

Whenever an application is made for the attachment of any moveable property belonging to the judgment-debtor, but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Application for attachment of moveable property to be accompanied with inventory.

#### Notes.

This section applies to Provincial Small Cause Courts.

See I. L. R., 7 Cal. 556, noted under sec. 230.

**237.** Whenever an application is made for the attachment of any immovable property belonging to the judgment-debtor, it shall contain at the foot a description of the property sufficient to identify it, and also a specification of the judgment-debtor's share or interest therein to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

Further particulars when application is for attachment of immovable property.

Every such description and specification shall be verified in manner hereinbefore provided for the verification of plaints.

#### Notes.

In attaching an estate paying revenue to Government, the attaching creditor must, in addition to the information required by the 1st clause of sec. 213, Act VIII of 1859, in respect of ordinary immoveable property, give also the special information indicated in the latter clause of that section, that section being cumulative in respect of estates paying revenue to Government.—11 W. R., 175.

The intention of sec. 213, Act VIII of 1859, is that the description in a notice of attachment should be sufficient to identify the property ; and in the case of an estate paying revenue to Government, that there should be a specification of the revenue.—12 W. R., 488 ; 18 W. R., 411.

Where a property was described as a lakheraj tank with four banks, the boundaries of which were given, the identification was held to be fully made out.—18 W. R., 411.

A decree-holder, on the 8th July 1885, applied for execution of a decree dated the 10th July 1873, omitting to set out specifically in such application a description of the immoveable property sought to be attached. On the 24th July he applied for and obtained one month's time to file a list of these properties ; and on the 7th August, after filing the list, applied for the attachment and sale of such properties. The judgment-debtor contended execution was barred by limitation. *Held* that the omission to file on the 8th July the list describing specifically the properties sought to be attached, was a mere defect of description which could be remedied under sec. 245 of the Code of Civil Procedure by allowing an amendment to be made ; and further that the two applications of the 8th and 24th July should be considered as one entire application dating from the date of the 8th July. *Syud Mahomed v. Syud Abedoollah* (12 C. L. R., 279) followed.—I. L. R., 14 Cal. 124.

Under the Civil Procedure Code (Act VIII of 1859) an application to the Court to continue the attachment of immoveable property, but to stay the sale of it, *held* to be a proceeding to keep in force the decree.—2 Madr. 218.

A hypothecation bond executed in 1878 by the husband (deceased) of defendant No. 1 to secure a debt due by him to a partner of the plaintiff was assigned to the latter in 1888. In 1882 the plaintiff, who was aware of the existence of this instrument, brought the land comprised in it to sale in execution of a money decree obtained by him against the executant, and defendant No. 3 became the purchaser. At the time of the sale the plaintiff gave no notice of the existence of the encumbrance. In a suit to recover the principal and interest due on the hypothecation bond :—*Held*, that the plaintiff was estopped from recovering the secured debt against the land.—15 Madr. 412.

Application was made for the attachment, in execution of a decree, of a muafi holding belonging to the judgment-debtor. The numbers and areas given in such application as the numbers and areas of the lands comprised in such holding were the numbers and areas of certain revenue-paying lands, and were not the numbers and areas of any lands held as muafi by the judgment-debtor. The order of attachment described the property as described in the application for attachment. The judgment-debtor having

alienated by sale a muafi holding belonging to him, the decree-holders sued to have such alienation set aside as void under the provisions of sec. 276 of Act X of 1877. *Held* that, having regard to the description given in the application for attachment and the order of attachment, it could not be said that the muafi holding alienated by the judgment-debtor was under attachment at the time of the alienation, and its alienation was therefore not void under sec. 276 of Act X of 1877. *Held* also that the material misdescription of the property in this case in the order of attachment protected the alienees, who were *bona fide* purchasers, from having the alienation set aside as void under sec. 276, as the attachment could not, under the circumstances, be held to have been "duly intimated and made known" as required by that sec.—3 Al. 698.

With reference to the question whether the whole joint family property or only the interest of the father therein is liable under a decree obtained against a Hindu father, *held* that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or of a simple money decree, it may be presumed that the family property and not the mere undivided share of the father was sold. *Pem Singh v. Partab Singh* referred to. The specification required by sec. 237 of the Civil Procedure Code, of the judgment debtor's share or interest in immoveable property sought to be attached should state distinctly whether it was the judgment-debtor's undivided share, or the family property in which the judgment-debtor had an undivided share, which was sought to be attached, and should also specify what that family property was. If the specification merely referred to the judgment-debtor's share and interest in what was the family property, the Court would hold, unless something to the contrary appeared, that the sale was of that share and interest only.—14 Al. 190.

See I. L. R., 7 Cal. 556 and 17 Cal. 631, noted under sec. 230.

**238.** If the property be land registered in the Collector's office, the application for attachment shall be accompanied by an authenticated extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue, for such land, and the shares of the registered proprietors.

When application must be accompanied by extract from Collector's register.

### *C.—Of staying Execution.*

**239.** The Court to which a decree has been sent for execution under this chapter shall, upon sufficient cause being shewn, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was made, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such

When Court may stay execution.



Court of first instance or Appellate Court if execution had been issued thereby, or if application for execution had been made thereto ;

and, in case the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution or discharge of such property or person pending the result of the application for such order.

### Notes.

This section applies to Provincial Small Cause Courts.

A Principal Sadr Amin is competent, under sec. 290, Act VIII of 1859, to allow the stay of execution of a decree of the High Court on its original side for a sufficient time to enable the judgment-debtor to make his application to the High Court for a new trial, on the ground that the decree had been obtained *ex parte* without his knowledge.—8 W. R., 202.

A party appealing against a decree, which directs him to pay money, may obtain stay of execution of the decree, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted.—I. L. R., 13 Bom. 241.

It is not open to the Court to refuse to execute a decree against which no appeal has been preferred, and the time for appealing against which has expired.—10 Cal. 817.

Where a decree passed by a Court governed by the Code of Civil Procedure is sent for execution to another Court in British territory likewise governed by the Code, it is not open to the latter to refuse to execute it, on the ground that the former had no jurisdiction. In case of doubt, the Court where execution is sought may adjourn the execution proceedings in order to enable the party interested to make an application to the Court passing the decree, and thence, if necessary, to the higher Courts of the same province in their turn.—7 Bom. 481.

Where a Court in one district transfers a decree for execution to a Court situate in another district, it is beyond the jurisdiction of the Court executing the decree to question the correctness or propriety of the order under which the decree was sent Court to such for execution. Where, in the opinion of the Court, sufficient cause has been shown against the execution of a decree transferred for execution, the Court executing the decree should follow the procedure prescribed by sec. 239, of the Code of Civil Procedure.—5 Cal. 736 ; 21 W. R., 141, 219.

**240.** Before passing an order under section 239 to stay execution, or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

Power to require security from, or impose conditions upon, judgment-debtor.

**Note.**—This section applies to Provincial Small Cause Courts.

**241.** No discharge under sec. 239 of the property or person of a judgment-debtor shall prevent it or him from being re-taken in execution of the decree sent for execution.

*Liability of judgment-debtor discharged, to be re-taken.*

**Note.**—This section applies to Provincial Small Cause Courts.

**242.** Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

*Order of Court which passed decree or of Appellate Court to be binding upon Court applied to.*

**Note.**—This section applies to Provincial Small Cause Courts.

**243.** If a suit be pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may (if it thinks fit) stay execution on the decree, either absolutely or on such terms as it thinks fit, until the pending suit has been decided.

*Stay of execution pending suit between decree-holder and judgment-debtor.*

#### Notes.

This section applies to Provincial Small Cause Courts.

No appeal lies against an order under the last clause of sec. 209 of the Code of Civil Procedure, staying the execution of a decree. The High Court, however, in the exercise of its extraordinary jurisdiction, will examine the judicial propriety of such an order. Where a Subordinate Judge, in consequence of a fresh suit by the plaintiff, stayed the execution of a decree which was passed in the defendant's favour for costs, the High Court, in exercise of its extraordinary jurisdiction, reversed the stay-order.—11 Bom. H. C. R., (A. C.) 151.

Sec. 209 of Act VIII of 1859 provides that, whenever a suit shall be pending in any Court against the holder of a decree of such Court by the judgment-debtor, the Court may, if it appears just and reasonable to do so, stay execution on the decree, either absolutely or on such terms as it may think proper, until a decree shall be passed in the pending suit. Any Court, to which a decree is transmitted for execution, can, under the section, stay execution, notwithstanding that the suit pending between the judgment-debtor and the holder of the decree is pending in such Court, and not in the Court which transmitted the decree.—6 N. W. P. H. C. R., 181.

A decree-holder having attached the property of his judgment-debtor in execution, the latter applied for a stay of execution until the decision of a pending suit brought by him against the judgment-creditor. The Court allowed the application, continuing the attachment on the property, and struck the execution case off the file. The decree-holder appealed to the High Court. *Held* that no appeal lay.—1 L. R., 9 Cal. 214; 12 C. L. R., 53.

See 10 Cal. 817, noted under sec. 239; 10 Al. 389, noted under sec. 235.

*D.—Questions for Court executing Decree.*

**244.** The following questions shall be determined by  
Questions to be decided by Court executing decree. order of the Court executing a decree, and not by separate suit (namely) :—

(a) questions regarding the amount of any mesne-profits as to which the decree has directed inquiry ;

(b) questions regarding the amount of any mesne-profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of decree, or the expiration of three years from the date of the decree ;

(c) any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof.\*

Nothing in this section shall be deemed to bar a separate suit for mesne-profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.

If a question arises as to who is the representative of a party for the purposes of this section, the Court may either stay execution of the decree until the question has been determined by a separate suit, or itself determine the question by an order under this section.†

**Notes.**

This section applies to Provincial Small Cause Courts.

The lower Appellate Court held that A could not bring his suit for mesne-profits, after he had obtained a decree for possession in a prior suit, in which “ he not having valued his suit so as to include the claims for wasilat,” no provision had been made for mesne-profits. Decision reversed on special appeal. *Per KEMP and E. JACKSON, JJ.*—1 B. L. R., S. N., 3.

A, a decree-holder, applied for execution of his decree, but was opposed by B, the judgment-debtor, on the ground that A had sold his decree to a third party, from whom it had passed to B's son. *Held* that this was a question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, and might be determined by order of the Court executing the decree under sec. 11 of Act VIII. of 1859. *Per LOCH and GLOVER, JJ.*—1 B. L. R., S. N., 9; 10 W. R., 144.

A, in execution of a decree of the lower Court against B, obtained possession of certain land therein mentioned. On appeal by B, the High Court reversed the decree of the lower Court, and ordered restitution of the property to B; but no mention of mesne-profits was made in the de-

\* This clause has been substituted for the original by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 26.

† This paragraph has been added by the same Act and section.

cree. B then sued for recovery of mesne-profits for the period during which A had been in possession. *Held* that such a suit would not lie. The question of mesne-profits ought to have been decided in execution under sec. 11 of Act XXIII. of 1861.—1 B. L. R., (A. C.) 146; 10 W. R., 131.

In a former suit brought for possession of immoveable property against J and her father, and subsequently revived against J as the representative of her father, possession and mesne-profits were decreed against J in her representative capacity, while as against her, in her individual capacity, the suit was dismissed. The decree-holder, after obtaining possession, attached and sold in satisfaction of his decree for mesne-profits J's private property, notwithstanding her objections, and himself became the purchaser, but never obtained possession. This sale, ordered on the 8th October 1863, was confirmed by the Judge on 15th March 1864. The present suit was brought by J for confirmation of her possession of her private property by cancellation of the execution-sale. *Held* (MACPHERSON and GLOVER, JJ., *dissenting*) that such suit was maintainable, and that J, in her individual capacity, was not a party to the suit in which execution issued, within the meaning of sec. 11 of Act XXIII. of 1861.—2 B. L. R., (F. B.) 73; S. C., 11 W. R., (F. B.) 1; 12 W. R., 201.

When money has been taken in execution of a decree which is subsequently reversed or modified, no fresh suit will lie for its recovery; the matter must be enquired into by the Court which passed the decree as a question arising between the parties relating to the execution of such decree.—4 B. L. R., App. 64; 2 W. R., 275; 4 W. R., 66.

Where, in a suit for land, the Court decreed to the plaintiff possession of the land, but made no decree in respect of mesne-profits, *held* that the plaintiff could not, under sec. 11 of Act XXIII. of 1861, obtain an order, from the Court executing his decree, declaring him entitled to any or what amount of mesne-profits. Under sec. 11 the question must relate to something comprised in the decree.—4 B. L. R., (A. C.) 111; 13 W. R., 11; 18 W. R., 122; 25 W. R., 327.

The plaintiff brought a suit for possession of land with mesne-profits. The suit was dismissed. He appealed on the question of possession only, and obtained a decree for possession without any mention of mesne-profits; and afterwards, in execution of the decree, he obtained possession of the land. *Held* that the plaintiff could afterwards bring his suit to recover mesne-profits from the date of decree for the period of six years next before the commencement of the suit, exclusive of the period during which the plaintiff was in possession. Secs. 2, 7 and 196 of Act VIII of 1859, and sec. 11 of Act XXIII of 1861, were no bar to such suit.—4 B. L. R., (F. B.) 113; 13 W. R., (F. B.) 15.

A, a judgment-debtor, paid to B, the decree-holder, a sum of money by way of compromise, in full satisfaction of the decree. B failed to certify this payment to the Court, and afterwards executed her decree for the full amount. In a suit by A against B for recovery of the amount previously paid out of Court in satisfaction of the decree, *held* that, notwithstanding sec. 11 of Act XXIII of 1861, the suit was maintainable.—5 B. L. R., 223; 13 W. R., (F. B.) 69. Overruling 3 W. R., S. C. C. Ref. 3.

When the Privy Council declares an appellant entitled to real property of which he was out of possession, and directs the High Court to make the inquiry necessary to ascertain what is comprised therein, and to proceed in the suit as upon the result of such inquiry may appear to be just, the High Court, on being applied to for execution, ought, besides giving possession,

to ascertain and award the mesne-profits up to the date of giving possession. An appeal will lie as of right from the order of a single Judge of the High Court as to execution of a decree of the Privy Council where the property is over Rs. 10,000. 5 B. L. R., 605. S. C. 14 W. R., (P. C.) 23; 13 Moore's I. A., 490.

B sued his brother C for possession of certain lands. B and C came to an amicable settlement, one of the terms of which was that C, during his life, should retain possession of certain of the lands, and that, after his death, they should pass to B. A decree was given in accordance with the terms of the compromise. On C's death, his widow refused to put B in possession of the lands. B sought to obtain possession of the lands with mesne-profits by executing the decree under the compromise against C's widow. *Held* that he ought to proceed by regular suit.—6 B. L. R., App. 142; 14 W. R., 485.

A sued for possession of certain lands, to which he alleged he was entitled as wussee (executor) under a wusseeutnamah (will), and which B had fraudulently, during the minority of himself and his brother, caused to be put up for sale under a decree, the execution of which was barred by lapse of time. B had become the purchaser at such sale. *Held* that a suit would not lie for the purpose of having it determined that the execution of B's decree was barred.—11 B. L. R., 42; 20 W. R., 5. See 5 B. L. R., 68; 13 W. R., 273; 23 W. R., 257; 24 W. R., 45.

The decree of the High Court affirmed under the circumstances of the case: but *held* (contrary to the opinion of the majority of a Full Bench):—Where a decree against a person in a representative capacity has been properly passed, and proceedings have been taken under it to obtain execution against the party in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of Act XXIII of 1861, sec. 11.—11 B. L. R., (P. C.) 149; 18 W. R., 185; 20 W. R., 162.

Where a party who has obtained a decree for land takes possession by his own act, and not by the act of the officer of Court, of more land than the decree gives him, *held* that a suit will lie to recover back possession of any land taken in excess of the decree.—12 B. L. R., 201; 12 W. R., 85.

The plaintiff (special respondent) sued to recover certain lands under the following circumstances: The defendant (special appellant) held a decree for the recovery of certain lands from the plaintiff within certain boundaries specified in the decree. In execution of that decree, the present defendant (then the decree-holder) took possession of the lands in dispute, averring that they were covered by the decree. This possession was given through an officer of the Court. Thereafter, the present plaintiff (then the judgment-debtor) appeared before the Court which has jurisdiction to execute the decree, and complained that the present defendant had illegally taken possession of the lands, because they were not covered by the decree. The Court determined that the decree did cover the lands, and rejected the application. The plaintiff then sued to recover possession of the lands, which was, as alleged, wrongly taken under the defendant's decree. *Held* that the suit would not lie. It was a question arising between the parties, and related to the execution of the decree, under sec. 11, Act XXIII of 1861. Such question, therefore, should be determined by the Court executing the decree, and not by a separate suit. 12 B. L. R., 203 note; 12 B. L. R., 207 note. S. C. 12 W. R., 85. See W. R., 1864, 208; and W. R., 1864, 247.

Where something has been done wholly contrary to what the decree ordered, it cannot be considered as an act done in the execution of the decree. In this case the decree was to lower a bund to the proper height, and that height was to be regulated according to the papers of the Munsif. If, in addition to lowering the embankment to the proper height, whatever it was, holes have been cut, or breaches made, in the embankment, so lowered, it was not done in execution of the decree, which ordered the embankment to be lowered—not that the embankment, when lowered, should be rendered useless by having holes or breaches made in it. Upon the above facts it was held that a suit would lie for trespass.—12 B. L. R., 208 note; 11 W. R., 516. See also 3 B. L. R., (A. C.) 413; 12 W. R., 329.

The plaintiffs obtained a decree against B in the Subordinate Judge's Court. Sometime afterwards B recovered a decree in the Munsif's Court against the plaintiffs. The plaintiffs thereupon applied for the attachment of this decree in satisfaction of their own against B. Before attachment, however, B assigned her decree to C. On C trying to execute B's decree against the plaintiffs, they brought the present suit for a declaration of their right to have a set-off made of the two decrees. *Held* that such a suit would not lie.—13 B. L. R., 489; 22 W. R., 235.

In a previous suit brought by S, the present appellant, against M to recover possession of certain land, H and others, claiming to be the owners of the property, asked leave to come in and defend the suit, which leave was refused. The suit was dismissed, and S appealed, and in her appeal she named H and his co-sharers as respondents, and a notice was consequently served upon them in the usual form. H and his co-sharers did not appear, and the judgment of the first Court being reversed, a decree for recovery of possession was given on 2nd November 1868, in which they were included. Subsequently H and his co-sharers brought a suit to have their title to this very property declared, one of the defendants being S herself. H and the other plaintiffs obtained a final decree declaring their title to the lands claimed by them on 31st December 1870. Whilst this second suit was pending, S took proceedings in execution of her former decree to recover a sum of Rs. 375, awarded her by that decree either for costs or mesne-profits (it was not clear which), whereupon D and his co-sharers, in order to prevent a sale of the property, deposited in Court the amount claimed under protest, and S received that amount on account of her decree. D and his co-sharers now brought the present suit against S to recover the amount so paid. The Court of first instance gave the plaintiffs a decree, which was affirmed on appeal. S appealed to the High Court. *Held* that, as D had not been made a party to the first suit (*S v. M*), he was entitled to recover from S the sum received out of Court by S.—13 B. L. R., App. 17.

In construing the provisions of sec. 11, Act XXIII of 1861, notwithstanding certain earlier decisions to a contrary effect, all the Indian High Courts have now recognized it to be settled law that, where the decree is silent touching interest, or mesue-profits, subsequent to the institution of the suit, the Court executing the decree cannot, under the section in question, assess or give execution for such interest or mesne-profits, but that the plaintiff is at liberty to assert his rights thereto by a separate suit. The Judicial Committee of the Privy Council, although of opinion that, if the matter had been *res integra*, the provisions of the section might have admitted of a different interpretation, being unwilling to run counter to a long and concurrent course of decisions of the Indian Courts in what is really a mere matter of procedure, accepted this construction of the law as binding. The plaintiff obtained a decree for the possession of certain lands



with mesne-profits up to the date of suit. No claim was made in the plaint for mesne-profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the defendant, execution was from time to time stayed by the Court on the defendant giving security to abide the event of the appeal, for the execution of the decree, and for payment of the mesne-profits accruing, while the plaintiff remained out of possession. The decree having been confirmed on appeal, the plaintiff applied for execution in respect of the interim mesne-profits. *Held* in the Court below that, as these were not provided for by the decree, they could not, under sec. 11, Act XXIII of 1861, be awarded in execution, but must be made the subject of a separate suit. *Held* by the Judicial Committee that the proceedings, whereby the defendant led the Court to stay execution, and continue him in possession, laid him under an obligation to account in the suit for the mesne-profits which he engaged to pay; and that this obligation was capable of being enforced by proceedings in execution, notwithstanding the construction given by the Court to sec. 11; since even if the defendant's liability to account were not to be considered "a question relating to the executing of the decree" within the meaning of the section, he was, in any case, precluded by the ordinary principles of estoppel from contending that the mesne-profits in question were not payable under the decree. Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ*.—15 B. L. R., 383; L. R., 2 I. A. 219; 24 W. R., 198. S. C. in High Court, 7 M. H. C. R., 97; 1 N.-W. P. H. C. R., 167; Ed. 1873, 246; 22 W. R., 160; 25 W. R., 215.

A regular suit will lie at the instance of one decree-holder against another for a refund of money that has been erroneously paid away to the latter contrary to the provisions of sec. 270 of Act VIII of 1859.—B. L. R., Sup. Vol., 1022; 9 W. R., 515. See 3 N.-W. P. H. C. R., 164.

Even with the permission of the Civil Court a separate suit cannot be brought for mesne-profits between the institution of the original suit and the execution of the decree thereon. Act XXIII. of 1861, sec. 11, commented on.—1 M. H. C. R., 453; 2 M. H. C. R., 435.

Plaintiff owed defendant a judgment-debt. He paid the debt, but not through the Court. Defendant then fraudulently applied to the Court to execute the decree, and the Court, being debarred by sec. 206 of the Code of Civil Procedure from recognizing payment made otherwise than through it, executed the decree by making the plaintiff pay again the sum decreed. Plaintiff sued to recover the amount overpaid. *Held* by the majority of the Court (SCOTLAND, C. J., and INNES, J., dissenting) that such a suit is not maintainable.—3 M. H. C. R., 183; I. L. R., 1 Madr. 203.

The words in sec. 11, Act XXIII. of 1861, "questions arising between the parties to the suit," cannot be limited to questions arising between those who were parties to the suit at the date of the decree; but, after decree, the representative of a decree-holder, or the representative of a defendant against whom an execution is sought under secs. 210 and 216 of the Code, become parties to the suit for the purpose of execution, and questions arising between them are questions arising between the parties to the suit within the meaning of sec. 11 of the amending Act.—3 M. H. C. R., 263.

A plaintiff in possession under a decree for land and mesne-profits ap-

plied for further execution as to mesne-profits, and obtained an order from the Court of first instance (the District Munsif's Court). This order was reversed by the Appellate Court (the Civil Court leaving it still open to the Court of first instance to make a further order). Plaintiff, however, instead of applying again for execution, instituted a fresh suit for mesne-profits in the Civil Court. The Civil Judge rejected the plaint. *Held* that sec. 11 of Act XXIII. of 1861 warranted the rejection of the plaint, on the ground that the mesne-profits to which plaintiff laid claim in the suit were payable in respect of the subject-matter of the former suit.—3 M. H. C. R., 287.

Where no liability to mesne-profits is imposed by a decree, sec. 11 of Act XXIII. of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne-profits, but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree.—4 M. H. C. R., 257.

A suit does not lie to enforce a liability specifically by the decree of a Civil Court in the mofussil, the right of suit in such case being taken away by sec. 11 of Act XXIII. of 1861.—4 M. H. C. R., 453.

The plaintiff sued to recover certain land of which the defendant obtained possession in execution of a decree in a former suit in which the plaintiff was a defendant, although it was not part of the land mentioned in the plaint or decree in the former suit. *Held* that the plaintiff's suit could not be maintained, and that his only remedy for the wrongful dispossession was a proceeding under sec. 11, Act XXIII. of 1861.—5 M. H. C. R., 185.

The ancestors of the plaintiff brought a suit in 1821 before the Registrar of the Adalat Court to eject the defendant's grandfather from a piece of ground. The Registrar found that the defendant was a tenant under the plaintiff at a monthly rent, and the Court decreed that defendant should remain in possession so long as he should continue to pay the rent regularly, and that, in default of payment, the plaintiff should be placed in possession. An attempt to obtain possession in execution of that decree in 1861 failed, and the plaintiff brought a suit to recover possession with arrears of rent. *Held* that sec. 11, of Act XXIII. of 1861 precluded the plaintiff from maintaining the suit.—5 M. H. C. R., 375.

By the terms of a decree passed by the District Munsif, the plaintiff was declared entitled to the possession of certain land together with the crops upon it. The plaintiff asked for execution of the decree in respect of the land and the crops which he alleged had been unlawfully taken away by the defendants, and possession of the land was given to the plaintiff, but he was referred to a separate suit for the damage sustained by him by reason of the removal of the crop. *Held* that no separate suit could be maintained, but the plaintiff's remedy was by a proceeding in execution under sec. 11 of Act XXIII. of 1861 (Civil Procedure Code).—6 M. H. C. R., 13.

Suit brought to recover the amount to which plaintiff was entitled under a decree passed in favour of himself and defendant as co-plaintiffs in a former suit. It appeared that defendant purchased the property sold in execution of the decree, and that the price for which the sale took place was sufficient to satisfy the decree. Instead of paying the purchase-money into Court, defendant, with the knowledge and assent of plaintiff, retained the whole sum upon the understanding that he should give the Court a receipt for himself and on behalf of plaintiff, and afterwards pay to plaintiff his portion of the amount decreed. Accordingly defendant presented a

petition to that effect, and obtained a certificate confirming the sale. Defendant having failed to pay plaintiff his portion, the present suit was brought. Upon these facts, it was *held* in special appeal that the decree was satisfied by sale of the judgment-debtor's property, and that the execution-proceedings were completely at an end, the defendant having been, by the assent of the plaintiff, made his agent for the acknowledgment of the satisfaction of the decree. No subsequent application under the decree could have been entertained by the Court which executed it. Therefore plaintiff's claim was not a matter determinable under sec. 11 of Act XXIII of 1861.—6 M. C. R., 304; 17 W. R., 14.

*Held* that a question raised for the first time between the parties to a decree, at the time of its execution, although not expressly reserved in that decree for determination at the time of its execution, may be inquired into and determined by the Court executing the decree under sec. 11 of Act XXIII. of 1861.—2 Bom. H. C. R., (A. C.) 393; 2nd Ed. 371.

Where a decree awarding possession of immoveable property is silent as to mesne-profits accruing between the filing of the plaint and the execution of the decree, the Court executing the decree has no power to award such; the proper course for the plaintiff to adopt under such circumstances is to apply to the Court which passed the decree for a review, or else to file a separate suit. *Jiva Patil v. Melukji Anant Nathina* (3 Bom. H. C. R., A. C., 31) overruled.—4 Bom. H. C. R., (A. C.) 181; 4 W. R., 92.

N obtained a decree against A for certain lands, and was put in possession of them in execution of the decree. On appeal, the decree against A was reversed, and the lands were accordingly restored to him, but no provision was made as to the mesne-profits received by N when he was in possession of the lands under the decree of the lower Court. In a suit brought by A against N to recover such mesne-profits, it was held that the suit would lie, and was not prohibited by sec. 11 of Act XXIII. of 1861.—5 Bom. H. C. R., (A. C.) 74.

When a suit is brought to recover possession of immoveable property, and the decree does not provide for the mesne-profits that accrued during the suit, a separate suit may be maintained for them. Where, however, it can be shown that the omission in the decree to provide for mesne-profits was the deliberate act of the Court, the defendant may set that up as a defence in the separate suit.—6 Bom. H. C. R., (A. C.) 109.

In a suit for mesne-profits (not being a suit for land and its mesne-profits) interest on mesne-profits cannot be recovered.—9 Bom. H. C. R., (A. C.) 7.

A obtains possession of property under a decree. The decree is subsequently reversed. *Held*, 1st, that A must restore the property itself, or its actual value as determined by evidence, and not the amount for which it may have been sold; and, 2ndly, under sec. 11 of Act XXIII. of 1861, that a claim for its restoration need not be the subject of a separate suit, but may be enforced in a miscellaneous proceeding.—10 Bom. H. C. R., (A. C.) 297.

Plaintiff's father purchased a house on the 11th June 1854 at a sale made under a decree against G D, but was not put into possession of it. Accordingly, in 1866, he obtained a decree for possession, which, however, was never executed. The defendant, in 1870, obtained possession of the house by another sale made in execution of another decree against G D. The present suit was instituted by plaintiff in 1871. *Held* that, not only was the remedy on the cause of action which accrued in 1854 and the decree of 1866 barred, but also that Act XXIII. of 1861, sec. 11, prevented the

plaintiff from bringing a new suit on the fresh cause of action accruing to him under the decree of 1866, as that section "took away from the parties to the suit the right to raise by a fresh suit any question as to their rights and liabilities under the decree." *Ranganasary v. Shappani* (5 M. H. R., 375) followed.—10 Bom. H. C. R., (A. C.) 433.

An application to the Court, passing a decree for possession in favour of the heirs of a mortgagee for further execution thereof, by taking an account, is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof. The proper course for a mortgagor who seeks for an account and redemption, or for redemption alone, is to bring an independent suit for that purpose. *Janoji v. Byankatesh* (2 Bom. H. C. R., 371) overruled.—12 Bom. H. C. R., (A. C.) 160.

A mortgagee was put into possession of the mortgaged property, under a decree obtained by him against the mortgagor, to the effect that the mortgagee should remain in possession until the mortgage-debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage-decree, and applied to be restored to the possession of the mortgaged property. Both the lower Courts granted the mortgagor's application. On special appeal, *held* (following the decision of the Full Bench in *Ravji Shivram Joshi v. Kaluram Maluckchand*, 12 Bom. A. C. 160) that such an application was not the proper mode for the mortgagor to redeem the property and to recover possession from the mortgagee, the previous decree for possession having been fully executed when the mortgagee was put into possession.—12 Bom. H. C., (A. C.) 163.

A suit will, notwithstanding sec. 206 of Act VIII. of 1859, lie for damages for an alleged breach of contract in not certifying to the Court a payment of money in satisfaction of a decree, made out of and not through the Court, in consequence of which the same was fraudulently recovered a second time by the person omitting to certify the said payment.—1 N.-W. P. H. C. R., 155; Ed. 1873, 237. S. C., *Agra H. C. R.*, (F. B.) Ed. 1874, 185.

A claim for damages for injury to certain goods belonging to plaintiff, but attached by the defendant in execution of a decree held by him against the plaintiff, pending such attachment, through the alleged negligence of the defendant, is a matter which should be determined by a separate suit, and not by the Court executing the decree under which the goods were attached.—3 N.-W. P. H. C. R., 187.

The plaintiff held a decree against the defendants, and agreed to take an elephant in satisfaction, the defendant promising, if satisfaction were entered up, to be responsible for the value of the elephant, should it be claimed and recovered by any other person. It was so claimed and recovered, and the plaintiff sued for its value. *Held* that the suit was not barred by sec. 11 of Act XXIII. of 1861.—6 N.-W. P. H. C. R., 126.

A decree passed for money was lost or destroyed: the decree-holder on suing out execution was referred to a regular suit. *Held* that the existence of the decree and of its terms might have been enquired into in the execution department, and that the order of the Court, to which application for execution was made, could not confer jurisdiction on a Court to entertain such a suit.—1 *Agra H. C. R.*, 78.

Where the object of the suit was to set aside orders passed in the miscellaneous department relating to execution of decree, *held* that such suit was untenable; sec. 11, Act XXIII. of 1861, having distinctly prohibited all remedy by separate suit, and the remedy provided being an appeal from the order complained of.—1 *Agra H. C. R.*, 93.

Where by a decree the plaintiff's right to a monthly allowance was declared, *held* that any failure on the part of the person bound to pay by the terms of the decree would constitute a good cause of action; and a fresh suit brought on the assertion of payment being withheld would not be affected by the provisions of sec. 11, Act XXIII of 1861.—2 Agra H. C. R., 23.

*Held* that sec. 11, Act XXIII of 1861, does not apply to suits brought by a decree-holder to question an alienation made by the judgment-debtor, inasmuch as the transferee was not a party to the former suit, and only questions between the parties to the suit must of necessity be determined in the execution department.—2 Agra H. C. R., 180.

Interest on a sum awarded for mesne-profits may properly be withheld until the date of the decree, since the amount is not ascertained before that time.—Marshall's Rep. 105; 1 Hay's Rep. 181; 11 W. R., 25.

According to the practice of the native Courts in Bombay, a sum found due for mesne-profits was a judgment-debt and carried interest by its own force. On petition in the native Court after decree upon appeal in England, interest was awarded on the amount of mesne-profits decreed, though not prayed for in the plaint, or given by the decrees in India or the order of affirmance in England.—3 Moore's I. A. 220.

A sold to B certain logs of timber, and 95 logs were delivered to B in part performance of the contract. C brought a suit against A and B, claiming the logs under another title. Pending this suit, C entered into an agreement with D, selling him the logs in the event of being successful in his suit. The judgment of the Court of first instance was in C's favour, and under such judgment D obtained possession of the logs in suit. This judgment was on appeal reversed. B then brought a suit in the nature of an action of trover against C and D for the logs and damages. The Court, without entering into the merits, dismissed the suit, on the ground that it was not maintainable, as the same relief would have been obtained under the provisions of sec. 11, Act XXIII of 1861. *Held* by the Judicial Committee, reversing such Judgment, that there had been a miscarriage, as that section did not apply, the suit by B against C and D being to recover damages for a tort alleged to have been committed by C and D, and that the latter was not a party to the original suit or bound by the judgment in that suit.—13 Moore's I. A., 69.

A suit by a ryot against another for damages on account of illegal appropriation of the produce of the land, including the ryot's profits, by the defendant during certain years, is not a suit for mesne-profits, and is therefore unaffected by sec. 11, Act XXIII of 1861. The question regarding amount cannot be settled in execution, but by separate suit.—3 W. R., 1.

Mesne-profits for the period during which the decree-holder was executing the decree and was kept out of possession by the opposite party may be awarded by the Court under sec. 11 Act XXIII of 1861. It is not necessary to bring a separate suit.—6 W. R., Mis., 13.

A claim for damages in respect of injury sustained by goods while under attachment in execution of a decree which was afterwards set aside, is not a matter to be disposed of under sec. 11, Act XXIII. of 1861, but must be made the subject of a separate suit.—7 W. R., 45.

A decree-holder took out execution against A and B. When B's property was attached, his widow, C, came forward, and laid claim to it on the part of her minor son, urging that, as B was not liable under the decree, his property could not be sold. The objection was disallowed and the property was sold. *Held* that sec. 11, Act XXIII of 1861, did not prevent C

from suing to set aside that sale, and recover B's property, on the ground that B was not liable under the decree.—7 W. R., 361.

The words "party to a suit" in sec. 11, Act XXIII. of 1861, include the heirs, assignees, and representatives of such party, and consequently give the purchaser of a decree all the rights of appeal, &c., which his vendor had.—8 W. R., 197; 10 W. R., 205.

The plaintiffs were held entitled to interest on mesne-profits.—8 W. R., 322.

Sec. 206, Act VIII of 1859, does not bar a suit brought to recover money paid into the Collectorate as Government revenue, although the person on whose behalf the money was paid had an Act X. decree against the person paying the money, as the entire amount of the decree was eventually recovered by taking out execution of the whole decree.—8 W. R., 449.

Where it is contended that the decree that has been executed is not the decree that was passed between the parties, but a decree modified by a subsequent decretal order, sec. 11, Act XXIII of 1861, does not apply, the question not being one relating to the execution of the decree and between the parties to the suit.—8 W. R., 506.

Where the holder of a decree for maintenance is opposed in execution by the heirs of her judgment-debtors, the questions arising between them cannot be determined in execution, but must be tried in a regular suit. *Quære*, if the original judgment-debtor were alive, could the decree-holder enforce her claim for maintenance by execution without a fresh suit for each instalment unpaid?—10 W. R., 93.

A Court executing a decree has no power to assess mesne-profits, unless it is ordered by the decree that the mesne-profits are to be assessed in execution; and it is an essential part of a decree which orders mesne-profits to be assessed in execution, to fix the period in respect of which such mesne-profits are to be assessed.—11 W. R., 200.

The mesne-profits which, under the provisions of sec. 11, Act XXIII. of 1861, are assessable by the Court executing the decree, are only such as have been by the decree made payable in respect of the subject-matter of the suit between the date of the suit and the date of the execution of the decree. Any question of mesne-profits not determined by the Court making the decree is not properly cognizable by the Court executing the decree.—11 W. R., 339.

Sums paid in execution in excess of what was the due under decree can only be recovered by application to the Court which executed the decree, not by a separate suit.—15 W. R., 160.

Although the common practice is to make interest payable from the date on which the mesne-profits are assessed, interest was given in a suit for mesne-profits which ought to have been paid by the defendants, but which plaintiffs had been made to pay, from the date when they ought to have been paid by the defendants.—17 W. R., 228.

Where a decree was silent as to the plaintiff's right to mesne-profits after the date of filing the suit, and did not reserve any question of mesne-profits for further investigation, the Court which executed the decree was held to have acted *ultra vires* in ordering an investigation into mesne-profits which may have accrued due pending the suit and up to the time of execution.—19 W. R., 154.



A judgment-creditor having caused certain property of his judgment-debtor to be sold in execution, the proceeds realised did not amount to the full judgment-debt. Afterwards the judgment-debt was reduced in appeal to a sum far below the amount realised in execution, and the judgment-debtor brought a suit to recover the excess moneys. *Held*, with reference to Act XXIII. of 1861, sec. 11, that the suit did not lie, but that the Court which was charged with the execution of the decree had full jurisdiction to determine the question and order a refund.—19 W. R., 413.

Where a decree-holder in execution takes possession of more land than is covered by the decree, and on an objection raised, and after inquiry made, the excess land is subsequently relinquished, the question of *wasilat*, being one which arises between the parties to the suit with reference to the execution of the decree must, under Act XXIII. of 1861, sec. 11, be determined by the Court executing the decree, and not by a separate suit.—20 W. R., 415 ; 7 W. R., 372.

A suit to enforce a contract by which a dispute was adjusted between a decree-holder and judgment-debtor is not barred by Act VIII. of 1859, sec. 206.—22 W. R., 298.

A decree awarding possession with *wasilat* from the date of suit was held to be rightly construed as awarding mesne-profits until the date when delivery of possession should be effected, and reserving the question of the amount for adjustment in execution.—22 W. R., 328.

In a suit for possession under an usufructuary mortgage, plaintiff obtained a decree which was afterwards authoritatively interpreted to mean that he was to get possession of the property in order to repay himself out of the profits, keeping the usual accounts, and, after satisfaction of his claim, restore the property. *Held* that, under the terms of the decree, he was in effect required to certify, for the information both of the Court and of the judgment-debtors, the amounts received and outstanding ; and that the Court executing the decree was bound to require from him, from time to time, a statement of the amount received, and could deal with the matter under Act XXIII. of 1861, sec. 11.—23 W. R., 156.

Where a refund is claimed of the proceeds of an execution-sale, on the ground that the decree has been satisfied by compromise, the matter ought to be tried under Act XXIII. of 1861, sec. 11, and not by regular suit.—23 W. R., 207.

Certain decree-holders, having been sued successfully for possession by the judgment-debtors in the first Court, appealed to the High Court, who reversed the decision, and whose order was confirmed by the Privy Council. The decree-holders on this applied for execution and for mesne-profits for the interval during which they had been kept out of possession. *Held* that they were entitled to what they claimed in execution without bringing a regular suit, as the effect of the High Court's decree was to replace the parties *in statu quo*.—23 W. R., 441.

A suit will lie to set aside a sale made in contravention of the terms of sec. 64, Beng. Act VIII of 1869, the judgment-debtor not being bound to oppose the sale in the proceedings in execution.—25 W. R., 156.

Although the assessment of mesne profits is reserved for the period of execution of decree, it is an essential part of the decree itself, and not a mere process in execution, and must therefore be made by a Court authorised to pass the decree.—25 W. R., 270.

A party who has been put upon the record, whether rightly or wrong-

ly, is so far a party to the suit that he has a right of appeal under Act XXIII. of 1861, sec. 11.—2 C. L. R., 545.

In execution of a decree the property of the judgment-debtor was sold, and on an account being taken, a certain sum therein appearing to be due was paid in December 1868 to the decree-holders. Subsequently, on the application of the judgment-debtor, the account was re-opened, and had been overdrawn by the decree-holders. In 1876 the judgment-debtor applied to the Court which executed the decree for an order for the repayment of the amount overdrawn. *Held* that, while the application was not barred by any provisions of the Limitation Act, IX of 1871, the English doctrine of laches did not apply in this country; and, further, that the application had been presented in the proper Court, as required by sec. 11 of Act XXIII. of 1861 (corresponding with sec. 244 of Act X. of 1877).—4 C. L. R., 577.

Interest on mesne-profits may be allowed from the commencement of the suit at the annual rate allowed by the Court. *Hurropersaud Roy v. Shamapersaud Roy* (I. L. R., 3 Cal. 654) followed.—6 C. L. R., 357.

A sale on the 4th March 1871, of certain property sold in execution of a decree obtained by A, having been confirmed on the 5th May 1878, notice was, on the 31st May, received that the judgment-debtor had been adjudicated a bankrupt in London, and an application was made to the Court to abstain from dealing with his property. All proceedings were thereupon stayed, and on the 8th of July 1878 the purchaser applied to the Court for a refund by the present plaintiffs, who were the administrators of A, of this purchase-money, and on the 19th of the same month an order was made for such refund. The amount was refunded without protest by the plaintiffs who then sued the purchaser and the original judgment-debtor to recover the amount paid by them. *Held* that the suit would not lie, but that the question was one to be determined under sec. 244 of the Civil Procedure Code by the Court executing the decree.—10 C. L. R., 573.

K and M were brothers alleged to be joint in food, dwelling, and business. In a suit which was brought against K, and which was unsuccessfully defended by him on behalf of himself and the joint family, a decree for costs was passed against him. K died after decree and the decree-holder in execution had K's sons put on the record as his representatives. Certain property was attached in execution, and the sons objected that the property in question had come to them as the self-acquired property of their uncle M, who had died after K, and that they had inherited no property from their father K. Their objection was allowed by the Court executing the decree, and the property was ordered to be released from attachment. In a suit brought by the assignee of the decree-holder against the sons of K to establish his right to proceed against the property in question in execution of the decree against K, *held* that the question of the liability of the property to be taken in execution in the hands of the defendant was a "question arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, &c., of the decree" within the meaning of sec. 244 of the Civil Procedure Code, and that the suit was consequently not maintainable. The cases as to the position of representatives added to the suit either before or after decree referred to and discussed.—I. L. R., 16 Cal. 1.

D obtained a decree against the father of A and R, Hindus, on a hypothecation bond whereby certain land was pledged as security for

repayment of a loan. The decree declared the land liable to be sold for repayment of the debt. The judgment-debtor having died before the decree was executed, A and R were made parties to the proceedings in execution, and the land was attached. A and R objected to the attachment, on the ground that their shares in the land were not liable to be sold in execution of the decree, as they were not parties to the suit. This objection was allowed, and D brought a suit for a declaration that the property was liable to be sold. That suit was dismissed on the ground that a suit for a declaration would not lie. D then sued to recover from A and R the balance due under the decree against their father after crediting the amount recovered by the sale of their father's share. It was objected that the suit was barred by sec. 244 of the Code of Civil Procedure. *Held* that the duty of a son under Hindu law to pay his father's debt out of his own share of ancestral estate is not a matter which can be decided under sec. 244 of the Code of Civil Procedure. The questions contemplated by sec. 244 are those which relate to the enforcement of the obligation created by the decree. The obligation to pay the father's debts out of the son's share of the ancestral estate is not an obligation created by a decree against the father.—11 Madr. 413.

When a Munsif set aside on review an order rejecting an objection to the execution of a certain decree, and the District Court on appeal refused to interfere, *held* that no second appeal lay to the High Court.—12 Madr. 125.

In execution of a decree the defendant, who was sued as the representative of her deceased brother, objected under sec. 244 of the Code of Civil Procedure to the attachment of certain lands to which she set up independent title. The objection was disallowed, and the land was sold. She then sued the execution-purchaser to set aside the Court-sale, and obtained a decree against which no appeal was preferred. She now sued for possession. *Held* that the suit lay, notwithstanding the order under sec. 244. *Per Cur.*—The words “not competent” in sec. 44 of the Evidence Act refer to a Court acting without jurisdiction.—12 Madr. 228.

The assignee of a decree applied for execution; his application was dismissed and he was never brought on to the record as decree-holder. He now sued for the cancellation of the order refusing execution and for a declaration of his right to execution:—*Held*, that the suit was not precluded by Civil Procedure Code, sec. 244.—14 Madr. 478.

At a sale in execution of a decree a decree-holder, who had obtained leave to bid, was alleged to have made a bid through his agent of Rs. 90,000, but he shortly afterwards repudiated the bid, and did not pay the deposit. The property was put up for sale again on the following day under sec. 306 of the Code of Civil Procedure, and was in due course knocked down for a smaller sum. The judgment-debtor filed a petition under sec. 293 to recover from the decree-holder the loss by re-sale; the petition was rejected. On appeal, *held* (1) that the question at issue was one arising between the parties to the suit, and that an appeal lay against the order rejecting the petition; (2) that the property, having been forthwith put up again and sold under sec. 306 of the Code of Civil Procedure, was re-sold within the meaning of sec. 293.—12 Madr. 454.

By a *sanad* duly executed on the 20th August 1850, the plaintiffs' father, Yeshvantrav, who was a *vatandar deshmuks*, appointed the defendants and their heirs hereditary *vatani gumastas*, and granted, by way of remuneration for their services, Rs. 201 and a quantity of grain out of the

annual *vatan* income in perpetuity. In consideration of certain sums obtained from the defendants, Yeshvantrav mortgaged the *vatan* property to the defendants, who subsequently sued Yeshvantrav upon the mortgage. That suit was referred to arbitration, and an award was duly made, and a decree upon the award was obtained by the defendants against Yeshvantrav. In 1859, execution of the decree was granted against Yeshvantrav. In 1864 the services connected with the *vatan* were discontinued by Government. In 1871 Yeshvantrav died. The defendants, having kept the decree alive, sought in 1881 to execute the decree against the plaintiffs' eldest brother, who filed objections, but his objections were overruled, and execution was ordered to issue. The plaintiffs brought this suit in 1883 for a declaration that the defendants were no longer entitled to the allowance under the *sanad*, and for an injunction restraining the defendants from the execution of the decree against the *vatan*. The defendants contended (*inter alia*) that the *sanad* could not be cancelled, Yeshvantrav having granted it as full owner; that the receipt, by the defendants, of the allowance had been adverse since 1864, when their services had ceased; and that the execution-proceedings against the plaintiffs' father and their elder brother in 1859 and 1881, respectively, bound the plaintiffs. Both the lower Courts decided in favour of the plaintiffs. On appeal by the defendants to the High Court, *held* (confirming the decree of the lower Courts) that the plaintiffs were entitled to the declaratory decree and to the injunction prayed for. Although the management of the *vatan* was vested by the *sanad* in the defendants and their heirs in perpetuity under the title of *gumastas*, nevertheless the remuneration attached to the office by Yeshvantrav was in derogation of his successor's rights, and was, therefore, at any rate in the absence of proof of custom, invalid against them. *Held* also that, having regard to the terms of the *sanad*, it was in the power of the original grantor, or any of his successors, to determine the office and the remuneration at any time after the *vatan* services ceased in 1864. *Held* also that, assuming the grant by Yeshvantrav to be invalid as against his successor, adverse possession would only run against the plaintiffs from the time of his death in 1871, and the present suit having been filed within twelve years from that date was not barred. *Held* further that the proceedings in execution of the decree of 22nd June 1859, including the order of the 18th June 1881, did not bind the plaintiffs, under sec. 244 of the Civil Procedure Code (Act XIV. of 1832), the plaintiffs not having been parties to them.—12 Bom. 80.

Mere ignorance of the law cannot be recognized as a sufficient reason for delay under sec. 5 of the Limitation Act (XV. of 1877). A obtained a decree against B as the heir and legal representative of his deceased uncle C. The decree directed that the amount adjudged should be recovered from C's assets in the hands of B. In execution of this decree certain property was attached. B claimed this property as his own, and sought to remove the attachment, but the Court passed an order confirming the attachment on the 20th November 1880. In 1881 B filed a regular suit to set aside this order. The suit was dismissed in 1885, as barred by sec. 244 of the Civil Procedure Code (Act XIV. of 1832). Thereupon B filed an appeal from the order in execution made on the 20th November 1880. This appeal was rejected as time-barred, under art. 152 of sch. ii of the Limitation Act, XV. of 1877. *Held* that the time spent in the actual proceedings in the suit to set aside the order in execution might be deducted in computing the delay that occurred before the appeal was filed. But the plaintiff was not entitled to a deduction of the time that intervened between the date of the order appealed against and the date of filing the suit.—12 Bom. 320.

In execution of a decree on a mortgage certain property was sold which the plaintiff in this suit claimed as his own under a sale to himself by the sons of the judgment-debtor. He applied to the Court to have the sale set aside, but, failing in his application, he sued both the decree-holder and the auction-purchaser for a declaration of his title to the property in question. The Assistant Judge held, on appeal, that the suit was not maintainable, on the grounds (1) that, the greater part of the property being included in the decree, the question of title ought to have been settled in execution-proceedings under sec. 244 of the Code of Civil Procedure (Act XIV. of 1882) and not by a separate suit; and (2) that, even if the point could be raised in a separate suit, the present suit was premature, as the plaintiff should have waited till he was dispossessed by the auction-purchaser. *Held* (reversing the decision of the Assistant Judge) that sec. 244 did not bar the present suit. It could not apply except as regards property affected by the decree, and a part of the property claimed by the plaintiff was not included in the decree. Moreover, the question in the present suit did not arise between the parties to the former suit or their representatives. *Held* also that the suit was not premature. A person, whose property is sold in execution of a decree against a third party, is not bound to wait till he is dispossessed by the auction-purchaser. As soon as his title is denied, he is entitled to bring his suit.—13 Bom. 34.

A purchaser at a Court sale is not a party, or the representative of a party, within the meaning of section 244 of the Code of Civil Procedure (Act XIV of 1882) He is, therefore, not bound by any order in the miscellaneous inquiry under section 280, 281, or 282 of the Code. Nor is he bound by the specifications contained in the proclamation of sale of the claims of intervenors. Certain property was attached in execution of a decree. The defendants intervened, and objected to the attachment, on the ground that they held the property on permanent tenancy. Their objection was allowed, and the Court made an order, directing the property to be sold, subject to the defendant's rights. In the proclamation of sale, however, it was stated that the Court did not guarantee the title of the intervenors. The plaintiff purchased the property at the Court-sale. He then sued to eject the defendants. The defendants pleaded that the plaintiff had purchased, subject to their rights as permanent tenants. Both the lower Courts rejected the plaintiff's claim, on the ground that he was bound by the order in the miscellaneous inquiry, which had become conclusive by reason of his having omitted to sue within one year from the date of the order. *Held*, reversing the lower Court's decision, that the order in the miscellaneous inquiry was not binding on the plaintiff as an auction-purchaser.—15 Bom. 290.

*Held* that the assignees of a purchaser from a judgment-debtor of property, the subject-matter of a decree for enforcement of hypothecation, were entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under sec. 291 of the Civil Procedure Code, and that the executing Court was bound to accept the money, and stop the sale. *Held* also, where the executing Court had refused to accept the money, and the sale had taken place, that a suit by the assignees to set aside the sale and for a declaration of their right to come in under sec. 291 was not barred by sec. 244 of the Code.—10 Al. 1.

The defendants along with one N and C had brought a suit against one A in the Civil Court at Peshawar in the Panjab, and obtained a decree on the 23rd July 1878, for Rs. 30,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no steps were taken thereupon. On the 12th June



1883 A died. On the 30th April 1884, the defendants again applied to the Court at Peshawar, treating their judgment-debtor as being then alive, for fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th August 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it was stated that the application was "for execution against Ajudhia Prasad, and after his death against Angan Lal, the own brother, and Durga Kuar, widow, and Lachman Prasad and others, sons of Ajudhya Prasad, residents of Kundarki, and the said Angan Lal, at present residing at Umballa, and employed in the Commissariat Transport Department, judgment-debtors." It was further stated that "the judgment-debtor was dead, and his heirs are living and in possession of his estate, and Angan Lal himself has realised Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta, and appropriated the same; therefore, to that extent the person of the said Angan Lal was liable." Notification of this application was issued to Angan Lal, as also to the other persons named therein. Angan Lal objected to the application as against him, stating that, although he was the brother of A, deceased, yet he always lived separate, and carried on business separately; and that there was no connection or partnership between him and the deceased judgment-debtor, and that he had no property of the deceased in his possession. Further that, as A left issue, it was wrong to call him as heir to A, and take out execution-process against him. In reply to these objections the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased, and therefore liable to the extent of the sum so received by him. The Subordinate Judge, holding that Angan Lal was the brother of the deceased, and had realised the amount from the Commissariat office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended, first, that the suit was in effect a suit under sec. 283 of the Code of Civil Procedure, and therefore barred as not having been brought within a year from the order of the Subordinate Judge; and, secondly, that the proceedings of the Subordinate Judge were held under sec. 244 of the Code, and therefore no separate suit would lie. *Held* that the first contention must fail, inasmuch as an essential condition precedent to a suit under sec. 283 of the Code is the making of an attachment of some property; of objection being taken to such attachment; of investigating being made into such objection; and, lastly, of its being allowed or disallowed: and these do not exist in this case. The second contention also must fail, as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal representative of the deceased judgment-debtor. *Mirza Mahomed Aga Ali Khan Bahadur v. Balmukund* (L. R., 3 I. A. 241), *Sayid Nadir Hossain v. Bipen Chund Bassarat* (3 C. L. R., 437), were referred to.—10 Al. 479.

Where, subsequent to a decree, a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property. The rule of law against breaking up the integrity of a mortgage-security is a rule aiming at the protection of the mortgagee, and is not applicable to



cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. Disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates, and the extent of the share acquired under the purchase, are questions falling within the purview of cl. c. of sec. 244 of the Code of Civil Procedure, and must be determined by order of the Court executing the decree. *Banarsi Das v. Maharani Kuar* (I. L. R., 5 Al. 27), *Wise v. Abdool Ali* (7 W. R., 136) and *Pogose v. Fukurooddeen Mahomed Ahsan* (25 W. R., 343), referred to.—10 Al. 570.

In a suit upon a hypothecation bond a third party was made defendant, as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond, and for enforcement of the mortgage. In execution of the decree, the debt not being satisfied by sale of the mortgaged property, the decree-holder caused certain other immoveable property in the possession of the third party to be attached. She objected to the attachment, on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed, and the decree-holder then sued for a declaration that the property belonged to the mortgagor judgment-debtor, and was liable to attachment and sale in execution of the decree. *Held* that, as no claim in the former suit was made against the objector personally or in a representative character, but, as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property, and, so far as it was sought to be enforced against other property, she was a stranger to that suit, and her objection must be taken to have been decided under secs. 278 and 280 of the Civil Procedure Code, and the present suit was rightly brought under sec. 283, and was not barred by sec. 244. *Kameshwar Pershad v. Run Bahadur Singh* (I. L. R., 12 Cal. 458) referred to. *Mulmantri v. Ashfak Ahmad* (I. L. R., 9 Al. 605) and *Nimba Harishet v. Sitaram Paraji* (I. L. R., 9 Bom. 458) distinguished.—11 Al. 74.

B obtained an *ex-parte* decree for arrears of rent against S under Act X of 1859, and in execution of that decree brought the tenure to sale. At the sale the tenure was purchased by N. S then brought a suit against B and N to set aside the sale, on the ground that the rent-decree and all execution-proceedings taken thereunder were fraudulent, and alleging that B was the actual purchaser in the name of N. An objection was taken that the suit would not lie, and that the questions in the suit were such as could have been determined, and were determined, by the Court executing the decree. *Held*, that neither sec. 244 of the Civil Procedure Code, nor the corresponding sec. 11 of Act XXIII of 1861, has any application to proceedings in execution of a decree under Act X of 1859, and that the suit, being one to set aside the sale on the ground of fraud, was maintainable. *Saroda Churn Chuckerbutty v. Mahomed Isuf Meah* (I. L. R., 11 Cal. 376) distinguished.—I. L. R., 15 Cal. 179.

H. D. and R. D. owned a 6-anna share in certain decrees. The other decree-holders subsequently sold their 10-annas share to H. S. and S. M., two of the judgment-debtors. H. D. and R. D. then proceeded to execute the decrees, and in satisfaction thereof were allowed to receive, upon giving security under sec. 231 of the Code, the full 16-anna share of the decretal amount from H. S. and S. M., notwithstanding the objection of the latter on the ground of their purchase. Thereupon H. S. and S. M. brought a suit for declaration of their right of purchase and the recovery

of a 10-anna share of the money in the hands of H. D. and R. D. *Held* that the plaintiffs were entitled to the relief sought for. *Held*, also, that the provisions of sec. 258 of the Civil Procedure Code did not affect the suit, which was brought, not upon the allegation that the decrees were satisfied by the plaintiffs' purchase, but, on the contrary, was founded upon the proposition that the decrees were not so satisfied. *Abdul Rahiman v. Khoja Khaki Aruth* (I. L. R., 11 Bom. 6) referred to. *Held*, further, that the claim was not within the words "relating to the execution of the decree" in sec. 244 of the Civil Procedure Code, inasmuch as it did not raise any question in respect to the furtherance of, or hindrance to, or the manner of carrying out, the execution of the decrees.—15 Cal. 187.

The pandaram of a mutt being empowered under a decree to nominate a person to be the head of a subordinate mutt, subject to the approval of the Subordinate Court, made a nomination and died before the Subordinate Court had come to a determination as to the fitness of his nominee. His successor in office was brought on to the record and revoked his nomination and made a fresh nomination. The Subordinate Court treated the fresh nomination as a nullity and made an order confirming the first. The pandaram appealed against this order:—*Held*, (1) that an appeal lay against the order complained of; (2) that the person, whose nomination had been confirmed, was a necessary party to the appeal; (3) that the nomination first made was revocable for good cause, and that the fitness of the person nominated by the appellant should be investigated by the Subordinate Judge.—13 Madr. 338.

*Held* BY THE FULL BENCH:—An objection taken by a person who has become the representative of the judgment debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property, and not held by him as such representative, is a matter cognizable only under sec. 244 of the Code of Civil Procedure, and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under secs. 280 and 281 as provided by sec. 283. *Held* by the majority of the Full Bench (PRINSEP, O'KINEALY, and GHOSE, JJ.):—Secs. 278 to 283 of the Civil Procedure Code do not cover the case of any contest between parties to the suit or their representatives on the record of the suit in regard to the execution, discharge, or satisfaction of a decree. The effect of the decision between such parties is that the right to enforce or oppose execution is determined under sec. 244, subject to the result of such appeal as is allowed by law. *Per* PRINSEP and O'KINEALY, JJ.:—Section 244 should be liberally construed to prevent litigation.—17 Cal. 711.

*Held* by the Full Bench (PETHERAM, C. J., PRINSEP, TOTTENHAM, and PIGOT, JJ., GHOSE, J., dissenting), that when circumstances affecting the validity of a sale in execution have been brought about by the fraud of one of the parties to the suit, and give rise to a question between these parties such as, apart from fraud, would be within the provisions of sec. 244, a suit will not lie to impeach the validity of the sale on the ground of such fraud. *Saroda Churn Chuckerbutty v. Mahomed Isuf Meah*, I. L. R., 11 Cal. 376; *Viraraghava Ayyangar v. Venkatacharyar*, I. L. R., 5 Madr. 217; *Paranjape v. Kanade*, I. L. R., 6 Bom. 148; and *Sakharam Gobind Kale v. Damodar Akharam Gujar*, I. L. R., 9 Bom. 468, approved; *Gobind Chandra Majumdar v. Uma Charan Sen*, I. L. R., 14 Cal. 679, dissented from in part. *Held* that in such a case the judgment-debtor is entitled, whether the sale has been confirmed or not, to make, as against the

person guilty of the fraud or accessory thereto, such application (if any) under sec. 311 as he may be entitled to make, his time for making it being computed from the time when the fraud first became known to him. *Held* further, that in cases in which the decree or the purchase is made *benami*, sec. 244 does not apply, and a suit may be held to lie to set aside the sale. *Per* GHOSE, J.—An objection under sec. 311, or upon the ground of fraud, raised by the judgment-debtor after the sale has been confirmed under sec. 312, cannot be dealt with under sec. 244. In such a case the judgment-debtor is entitled upon the ground of fraud to bring a suit to set aside the sale, or at all events to have it declared that the sale passed no title to the purchaser, or that the purchaser is a trustee for him. There is no special provision in the Code for setting aside a sale on the ground of fraud when it has once been confirmed.—17 Cal. 769.

A judgment-debtor, upon the attachment of certain land in execution of decrees passed against him personally by the Revenue Court, instituted a suit for declaration and establishment of his right to such land, not as his own property, but as *wakf*, of which he was *mutawalli* or trustee :—*Held* that, inasmuch as the plaintiff was not suing in his own right, but in his capacity as custodian trustee, or manager of the *wakf* property, and he must, therefore, be taken to fill a character separate from that in which the decrees were passed against him by the Revenue Court, his suit was not barred by the provisions of sec. 244. *Madho Prakash Singh v. Murli Manohar* (I. L. R., 5 Al. 406) and *Shankar Dial v. Amir Haidar* (I. L. R., 2 Al. 752) referred to.—7 Al. 36.

The plaintiff in a suit for possession of immoveable property obtained a decree for possession thereof, and in execution of the decree obtained possession of the property. This decree was subsequently reversed on appeal by the defendant. The decree of the Appellate Court was silent in respect of the mesne-profits which the plaintiff had received while in possession. The defendant instituted a suit to recover those profits :—*Held, per* PETHERAM, O. J., OLDFIELD, BRODHURST, and DUTHOIT, J. J. that the suit was not barred by sec. 244, of the Civil Procedure Code the question raised by such suit, although it might have arisen out of the decree of the appellate Court, not “relating to the execution, discharge, or satisfaction of the decree,” within the meaning of that section, (because, at the time, no such question had arisen or was in existence), and therefore not one in respect of which a separate suit is barred by that section. *Pratab Singh v. Beni Ram* (I. L. R., 2 Al. 61) distinguished by OLDFIELD J.

*Per* MAHMOOD, J.—That the suit was not barred by sec. 244, the mesne-profits sought to be recovered not having been realized in execution of the decree reversed on appeal.

*Per* DUTHOIT, J.—The words in cl. (c) of sec. 244, “any other questions arising,” &c., should be read as “any other questions *directly* arising ; otherwise the most remote inquiries would be possible in the execution department.—7 Al. 170.

Where certain property was attached in execution of a decree passed upon a bond against the legal representatives of the obligor, and the judgment-debtors objected to the attachment on the ground that the property was not part of the obligor's estate and liable to be taken in execution of the decree, but was property which they could claim in their own right :—*Held* that the matter in dispute was one between the parties to the suit in which the decree was passed, and relating to the execution, discharge, or

satisfaction of the decree within the meaning of sec. 244 of the Civil Procedure Code, and was, therefore, to be determined in the execution department and not by regular suit. *Chowdry Wahed Ali v. Mussammat Jumae* 11 B. L. R., 155) *Shankar Dial v. Amir Haidar* (I. L. R., 2 Al. 752) and *Nath Mal Das v. Tajammal Husain* (I. L. R., 7 Al. 36) referred to.

*Per MAHMOOD J.*—That the turning point upon which the application of the rule contained in sec. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor, in raising objections to execution of decree against any property, pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. *Kanai Lall Khan v. Sashi Bhouson Biswas* (18 W. R., 102) dissented from.—7 Al. 547.

Where, certain property having been attached in execution of a decree, the representative of the judgment-debtor objected that the property had been acquired by himself and not inherited from the judgment-debtor, and was therefore not liable in execution, *held* that the question was one which must be decided in the execution department under sec. 244 of the Civil Procedure Code. *Ram Ghulam v. Hazaru Kuar* (I. L. R., 7 Al. 547) referred to.—7 Al. 733.

*Held* that persons other than the decree-holders, or the persons whose property was sold in execution of decree, were not competent to apply to the Court under sec. 311 of the Civil Procedure Code to set aside the sale. *M*, in whose name property had been purchased at an execution sale which was improperly set aside, brought a suit to have the order setting aside the sale reversed, and the sale confirmed in her favour, and for a declaration that the property was not liable to be sold in execution of a decree of the defendants against third persons, under which it had been attached and advertised for sale. *Held* that such a suit could only be maintained under sec. 42 of the Specific Relief Act (I of 1877), but that sec. 244 of the Civil Procedure Code indicated the intention of the Legislature that such questions should be determined in the execution department, and, reading together the provisions of secs. 244, 278 and 283 of the Code, the suit was premature, and therefore not maintainable.—7 Al. 583.

After the death of a childless Hindu widow, a lessee from her of property which had belonged to her husband obtained against her vendees of part of the same property, a decree for damages for wrongfully keeping him out of possession. The effect of the decision was to decree the claim against the estate of the widow, and to exempt from liability the judgment-debtors personally and the property which they had purchased. In execution of the decree the said property was sold and was purchased by the decree-holder; one of the judgment debtors had died during the execution proceedings, and her son was duly impleaded as her representative, and he raised no objection to the attachment and sale. Subsequently this son sold his rights and interests in the property; and his vendee sued the decree-holder to recover possession, on the ground that the decree being limited to the estate of the childless Hindu widow, the defendant as purchaser could not acquire by the sale any rights superior to those of the widow; that those rights had expired upon her death, and left nothing to be sold, and that on her death the property devolved upon the plaintiff vendor, and had thence passed to the plaintiff. *Held* that the plaintiff's vendor was a party to the suit within the meaning of sec. 244 (c) of the

Civil Procedure Code, and that he not having objected to the sale in execution of the decree, neither he nor the plaintiff could go behind that sale or claim the property upon any title which he might have asserted in the execution proceedings; and that the suit was barred by sec. 244. *Ram Ghulam v. Hazaru Kuar* followed. *Bahori Lal v. Gauri Sahai* distinguished. *Mulmantri v. Ashfak Ahmad*, *Roop Lall Dass v. Bekani Meah* and *Ravunni Menon v. Kunju Nayar* referred to.—12 Al. 73.

B obtained a decree on a settlement of accounts made with V as trustee of a mutt. V's title as trustee having subsequently been negatived by decree, and the title of S declared, B applied to execute his decree against the property of the mutt, and to have S substituted as party to the suit in place of V. The application was rejected by the Munsif, but on appeal the District Judge made S a party, and reserved for determination in execution-proceedings the question whether the debt was contracted for the benefit of the mutt:—*Held*, that S was properly made a party, but that it was not open to him to raise this question in execution-proceedings.—9 Madr. 80.

The provisions of sec. 244 (c) of the Civil Procedure Code prohibit not only a suit between parties and their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of the decree, the object of which is to determine a question which properly arises between the parties or their representatives, and relates to the execution, discharge, or satisfaction of the decree.

A judgment-debtor, whose occupancy-tenure had been sold in execution of a decree for money, sued the purchaser for recovery of the property, on the ground that the sale of occupancy-rights in execution of decree was illegal and void, being in contravention of the provisions of sec. 9 of Act XII of 1831 (N.-W. P. Rent Act). *Held* by the Full Bench that the question involved in the suit was one of the nature referred to in sec. 244 (c) of the Civil Procedure Code as determinable only by order of the Court executing the decree, and that the suit was, therefore, not maintainable. *Narain v. Puran* (Weekly Notes, 1883 p. 218) referred to.—8 Al. 146.

In execution of a decree certain property was sold in pursuance of an order under sec. 244 of the Civil Procedure Code, and purchased by a person not a party to the suit, who subsequently obtained possession of the property. That order was subsequently set aside. In a suit by the judgment-debtor to recover possession of the property from the auction-purchaser by setting aside the sale:—*Held*, that the order directing the sale had the force of a decree, and that the plaintiff was not entitled to the relief claimed. *Jan Ali v. Jan Ali Chowdhry*, (10 W. R., 154) followed.—11 Cal. 362.

The defendant obtained a decree against the plaintiff as representative of his (the plaintiff's) deceased uncle, and in execution he attached the property in dispute. The plaintiff objected to the attachment, but his objection was disallowed, and the property was sold. The plaintiff did not appeal against the order disallowing his objection, but filed the present suit to establish his right. Both the lower Courts allowed the plaintiff's claim. On appeal by the defendant to the High Court:—*Held*, reversing the decree of the Courts below, that the plaintiff's suit was not maintainable. The question raised in the present suit was one which ought to have been taken in the execution-proceedings in the former suit under sec. 244 of the Civil Procedure Code (Act XIV of 1882); and having been, as a fact, raised and decided against the plaintiff, he could not bring a separate suit.—9 Bom. 458,



In 1877 the plaintiffs sued the defendant for possession of certain properties, and obtained a decree. In execution of this decree, the plaintiff, on 12th of July 1879, obtained formal possession of the properties sued for. The defendant continued to remain in actual possession and occupation of a portion of the premises, and refused to give up possession of the same to the plaintiff, who served with a two month's notice to quit in June 1881. The plaintiff did not evict the defendant in execution of the decree obtained by him against the defendant, but instituted a fresh suit for that purpose:—*Held*, that such a suit would lie. *Seemle*, that the delivery of formal possession in execution of a decree for possession gives a cause of action, against a defendant who remains in occupation of the premises, which may be enforced in a regular suit.—11 Cal. 93.

The provisions of sec. 244 of the Civil Procedure Code govern equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. *Cooke v. Hiseeba Beebee* (N.-W. P. H. C. R., 1874, p. 181) referred to.

All orders staying execution of decrees, whether passed by the Court which passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of sec. 244 (c) of the Civil Procedure Code, and, as such, appealable, irrespective of the provisions of sec. 588. *Kristomohiny Dossee v. Bama Churn Nay Chowdry* (I. L. R., 7 Cal. 733) and *Luchmeput Singh v. Seeta Nath Doss* (I. L. R., 8 Cal. 477) followed.

The widest meaning should be attached to clause (c) of sec. 244 of the Civil Procedure Code so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree and relating to its execution.

There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of sec. 243 of the Civil Procedure Code, have no reference to a case in which execution has already been carried out, and the decree-holder placed in possession of the property decreed to him.—7 Al. 73.

Under sec. 244, clause (c), and 258 of the Civil Procedure Code (Act XIV of 1882) no compromise of a decree which has not been duly certified under the provisions of the last-mentioned section can be recognized by any Court, and a separate suit to enforce such compromise is not maintainable.—10 Bom. 155.

The word "representative" as used in clause (c), sec. 244 of the Code of Civil Procedure, means any person who succeeds to the right of any of the parties to the suit after the decree is passed. A Hindu widow mortgaged certain properties, and afterwards by an *ekrarnamah* made them over to B, the next heir. The *ekrarnamah* contained a condition, that B was to be liable for the widow's debts. Subsequently the mortgagee brought a suit against the widow on the mortgage, and joined B as a party, on the ground that he was in possession of the mortgaged properties. That suit resulted in a money-decree being passed on appeal by the High Court against the widow personally, the property in the hands of B being held not to be liable. The case was taken on appeal to the Privy Council, and pending the hearing of that appeal the widow died, and B was brought on the record as her legal representative. The decree of the High Court was ultimately



confirmed by the Privy Council. In execution of the decree it was sought to make B liable to satisfy the amount out of the properties which he had obtained under the *ekrarnamah*, the mortgagee not having been aware of the conditions of the document before the decree of the High Court:—*Held* that, so far as these properties were concerned, he was not the legal representative of the widow, as he inherited them as heir-at-law of her husband, and that his title to them under the *ekrarnamah* was not that of a “representative” within the meaning of clause (c) of sec. 244. *Held*, further, that the question of B’s liability under the *ekrarnamah* did not fall within the scope of the provisions of clause (c) of sec. 244 as being a question to be decided between the “parties” to the suit, as although B was a party to the suit, the only claim against him was that the property in his hands was liable, as having been previously hypothecated, and as the suit was dismissed so far as that claim was concerned, it was not a question relating to the execution of the decree.—12 Cal. 458.

In execution of a decree by R S, another creditor claimed a rateable share of the proceeds realized. His claim was rejected. Pending an application to the High Court under sec. 622 of the Civil Procedure Code to set aside this order, the share claimed by S was detained in Court at his request. The High Court rejected the application of S, and R took out execution for the costs incurred therein and for interest on the sum detained in Court at the request of S.—*Held* that the interest could not be awarded to R in execution of the decree for costs.—8 Madr. 494.

In 1879, D obtained a decree against S. S gave security for the satisfaction of the decree, whereupon D agreed not to take proceedings in execution. In breach of this agreement, D in the same year applied for execution, and sold certain immoveable property belonging to S, of which K became the purchaser. K did not apply for possession until 1883, in which year he applied for and obtained possession of the property. S alleged that he then for the first time became aware of the sale, and that by the fraud of D and K he had been kept in ignorance of the execution-proceedings taken by D in breach of the above-mentioned agreement, and within thirty days after K obtained possession, he (S) applied for a reversal of the orders which had been passed in the aforesaid fraudulent proceedings. The Subordinate Judge held that the application was barred by article 166 of Schedule II of the Limitation Act, (XV of 1877), and referred the applicant to a separate suit to set aside the sale. On application to the High Court:—*Held* that a separate suit would not lie, and that the relief sought by S could only be obtained, at all events as against D, by an application under sec. 244 of the Civil Procedure Code (Act XIV of 1882). *Held* also that art. 166 of sch. 2 of the Limitation Act (XV of 1877) did not apply. That article, as amended by sec. 108 of Act XII of 1879, only applies to applications made under sec. 311 or sec. 294 of the Civil Procedure Code seeking to set aside the sale on the ground of a material irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court.—9 Bom. 468.

In a suit for partition a compromise was entered into by all the parties except S, and a decree obtained on the terms thereof. In execution S was dispossessed, and presented a petition to the Court, objecting that the decree was not binding on her. The petition was rejected. *Held* that the objection raised by S ought to have been investigated under sec. 244 of the Code of Civil Procedure, and that S was entitled to appeal against order rejecting the petition.—8 Madr. 473.

The Court has power to award to a successful appellant interest upon an amount found on appeal to have been improperly levied in execution of a decree.—9 Madr. 506.

G instituted a suit against H, C, and P, which was dismissed with costs, but an appeal was preferred. Pending the appeal, however, C took out execution of the decree for costs, and brought to sale a house belonging to G, of which H became the purchaser, paid the purchase-money, and got possession. Subsequently the decision dismissing the suit was reversed on appeal, and the defendants in that suit were ordered to pay a certain sum to G with costs. G then applied for restitution of her house which had been sold under the decree reversed, and eventually obtained an unconditional order for possession—H being left to any remedy open to him in respect of the purchase-money. G having obtained possession of the house, H brought a suit against her to recover the purchase money. *Held*, that notwithstanding sec. 244 of the Civil Procedure Code he was entitled in this suit to recover the purchase-money, as money received to his use, the consideration for it having failed. H was not, in his character as an auction-purchaser, a party to the execution-proceedings, and for the purpose of the suit was to be treated as a third person.—13 Cal. 326.

The parties to a suit agreed upon a compromise, the result of which was that the plaintiff obtained by the decree a greater quantity of land than he had originally claimed, and a decree was drawn up in accordance with the compromise. In the execution-proceedings, the defendant raised an objection that the plaintiff could not have execution for a greater quantity of land than he had claimed originally, and the Court executing the decree allowed the objection. No appeal from the Court's order was made, but the plaintiff brought a suit to recover possession of the larger amount of land mentioned in the compromise. *Held* that the order of the Court executing the decree was erroneous in law, and might properly be reconsidered upon an application for review; but that the present suit came within sec. 244 of the Civil Procedure Code, and, therefore, could not be maintained.—9 Al. 229.

R. having obtained a decree for money against K, the karnavan of the defendants, K died, and the defendants were made parties to the suit as representatives of K. Tarwad property was then attached by R, and the defendants having objected, the Court raised the attachment. R sued for a declaration that the property released was liable to be sold. *Held*, that the suit was barred by sec. 244 of the Code of Civil Procedure.—10 Madr. 117.

A mortgagor obtained a decree for redemption on payment of the mortgage amount, together with a further sum assessed as the value of improvements made by the mortgagee. When the decree-holder applied for the execution of the decree, it was contended on behalf of the mortgagee that the improvements ought to be revalued, as they were, at the time of execution, of more value than at the date of the decree:—*Held*, that the mortgagee was entitled to revaluation in the execution-proceedings.—10 Madr. 367.

A landlord sued his tenant for arrears of rent, and obtained a decree for a certain amount, and a declaration that, if the amount were not paid within fifteen days, the tenant should be ejected under sec. 52, Act VIII of 1869. The amount was not paid, and the landlord executed the decree and obtained possession. The tenant appealed, and succeeded in getting the decree set aside, and the amount found due from him for arrears by

the first Court was reduced, and a decree made directing that if the reduced amount were not paid within fifteen days he should be ejected. He paid the amount found due by the Appellate Court within the fifteen days, and recovered possession of his holding. He then brought a suit in the Munsiff's Court to recover mesne-profits from his landlord for the time he was in possession after the execution of the first Court's decree. It was contended on second appeal that the suit would not lie, as the matter might and should have been determined in the execution department under sec. 244 of the Civil Procedure Code. *Held*, that, as the suit was instituted in the Munsiff's Court, and the Munsiff under the circumstances of the case was the officer who, in the first instance, would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Munsiff, which he did not possess, and that upon the authority of the decision in *Purmessuree Pershad Narain Singh v. Jankee Kooer* (19 W. R., 90) this could not be made a ground of objection on appeal. *Held*, also, that, the point being one that was not raised in the pleadings or before either of the lower Courts, and being a point which went exclusively to the jurisdiction of the Court, it could not be raised on second appeal. *Quære*.—Whether such a suit does not lie, and whether the decisions in *Lati Kooer v. Sahodra Kooer*. (2 C. L. R., 75) and analogous cases to the effect that such a suit does not lie, are correct. *Ram Ghulam v. Dwarka Rai* (I. L. R., 7 Al. 170) cited and approved.—14 Cal. 605.

S S brought a suit under a mortgage-bond, making R S, a subsequent incumbrancer, a defendant, and obtained a decree for a sale of the whole of the mortgaged premises. After the decree a compromise was effected between all the parties *with the exception* of R S, by the terms of which, in consideration of the judgment-debtors (mortgagors) undertaking to do certain acts, S S promised to execute his decree against only a 3 annas 12 dams share of the mortgaged premises. The judgment-debtors (mortgagors) having failed to carry out the compromise, S S applied for a sale of the whole of the mortgaged premises, but on the petition of R S setting out the terms of the compromise to which he was no party, the Subordinate Judge, by an order of the 7th September 1885, held that under the agreement S S was entitled to sell only a 3 annas 12 dams share of the mortgaged premises, which was accordingly directed to be sold. That order was not appealed against, but subsequently in March 1886, S S made a fresh application for a sale of the remainder of the premises, R S objecting. *Held* that the order of the 7th September was one which the Courts was competent to make under sec. 244 of the Code of Civil Procedure, and by reason of that order not being appealed it became final.—14 Cal. 640.

Where questions are raised between the parties to a decree relating to its execution, discharge, or satisfaction, the fact that the purchaser at a judicial sale, who is no party to the decree of which the execution is in question, is interested and concerned in the result has never been held to prevent the application of sec. 244 of the Civil Procedure Code, limiting the disposal of these matters to the Court executing the decree. The plaintiffs in a suit to have the judicial sale of a zemindari set aside alleged that the decree-holder, in part satisfaction of his decree, had received, from them and other co-sharers in the zemindari, their proportionate amounts of the debt decreed, and had agreed that their shares should be exempt from the execution sale about to take place: that the sale took place, subject to that exemption: that the decree-holder, however, with whom some of the co-sharers and the purchasers colluded, fraudulently had the sale set aside,

revived the attachment, and caused a second sale, at which all the shares in the zemindari were sold. *Held*, that the question, besides that the charge of fraud was not sufficiently specific, was determinable, in virtue of sec. 244 of the Code of Civil Procedure, only by order of the Court executing the decree.—19 Cal. 683.

An order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*—6 Cal. 203.

An order directing an account is not an order in the nature of a final decree, and is unappealable ; such an order merely directs certain proceedings to be taken, in order that a final decree may thereafter be made.—9 Cal. 773.

A suit for the recovery of money paid to a judgment-creditor out of Court in satisfaction of a decree, but not certified, is barred by sec. 244 (c) of Act X of 1877 and by the last paragraph of sec. 258 as amended by Act XII of 1879.—6 Bom. 146.

There is no appeal against an order made under Act X of 1877, sec. 244, determining questions between the parties to a suit as to the amount of mesne-profits recovered by the plaintiff subsequently to the decree, and as to the amount payable on account of the costs of execution of that decree.—2 Bom. 553.

There is no appeal against an order under sec. 244 of Act X of 1877, granting an application for the sale of certain property, to satisfy a sum which, in the course of execution proceedings has been found to be due to the applicant for mesne-profits.—5 Cal. 50.

Moneys realized as due under a decree, if unduly realized, are recoverable by application to the Court executing the decree, and not by separate suit. The opinion of STUART, C. J., in the *Agra Savings Bank v. Sri Ram Mitter* (1 L. R., 1 Al. 388) differed from. *Haramohini Chaudhrai v. Dhonmani Chaudrai* (1 B. L. R., (A. C.) 193) and *Ekauri Singh v. Baij Nath Chattapadhyaya* (4 B. L. R., (A. C.) 111) distinguished.—2 Al. 61 ; 2 *Agra H. C. R.*, 45.

In a suit to recover possession of land, the defendants resisted execution, on the ground that they were cultivators, and that the decree only authorized the plaintiff to recover possession as proprietor. The objection was overruled, and the defendants were ejected. They then sued to set aside the order made in the execution-proceedings and to recover possession. *Held* that the suit was barred under sec. 244, cl. (c), of the Civil Procedure Code.—9 Cal. 872 ; 12 C. L. R., 571.

A judgment-debtor, who claims to have a sale of his land to set aside on the ground of fraud committed by the judgment-creditor, who procured a sale without advertisement, and purchased the property without leave of the Court, is debarred from bringing a suit to set aside the sale, inasmuch as the question is one arising between the parties to the suit, and relates to the execution of the decree within the meaning of sec. 244.—5 *Madr.* 217.

The holder of a decree against a firm caused certain property to be attached in execution of the decree as the property of the firm. One of the partners in the firm objected to the attachment, on the ground that such property was not the property of the firm, but was his private property. The Court disallowed the objection, whereupon such partner appealed from the order disallowing this objection. *Held* that such order was not one under sec. 244 (c) of Act X of 1877, but under sec. 281, and was therefore not appealable.—4 Al. 190.

A decree-holder, having assigned a share of her decree, applied several times jointly with such assignee for execution. On a subsequent application made by the original decree-holder alone, the Court, while granting the application, directed that the proceeds arising from such execution should only be paid over to the co-decree holders jointly. *Held* that the question in dispute being one between co-decree-holders, and not between parties to the suit or their representatives, as contemplated, by Act X of 1877, sec. 244, art. (c), no appeal would lie from such order.—5 Cal. 592.

An order for attachment and sale of property in execution of a decree is an order "of the same nature with" an order made in the course of a suit for attachment of the debtor's property. The latter order is appealable under sec. 588, cl. r, of the Code of Civil Procedure. It follows that an order for attachment and sale in execution of a decree is (according to the requirement of sec. 588, cl. j) "of the same nature with appealable orders made in the course of a suit," and therefore is appealable under that section.—8 Cal. 28.

Where an application was made for the issue of execution of decree, and the District Munsif made an order refusing execution, the decree being one passed not in a regular suit, and governed by the one-year limitation, and the Subordinate Judge on appeal reversed the Munsif's order, applying the three years' limitation, *held* by the High Court that, as Act X of 1877, sec. 588, provided that orders passed in appeal from orders under sec. 244 should be final, no second appeal lay, and that the High Court could not interfere under sec. 622, as the Subordinate Judge has jurisdiction to hear the appeal.—1 Madr. 401.

Where a plaintiff, in bringing a suit for possession and for mesne-profits, approximately estimates the amount of such mesne-profits at a certain sum, and obtains a decree which leaves the amount due as mesne-profits to be ascertained in execution, he is not bound down to the amount claimed in his plaint, but if more is found due to him, he is entitled, on payment of further court-fees, to recover the larger amount so found due. *Baboojan Jha v. Byjnath Dutt Jha* (I. L. R., 6 Cal. 474) distinguished. A Court, in execution-proceedings, cannot look behind the decree when the decree does not limit the amount of *wasilat* to be awarded.—8 Cal. 295.

By a decree in an administration-suit, A was appointed Receiver to manage the estate. A died, and by a subsequent order B was appointed Receiver. One of the defendants in the suit applied to have B removed from the office of Receiver, on the ground of his alleged mis-management of the estate. The application was refused. *Held* that the order of refusal was appealable, whether the former Code or the present Code of Civil Procedure was deemed to be applicable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree.—5 Bom. 45.

A decree enforcing a first mortgage of certain property not being satisfied, the property was sold in execution of a decree of a later date enforcing a second mortgage of the property. *Per* STUART, C. J.—That the decree enforcing the first mortgage could not be executed against the property, but the holder of such decree was bound to bring a fresh suit against the purchaser of the property to enforce his decree. *Per* STRAIGHT, BRODBURST, and TYRRELL, JJ.—That a fresh suit was the most convenient and expeditious remedy. *Per* OLDFIELD, J.—That the purchaser not being the "representative" of the judgment-debtor within the meaning of sec. 244 (c) of the Civil Procedure Code, the holder of such decree must bring a fresh suit to enforce it.—5 Al. 452.



In 1875 a decree was passed against N as representative of L, who died pending the suit, declaring N liable to the extent of the assets of L which might have come to the hands of N. In 1879 the decree-holder applied for execution of the decree, and, without proof that any of the assets of L had come to the hands of N, obtained an order, and attached lands belonging to N. N objected to the attachment, but the Munsif, without investigation, rejected his claim, and directed N to bring a regular suit. The land was sold and purchased by A B. N, after an abortive attempt to obtain a review of the Munsif's order from his successor, brought a suit in 1880 against the decree-holder and A B to recover the land. *Held* that, as N was a party to the former suit within the meaning of sec. 244 of the Civil Procedure Code, 1877, the suit would not lie.—5 Madr. 391.

On appeal from an order allowing an application by the legal representative of a deceased decree-holder for execution, the Appellate Court, holding that the applicant must obtain a certificate under Act XXVII of 1860 before he could take out execution of the decree, made an order directing that execution of the decree should be stayed until the applicant had obtained such certificate. *Held* that such order fell under sec. 244 of the Civil Procedure Code, and was therefore appealable. Also, following the principle enunciated in *Lachmin v. Ganga Prasad* (I. L. R., 4 Al. 485), that the possession of a certificate under Act XXVII of 1860 was not “an imperative condition precedent to the institution” of execution-proceedings by the representative of a deceased decree-holder; but that, where the judgment-debtor objects to the title of the person claiming to execute the decree, the Court should consider whether the objection is vexatiously raised or is a *bona fide* one.—5 Al. 212.

A suit will not lie upon a decree the execution of which is barred by the provisions of the Limitation Act. A suit may be brought in the High Court of Bombay upon a judgment obtained in the Court of Small Causes of Bombay. The execution of the decrees in such suits is rigorously confined to immoveable estates. The ground of the interference of the High Court in such cases is that, practically, the judgment-creditor could not recover his debt except by process against the immoveable estate of the debtor. In such cases the plaint must contain an averment, and the plaintiff must establish, to the satisfaction of the High Court, that there is not any sufficient moveable property of the defendant against which the decree of the Court of Small Causes can be fully executed, and that he has immoveable property situated within the original jurisdiction of the High Court against which execution can be had. *Moonshi Golam Arah v. Curreem Bux Shaikji* (I. L. R., 5 Cal. 294) referred to.—6 Bom. 7.

M, who held a decree against S for possession of certain immoveable property and costs, assigned such decree to S by way of sale, agreeing to deliver the same to him on payment of the balance of the purchase-money. He subsequently applied for execution of the decree against S claiming the costs which it awarded. S thereupon paid the amount of such costs into Court, and, having obtained stay of execution, sued M for such decree, claiming by virtue of such assignment. The lower Court held that the suit was barred by the provisions of sec. 244 of Act X of 1877, and also, treating such assignment as an uncertified adjustment of such decree, that it was barred by the terms of the last paragraph of sec. 258 of that Act. *Held* that the suit was not barred by anything in either of those sections. The words “any Court” in the last paragraph of sec. 258 refer to proceedings in execution and to the Court or Courts executing a decree.—3 Al. 533.



S, alleging that a money-decree against him held by G had been adjusted out of Court by a payment in cash and the delivery of certain property, and that M had, notwithstanding such adjustment, applied for execution of such decree, and recovered the amount thereof, as the Court executing such decree had refused to determine whether it had been satisfied on the ground that such adjustment had not been certified, sued M for the money which he had paid him out of Court. *Held* that the suit was not barred by the provisions of sec. 244 of Act X. of 1877 or of sec. 258 of that Act. The last paragraph of sec. 258 means that the Court executing the decree shall not recognize an uncertified payment or adjustment out of Court. It does not prohibit a suit for money paid to a decree-holder out of Court, and the payment of which, not being certified, could not be recognized, and which the decree-holder had not returned, but had misappropriated by taking out execution of the decree a second time, and securing the amount in full through the Court.—3 Al. 538.

A Subordinate Judge admitted a plaint in *forma pauperis*, but, holding that he had no jurisdiction to try the suit, returned the plaint to the plaintiff for its presentation in the proper Court, and ordered each party to pay his own costs. After the presentation of the plaint in another Court, and before the termination of the suit, the Collector applied to the Subordinate Judge for execution of the order as to costs by seeking to recover the amount of the stamp-duty from the plaintiff. The Subordinate Judge refused to execute the order, on the ground that the pauper-suit was still pending in another Court. His order was affirmed by the District Judge in appeal. On second appeal to the High Court, *held* that there was no appeal, and, therefore, no second appeal, under sec. 244, cl. c, of the Civil Procedure Code (Act X of 1877), against the order of the Subordinate Judge refusing execution of the order as to costs, inasmuch as the question was not between the parties to the suit. *Held* further that, under sec. 412 of Act X of 1877, the Subordinate Judge had no jurisdiction to make the order for payment of court-fees by the plaintiff. The High Court accordingly, in the exercise of their extraordinary jurisdiction, annulled the Subordinate Judge's order about costs, and all the subsequent proceedings consequent upon that order.—6 Bom. 590.

Certain persons, claiming by right of inheritance to C, sued B, N, A, K, and others for possession of certain immoveable property, and obtained a decree, dated in August 1876, for possession of the same. In the course of the litigation which ended in that decree Z purchased certain immoveable property from B, N, A, and K. Z was subsequently dispossessed of such property in execution of the decree of August 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited the same from D, that it was not affected by that decree, and that he had been improperly dispossessed of it in execution of that decree. *Held* by the Court that, the plaintiff not being the representative of any of the parties to the suit in which that decree was passed, in the sense of sec. 244 of the Civil Procedure Code, but being, if his allegations were true, a purchaser from certain of the judgment-debtors of property not affected by that decree, the suit was not barred by the provisions of that section.—Partab Singh v. Beni Ram (I. L. R., 2 Al. 61) distinguished. Observations by Stuart, C.J., on his judgment in the Agra Savings' Bank v. Sri Ram Mitter (I. L. R., 1 Al. 388), and on the judgment of the Full Bench in Partab Singh v. Beni Ram (I. L. R., 2 Al. 61) referring to the judgment.—5 Al. 94.

In execution of a decree on a mortgage-bond executed by the father

of the judgment debtors, since deceased—which decree directed that the mortgage-lien should be enforced, *first*, by sale of the property specially mortgaged; and, *secondly*, if the debt remained unsatisfied, by the sale of the other property in the possession of the judgment-debtors—the judgment-creditors proceeded to have the mortgaged property sold. After the issue of the sale-notification, and three days prior to the date fixed for the sale, one of the judgment-debtors applied to have the sale stayed, on the ground that an administration-suit was pending with respect to the property of his father, the mortgagor, and also asked that a receiver might be appointed and arrangements made for the purpose of paying off the mortgage-debt and saving the property from being sold. On this application the Court passed an order staying the sale. *Held* that such order was appealable, being a question arising between the parties to the suit in which the decree was passed, and relating to the execution of that decree, and as such coming within the provision of cl. c, sec. 244, Act X of 1877 (Civil Procedure Code). *Held* also that the Court was wrong in passing such order, inasmuch as there were no reasonable grounds why a secured creditor should be debarred from enforcing his security pending the administration-suit.—7 Cal. 733.

One Khelut Chunder was entitled to a share in Pargana Alumpore. Before he obtained possession, Government revenue on the whole estate fell due. Khelut failed to pay his share, and his co-sharer, Kaminee, to save the estate, paid the whole sum due, and subsequently sued Khelut for the amount, eventually obtaining a decree. Subsequently this decree became vested in one Rutnessur, and the Pargana Alumpore came into the possession of Kaliprosono Ghose. Rutnessur obtained an order for execution against the property of Khelut, and, having transferred his decree to the High Court, proceeded to enforce the decree against Kristo Mohinee, the widow of Khelut, and her son, by attaching the family dwelling-house in Calcutta. The widow and son then brought this suit against Kaliprosono to have the share of Khelut in Alumpore ascertained, and praying for a decree calling upon Kaliprosono to pay the amount of the value of the share of Alumpore in satisfaction of Rutnessur's decree. *Held* that the suit could not be maintained so far as it attempted to make the decree a charge against Alumpore. Questions as to part satisfaction of a decree cannot, according to cl. c. sec. 244 of Act X of 1877, be raised in a separate suit. That section alludes to parties to the decree or their representatives; but it is not on that account open to a plaintiff to evade the section by adding an unnecessary party to the suit. *Held* on appeal that the suit was rightly dismissed; that, as far as Rutnessur was concerned, it had already been decided that Rutnessur was entitled, if he so chose, to execute his decree against the Calcutta property; and that, therefore, that question was *res judicata*; and that, as regards the plaintiff's claim that the patni given by Kaliprosono to Hurry Churn should be treated as part-payment to Rutnessur, such a question could only be decided in execution-proceedings. That the mere existence of the agreement between Kaliprosono, Rutnessur, and Hurry Churn did not entitle the plaintiff to join them as co-defendants in the suit. That, as far as Kaliprosono was concerned, the suit brought against him could only be treated as a suit to establish a charge or lien on land out of Calcutta, and therefore the Court had no jurisdiction to try it.—8 Cal. 402.

On an application for execution for the full amount due under a decree by some of several joint decree-holders, the judgment-debtor objected to

execution being granted for the full amount of the decree, on the ground that he had already paid off a large portion of the money due under the decree to B, one of the joint decree-holders. The payment was made out of Court, but B, who claimed to be entitled to a  $12\frac{1}{2}$ -anna share in the decree, certified the payment in the manner prescribed by sec. 258 of the Civil Procedure Code (Act XIV of 1882), and represented that his claim had been satisfied in full. The other joint decree-holders denied B's right to the  $12\frac{1}{2}$ -anna share claimed by him, and refused to recognise the payment said to have been made to him. The lower Court disallowed the objection, and granted execution for the full amount of the decree. *Held* that, regard being had to the provisions of the General Clauses Act (I of 1868), the word "decree-holder" in sec. 258 of Act XIV of 1882 should be read in the plural, and looking at the provisions of sec. 231 of the latter Act, the Court ought not to recognise payments made out of Court, unless made and certified for the benefit of all the joint decree-holders of any portion of the decree in excess of that to which the decree-holder so paid is undisputedly entitled. *Held* also that a judgment-debtor is entitled to credit for any sum paid *bona fide* to one of several joint decree-holders, and duly certified to the Court by the latter, and that the other joint decree-holders cannot execute the decree for more than their own share. *Held* further that in this case the lower Court was wrong in wholly ignoring the payment certified by the decree-holder B, and that it should have determined, *first*, whether the payment to B was a fraud on the other joint decree-holders; and, *secondly*, what amount the latter were entitled to have out of the whole decree, the latter being the main question between the applicants for execution and the judgment-debtor, and as such clearly within the scope of sec. 244 of the Civil Procedure Code. See *Ranee Nyna Kooer v. Doolee Chund* (22 W. R., 77), *Brojeswari Chowdhranee v. Tripoora Soondere Debi* (3 C. L. R., 513), and *Mahima Chandra Roy v. Pyari Mohan Chowdhry* (2 B. L. R., App. 43).—9 Cal. 831.

An objection to the attachment of property attached in execution of a decree was allowed, the decree-holder being ordered to pay the costs of the objector. The decree-holder thereupon brought a suit to contest the order allowing the objection. He did not seek in this suit relief in respect of the costs. He obtained a decree setting aside the order allowing the objection. He then applied to the Court which had made the order to order a refund of the amount of the costs which had been paid to the objector. *Held* that the application being regarded as one with regard to a portion of an order made under sec. 280 of the Civil Procedure Code, the Court was *functus* in the matter, and could not make or enforce such an order as was sought for; and that its order disallowing the application was not appealable, as it was not one made under sec. 244, and if taken to be one passed with reference to sec. 280, an appeal was barred by sec. 283.—6 Al. 21.

A suit for money having been brought against the holder of an impartible zemindari, a decree was passed in 1867 by consent to the effect that the zemindar undertook to pay a certain sum by yearly instalments and hypothecated certain land as security. A memorandum of this decree was registered under sec. 42 of Act XX of 1866. The last instalment fell due in February 1870. The decree was kept alive against the zemindar up to his death in 1873. Upon the death of the zemindar proceedings in execution were taken against his son, who succeeded to the zemindari, but were set aside on appeal. In January 1882, a suit was brought against the son to recover the amount of the last instalment due by this father

under the decree of 1867 :—*Held* that the suit was neither barred by the provisions of sec. 244 of the Code of Civil Procedure, nor by limitation.—7 *Madr.* 328.

A judgment-debtor sued the decree-holder for recovery of possession of certain land which had been sold in execution of the decree, and to set aside the sale on the ground that the land was not liable, under sec. 9 of the N.-W. P. Rent Act, to sale in execution of decree. *Held* that the question at issue between the parties was clearly one relating to the executing and satisfaction of the decree, and that the suit was therefore barred by the provisions of sec. 244 of the Civil Procedure Code.—6 *Al.* 393.

A plaintiff, alleging that her husband (deceased) had advanced money on the security of land belonging to a family of four Hindus, sued them to enforce his lien and obtained a decree. The representatives of one of the defendants only appealed, and the decree was reversed as regarded them. The decree was executed as against the other defendants by the attachment and sale of their shares of the land, and the plaintiff became the purchaser. The successful appellants obstructed her in her attempts to obtain possession, and she now sued them for partition of the three-quarters share purchased by her :—*Held*, that the suit was not precluded by Civil Procedure Code, sec. 244.—15 *Madr.* 226.

A judgment-debtor, alleging that he had entered into an agreement with the decree-holder in satisfaction of his decree, and that the latter had, in breach of such agreement, procured the issue of a warrant of attachment, now sued for a declaration that the decree had been satisfied, and prayed also for the cancellation of the warrant of attachment :—*Held*, that the suit was not maintainable.—15 *Madr.* 302.

A judgment-debtor, alleging that his right as occupancy-tenant of certain land had been sold in execution of the decree, sued the decree-holder and the auction-purchaser to set aside the sale as illegal under sec. 9 of the N.-W. P. Rent Act. The Court of first instance decreed the claim, and ordered the defendant-decree-holder to refund the purchase-money. *Held* that, as between the defendant-decree-holder and the plaintiff, the question at issue was one arising between the parties to the suit in which the decree was passed, and relating to the execution, discharge, or satisfaction of the decree, and was therefore, under sec. 244 of the Civil Procedure Code, to be determined by the Court executing the decree, and not by separate suit. *Janki Singh v. Ablakh Singh*, (I. L. R., 6 *Al.* 393) followed. *Held* also that, apart from this consideration, it was beyond the lower Court's power to make an order directing the decree-holder to refund the purchase-money, that being a matter between two co-defendant which was not raised, and could not be decided, in the present suit.—6 *Al.* 448.

Where a judgment-debtor, pending the execution proceedings, was granted permission to examine the state of the accounts, but failed to do so, and then made a fresh application to the Court for the same purpose after the execution proceedings had been struck off, and the decree declared to be satisfied : *Held*, that the question must be determined with reference to the provisions of sec. 647 of the Civil Procedure Code, and the only course open to the judgment-debtor would have been to apply for a review of the order which declared the decree to be satisfied and struck off the execution proceedings : *Held*, also, that the words, "the following questions shall be determined by order of the Court executing the decree," of sec. 244 of the Code of Civil Procedure, must be interpreted to mean the Court executing the decree at the time when the application is made, and that they do

not include the Court which has executed the decree and has, therefore, become *functus officio*.—10 Cal. 538.

An order passed on appeal by a High Court determining a question mentioned in sec. 244 of Act X of 1877 is a final “decree” within the meaning of sec. 595 of that Act. *Held*, therefore, where such an order involved a claim or question relating to property of the value of upwards of ten thousand rupees, and reversed the decisions of the lower Courts, that, notwithstanding the value of the subject-matter of the suit in which the decree was made in the Court of first instance was less than that amount, such order was appealable to Her Majesty in Council.—3 Al. 633.

See 8 Cal. 477, 10 Cal. 410, 18 Cal. 469 and 13 Al. 290, noted under sec. 2; 6 Cal. 786 and 14 Madr. 99, noted under sec. 258; 6 Cal. 777, 17 Cal. 57, noted under sec. 13; 8 Bom. 287, noted under sec. 3; 7 Madr. 255, noted under sec. 234; 7 Cal. 403, noted under sec. 278; 9 Al. 46, noted under sec. 232; 9 Al. 64, noted under sec. 411; 15 Cal. 371 and 11 Bom. 506, noted under sec. 232; 12 Bom. 279, noted under sec. 545; 12 Al. 61 and 14 Al. 420, noted under sec. 87 of the Transfer of Property Act; 17 Cal. 968, noted under sec. 211; 12 Al. 313, noted under sec. 234; 10 Al. 354, noted under sec. 214; 14 Al. 210 and 16 Bom. 91, noted under sec. 295.

### *E.—Of the Mode of executing Decrees.*

**245.** The Court, on receiving an application for the execution of a decree, shall ascertain whether such of the requirements of sections 235, 236, 237, and 238, as may be applicable to the case, have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow it to be amended then and there, or within a time fixed by the Court. If the application be not so amended, it shall be rejected.

Every amendment made under this section shall be attested by the signature of the Judge.

When the application is admitted, the Court shall enter in the register of the suit a note of the application and the date on which it was made, and shall order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for money, the value of the property attached shall, as nearly as may be, correspond with the amount for which the decree has been made.

### **Notes.**

This section applies to Provincial Small Cause Courts.

Sec. 15, Act XXIII. of 1861 (Act VIII. of 1859, sec. 215), did not make essential that the decree itself should be filed, but only required certain particulars specified in sec. 212, Act VIII. of 1859, on which the Judge is empowered to pass orders for execution.—4 W. R., Mis., 16.

Sec. 15, Act XXIII. of 1861, did not authorise a Judge to reject an application for the execution of a decree on the ground of an irregularity in



form. Where the application is irregular, the Judge should either return it immediately to the applicant for correction, or with his consent cause the necessary correction to be made.—6 W. R., Mis., 15.

Under sec. 15, Act XXIII. of 1861, if an application for execution corresponds with the terms of a decree, it should be admitted. If the decree needs correction, the Court executing cannot correct it; but it is for the defendant to apply to the Court which made the decree.—8 W. R., 277.

On the 9th of April 1880, A applied for execution of a decree, which he had obtained against B. On the 20th of April 1880, the Judge of the Court, under the provisions of sec. 245 of the Code of Civil Procedure, ordered the application to be amended within seven days. This order was disobeyed, but no order rejecting the application was asked for or passed. On the 11th of May 1880, the applicant prayed leave to make the amendment, which prayer was granted. *Held* that the order of the 11th of May 1880, granting leave to amend, was not *ultra vires* of the Judge, under the provisions of sec. 245 of the Code of Civil Procedure.—I. L. R., 8 Cal. 479.

See also 3 B. L. R., (A. C.) 413, and 12 W. R., 329.

See 14 Cal. 124, noted under section 237; 17 Cal. 631, noted under section 230.

**245A.\*** Notwithstanding anything in the last foregoing section or in any other section of this Code, the Court shall not order the arrest or imprisonment of a woman in execution of a decree for money.

Prohibition of arrest or imprisonment of woman in execution of decree for money.

**Note.**—This section applies to Provincial Small Cause Courts.

**245B.\*** (1) Notwithstanding anything in section 245 or in any other section of this Code, when an application is for the execution of a decree for money by the arrest and imprisonment of a judgment-debtor who is

Discretionary power to permit other judgment-debtors to show cause against imprisonment.

liable to be arrested in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice, and show cause why he should not be committed to jail in execution of the decree.

(2) If appearance is not made in obedience to the notice, the Court shall not, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

**Note.**—This section applies to Provincial Small Cause Courts.

**246.** If cross-decrees between the same parties for the payment of money be produced to the Court, execution shall be taken out only

Cross decrees.

by the party who holds a decree for the larger sum, and for so much only as remains after deducting the smaller sum, and

\* These two sections have been inserted by the Debtors' Act (VI of 1888), sec. 2.



satisfaction for the smaller a sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

If the two sums be equal, satisfaction shall be entered upon both decrees.

*Explanation I.*—The decrees contemplated by this section are decrees capable of execution at the same time and by the same Court.

*Explanation II.*—This section applies where either party is an assignee of one of the decrees, and as well in respect of judgment debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

*Explanation III.*—This section does not apply, unless—  
the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other, and each party fills the same character in both suits; and  
the sums due under the decrees are definite.

*Illustrations.*

(a) A holds a decree against B for Rs. 1,000. B holds a decree against A for the payment of Rupees 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this section.

(b) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this section.

(c) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this section.

**Notes.**

This section applies to Provincial Small Cause Courts.

The purchaser of a decree held by A, against whom B holds a cross-decree, takes it subject to a set-off on account of B's decree.—1 B. L. R., (F. B.) 23; 10 W. R., 450; 6 W. R., Mis., 73; 18 W. R., 442; 19 W. R., 85; 21 W. R., 141.

A, by deed of zuripeshgi, let certain lands to B to secure a sum advanced by him to her, and interest thereon. B covenanted to pay certain dues annually to A. On failure by B, A obtained a decree against him for the amount. In execution of a decree against B, C purchased his interest in the sum secured by the deed of zuripeshgi, and sued A to recover the same. *Held* that A was entitled in such suit to set off the amount of the decree obtained by her against B.—2 B. L. R., (A. C.) 84; 10 W. R., 380.

Where there were cross-decrees, and one of the decree-holders was, by an order of the Court made with the consent of both parties, bound, in executing his decree, to set-off the amount of the decree against him, *held* that it would be inequitable to allow the other decree-holder to obtain execution in full without setting off the amount decreed against him. A de-

cree cannot be executed, nor can it be seized and sold, in portions.—3 B.L. R., (A. C.) 114; 11 W. R., 488.

The purchaser of a decree sought to execute the decree, but was opposed by the judgment-debtor, who sought to set-off two other decrees, obtained by herself and her sisters, against the judgment-creditor. These decrees were obtained about the date of the purchase, but it did not appear whether previously or subsequently. *Held*, in neither case could they be the subject of set-off.—6 B. L. R., App. 125; 15 W. R., 127.

The plaintiffs obtained a decree against B in the Subordinate Judge's Court. Some time afterwards B recovered a decree in the Munsif's Court against the plaintiffs. The plaintiffs thereupon applied for the attachment of this decree in satisfaction of their own against B. Before attachment, however, B assigned her decree to C. On C trying to execute B's decree against the plaintiffs, they brought the present suit for a declaration of their right to have a set-off made of the two decrees. *Held* that such a suit would not lie.—13 B. L. R., 489; 22 W. R., 235.

Act VIII of 1859, sec. 209, which provides for the set-off of cross-decrees, applies only to decrees of the same Court, or decrees sent to a Court for execution. Therefore, when on application for execution of a decree in the Court of a principal Sadr Amin, it was sought to set-off a decree obtained in the Judge's Court, which had not been sent to the Principal Sadr Amin for execution, *held* that sec. 209, Act VIII of 1859, did not apply. Question referred, not answered, on the ground that it did not arise in the case.—B. L. R., Sup. Vol., 503; 6 W. R., Mis., 72.

The statement of a party to a suit is admissible original evidence against him to prove the contents of a written instrument. In a suit to recover balance of rent due, the defendant pleaded the pendency of a suit, brought by him in the District Munsif's Court against the plaintiff for damages for illegal dispossession, and that he had given credit against the amount of damages for the balance of rent due. *Held* that the pendency of the suit in the District Munsif's Court was not a bar to the present suit, but that it was open to the Court in its discretion to postpone the hearing of the present suit until the District Munsif had given his decision.—3 M. H. C. R., 158.

Before cross-decrees can be set-off the one against the other, it is necessary that they should be in the same Court for execution.—3 N.-W. P. H. C. R., 104; 16 W. R., 303.

*Held* that, according to the true construction of sec. 246 of Act X of 1877, a purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross-judgment of a higher amount such as would have rendered the order for execution incorrect. If the Court has jurisdiction, such purchaser is no more bound to inquire into the correctness of an order for execution, than he is as to the correctness of the judgment upon which execution issues.—L.R., 13 I.A. 106; I.L.R., 14 Cal. 18.

Where a decree for the plaintiff has been obtained in a suit, and a cross-suit is pending, the Court will not stay proceedings in execution of the first suit, or order the proceeds of that decree to be paid into Court to abide the result of the second.—1 Ind. Jur., N. S., 330.

In order to admit of a set-off being made when there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite.—5 W. R., Mis. 12.

Where execution of A's decree against B was stayed pending the passing of a decree in B's cross-suit, *held* that no subsequent purchase of B's rights and interests in his cross-suit could be set up as a bar to A's rights to attach the whole of the decree in the cross-suit, in execution of his decree against B.—7 W. R., 219.

Where a cross-decrees had been obtained, and one of them had been assigned, in a suit by the other decree-holder to set aside the assignment as fraudulent, *held* that it was fraudulent, and the right of set-off was unaffected. *Quære*.—Whether, had the assignment been a *bona fide* one, i.e., for a valuable consideration, the assignee would have taken the decree subject to the equities or liabilities of the decree-holder to the judgment-debtor.—7 W. R., 470.

An award of private arbitration *per se* did not come under the provisions of sec. 209 of Act VIII of 1859, so as to be set-off against a decree of Court.—11 W. R., 144.

S had against M in the Rungpore Court a decree for costs which he removed for execution to the Court of Beerbhoom. On this M applied to the latter Court, under sec. 209, Act VIII of 1859, for stay of execution pending the decision of another suit which he had brought against S. *Held* that, on the decision of the other suit, it ought to have been ascertained which party had a decree for the larger sum, and that execution should have been taken out by that party only, and for so much as should remain after deducting the smaller sum, which should have been entered on the decree for the larger sum.—12 W. R., 212.

When a decree in favour of an appellant describes a set of costs as due by the appellant to the respondent, it means, not that any sum should be actually paid to the latter, but that the costs in question should be deducted from the gross amount decreed, and the remainder only recovered under the decree. Sec. 209, Code of Civil Procedure, had no application in such a case.—12 W. R., 308.

Whether the provisions of sec. 209 of the Civil Procedure Code, 1859, were applicable to decrees passed under Act X of 1859.—16 W. R., 303. There is now no distinction in this respect between rent-decrees and other decrees.

If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. Notwithstanding anything in sec. 246 of the Code of Civil Procedure, he is not bound to inquire whether the judgment-debtor holds a cross-decree of higher amount against the decree-holder any more than he is to inquire, in an ordinary case, whether the decree, under which execution has issued, has been satisfied or not. These are questions to be determined by the Court issuing execution. Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bona fide* and for fair value:—*Held* that the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale.—I. L. R., 14 Cal. 18.

Under two decrees of the Sadr Diwani Adalat passed in 1864, A was entitled to two-thirds and B to one-third of certain immoveable property, with mesue-profits in proportion. Each obtained possession of the immoveable property decreed to him. B appealed to the Privy Council

from both decrees in respect of the two-thirds awarded to A. In April 1866, pending the appeal, A applied for an account of the mesne-profits due to him after setting off the mesne-profits due to B, but as he failed to comply with a condition requiring him to give security for the amount claimed, in case the Privy Council should allow B's appeal, the application was struck off. In January 1867, B applied for the mesne-profits of the one-third decreed to him, and the Court found Rs. 18,000 to be the amount so due, but, on application by A, stayed further execution pending the Privy Council's decision. In 1873 the Privy Council dismissed B's appeal. In 1885, A, in execution of the Privy Council's decree, applied for Rupees 50,000 as mesne-profits in respect of the two-thirds. B at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set-off against the amount claimed by A. *Held*, that the question of the amount due to A up to the date when he acquired possession of the two-thirds and which had never been decided, should be reopened from the point at which it was left in 1866; that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to B, satisfaction of A's claim to that extent should be entered up and the balance recovered from B; and that this course, if not strictly in accordance with the letter, was in accordance with the spirit of secs. 246, 247 of the Civil Procedure Code, and at all events, should be allowed on principles of natural equity. *Held*, also that, until the amount due to A had been definitely ascertained in the execution department, B's right to maintain his set-off did not arise; that the set-off was, therefore, not barred by limitation; that the order of January 1867, was equivalent to a decree for the amount declared thereby as due to B; that, when the execution department had determined the amount due to A, that decision also would be a decree, and that sec. 246 of the Code could then be applied.—10 Al. 188.

A judgment-debtor may set-off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons.—9 Cal. 479.

S and two other persons held a decree for costs against M, which did not specify the separate interests of each in the decree, and M held a decree for money against S alone, which he wished to treat as a cross-decree under sec. 246 of Act X of 1877. *Held* that the decree held by S and the other persons was not a decree between the same parties as the parties to the decree held by M, and M's decree could not, be therefore, be treated as a cross-decree under that section.—2 Al. 91.

Sec. 246 of the Civil Procedure Code is applicable to cross-decrees, and not to cross-claims under one decree.—2 Al. 272.

In April 1877, M and S for money, and on the 10th May 1887, S sued M for money, both suits being instituted in the same Court. In the meantime, on the 9th May 1877, B applied for the attachment of the money claimed by M in his suit, and obtained an order prohibiting M from receiving, and S from paying, any sum which might be found in that suit to be due by S to M. On the 23rd June, 1877, M obtained a decree in his suit against S, and S obtained a decree in his suit against M, S's decree being for the larger sum. On the same day, under the provisions of sec. 209 of Act VIII of 1859, satisfaction for the smaller sum was entered on both decrees, and execution taken out of S's decree for so much as remained due. At the same time S objected to B's attachment, but his objection was disallowed. *Held* in a suit by S against B to have the order disallowing his objection set aside, and the property and legality of the

set-off above-mentioned established, regard being had to the provisions of sec. 209 of Act VIII of 1859, that the attaching order of the 9th May could have no operation or effect, and that, even if B had followed up that order, and attached M's decree against S, that step would not have put him in a better position, for the same section being followed, and the decrees being essentially cross decrees, that for the smaller sum became absorbed in the one for the larger, and attachment could not affect it.—2 Al. 866.

Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree, under the provisions of sec. 246 of the Code of Civil Procedure, to plead such decree in answer to an application for execution of the decree against him singly.—14 Al. 339.

See I. L. R., 10 Cal. 817, noted under sec. 239 ; 9 Al. 64, noted under sec. 411.

**247.** When two parties are entitled under the same decree to recover from each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party ; but satisfaction for the smaller sum shall be entered on the decree.

Cross-claims under same decree.

When the amounts are equal, neither party shall take out execution, but satisfaction for each sum shall be entered on the decree.

#### Notes.

This section applies to Provincial Small Cause Courts.

To make sec. 247 of the Code applicable in the case of cross-claims under one decree, the parties entitled thereunder to recover from each other must hold the same character and possess identical rights of enforcing execution, and enforcement of the decree can only be refused, or satisfaction entered up, when this is the case. *Held*, therefore, where a decree for money of a Court of first instance directed that the money should be realizable from certain specific property of the defendant, and exempted his person and other property, and the lower Appellate Court modified this decree by extending it to the person of the defendant, and in second appeal the High Court set aside the lower Appellate Court's decree and restored that of the first Court, directing that the costs of the defendant in the lower Appellate Court and in the High Court should be paid by the plaintiff, that, inasmuch as the plaintiff was only entitled to recover the judgment-debt due to him from the defendant from such specific property, whereas the defendant was entitled to recover the judgment-debt due to him from the plaintiff from his person and property, the provisions of sec. 247 were not applicable.—5 Al. 272.

See I. L. R., 6 Al. 351, noted under sec. 214 ; 9 Al. 64, noted under sec. 411 ; 10 Al. 188, noted under sec. 246.

Notice to show cause why decree should not be executed.

**248.** The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause

If it were to be treated as joint property, he could have none, for the deceased's interest would then have disappeared, having gone by survivorship to his brother.—16 Bom. 636.

The omission to give the notice required by sec. 248 of Act X of 1877 to the judgment-debtor on application for the execution of the decree affects the regularity of the sale which subsequently takes place in execution of the decree, and the validity of the entire execution-proceedings. *Ramessuri Dassie v. Doorgadas Chatterjee* (I. L. R., 6 Cal. 103) followed. *Held*, therefore, where execution of a decree was applied for against the legal representative of a deceased judgment-debtor, and the notice required by sec. 248 of Act X of 1877 was not given to such legal representative, and certain immoveable property belonging to the deceased judgment-debtor was sold, that such sale had been properly set aside by the Court executing the decree by reason of such omission. *Quære*.—Whether such omission was an irregularity in “publishing or conducting” the sale within the meaning of sec. 311 of that Act.—3 Al. 424.

When a judgment-debtor has died after decree, but before application has been made to execute the decree, the Court, before directing the attachment and sale of any property to proceed, must issue a notice to the party against whom the execution is applied for, to show cause why the decree should not be executed against him, and its omission to do so will invalidate the entire subsequent proceedings. A judgment having been obtained by A against B, and B having died before application was made for execution, A applied for execution of his decree upon a tabular statement, in which the judgment-debtor was stated to be C, widow of B, and C was also described as the person against whom execution was sought. Upon this application, the property mentioned in the tabular statement was directed to be attached and sold, and it was accordingly sold in execution, and purchased by A. No notice under sec. 248 of the Civil Procedure Code had been served upon C before issue of execution. *Held* that the application was improper; that the order for attachment and sale should not have been made; and that the Court which made it should have set the execution aside as soon as it became aware that no notice had issued previous to its issue. The fact of there being no section in the Code expressly authorising a Court to set aside its proceedings is immaterial, as every Court has an inherent right to see that its process is not abused or does not irregularly issue, and may set aside all irregular proceedings as a matter of course, provided that the interests of third parties are not affected. *Semble*.—Under sec. 248, the fact that application to execute the decree had been made in the lifetime of B would make no difference, unless an order had been made and the property actually attached under it; as whenever an application is made for execution against a legal representative of the judgment-debtor, the notice required by the section must be issued to him, unless the Court has already ordered execution to issue against him upon a previous application.—6 Cal. 103; 7 C. L. R., 105; 3 Al. 424.

See I. L. R., 6 Madr. 172, noted under sec. 230; 12 Al. 313, noted under sec. 234.

**249.** If the person to whom notice is issued under the last preceding section does not appear, or does not shew cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

Procedure after issue of notice.



If he offers any objection to the enforcement of the decree the Court shall consider such objection, and pass such order as it thinks fit.

**Notes.**

This section applies to Provincial Small Cause Courts.

An application was made to execute a decree, and notice was issued under sec. 216 of the Code of Civil Procedure, to the party against whom execution was applied for, to show cause why the decree should not be executed. He came and presented by his pleader a petition containing certain grounds of objection. The Judge did not fix any day for hearing the petition, but the case was subsequently called on, and was repeatedly placed before him, but the pleader did not attend, and therefore the objections were disallowed. The Judgment-debtor afterwards applied to the Judge to re-consider the order, but his application was refused. The High Court remanded the case to the Judge to try the nature of the objections taken by the judgment-debtor, observing that, if a day had been fixed, and the party had not then appeared, the Judge would have been justified in not going further into the case, but might have disposed of it at once.—5 B. L. R., App. 65; 14 W. R., 155.

A petition, under sec. 217, Act VIII. of 1859, is not required to be verified.—8 W. R., 200.

**250.** When the preliminary measures (if any) required by the foregoing provisions have been taken, the Court, unless it sees cause to the contrary, shall, “subject to the provisions of sections 245A and 245B,”\* issue its warrant for the execution of the decree.

Warrant when to issue.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where a judgment-creditor had obtained a writ of attachment against the property of his judgment-debtor, but the debtor had no property to the knowledge of the creditor against which the attachment could be enforced, *held* (reversing the decision of the Court below) that he was entitled to an order for execution of the decree by attachment of the person of the debtor. In an application for such an order, the *onus* is on the judgment-debtor to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, and not on the creditor to show that, by sending the debtor to prison, some satisfaction of the debt would be obtained.—8 B. L. R., 255; 258 note.

In a suit for an account by a principal against his agent, the plaintiff should ask in his plaint that a proper account may be taken. If the defendant is found liable to render such account for a certain period, the Court should make an interlocutory decree declaring that he is so liable, and direct him to file an account in Court within a fixed period. This decree may be enforced under sec. 260 of the Civil Procedure Code. After an account has been filed, the plaintiff should be allowed reasonable time to examine it. If the objections are numerous, the procedure prescribed by secs. 394 and 395 and form 157 of sch. iv. to the Code should be followed. When the accounts have been taken, the Court must determine the amount due, and the final decree should be for the payment of this amount,

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\* The words quoted have been inserted by the Debtors' Act (VI of 1888), sec. 3

and also, if necessary, for the delivery of any papers, vouchers, or other documents which have come into the hands of the agent in the course of his employment. In a suit for an account against A and B as agents, the plaintiff asked for an account as against A from 1265 (1858) to 1283 (1876), and as against B from 1281, (1874) to 1283 (1876). *Held* that there had been no misjoinder. The seven days within which a notice of objection to a decree by a respondent under sec. 561 of the Code must be given is not a period to which the provisions of paragraph 2 of sec. 5 of the Limitation Act can be extended, and the Court has no discretion to extend the period. Forms of keeping accounts of joint property in the mufassal considered.—I. L. R., 7 Cal. 654.

**251.** Such warrant shall be dated the day on which it is issued, signed by the Judge or such officer as the Court appoints in this behalf, sealed with the seal of the Court, and delivered to the proper officer to be executed.

And a day shall be specified in such warrant on or before which it must be executed, and the proper officer shall endorse thereon the day and manner in which it was executed, or, if it was not executed, the reason why it was not executed, and shall return it with such endorsement to the Court from which it issued.

**Note.**—This section applies to Provincial Small Cause Courts.

**252.** If the decree be against a party as the legal representative of a deceased person, and the decree be for money to be paid out of the property of the deceased, it may be executed by the attachment and sale of any such property:

Decree against representative of deceased for money to be paid out of deceased's property.

If no such property remains in the possession of the judgment-debtor, and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property not duly applied by him, in the same manner as if the decree had been against him personally.

**Notes.**

This section applies to Provincial Small Cause Courts.

The plaintiff sued the defendants on the ground that they were in possession of his deceased debtor's property. It being found that the defendants received no assets from the deceased, *held* that the suit was rightly dismissed. If the suit had simply been against the defendants as heirs or personal representatives of the deceased, and if they had alleged that no assets had come to their hands, the plaintiff would have been entitled to a decree against them as representatives of the deceased, if he had prayed for such a decree, without going to trial on the question whether

or not the defendants had assets ; and in that case he might have proceeded, in enforcement of his decree, under the provisions of sec. 203 of Act VIII. of 1859.—6 B. L. R., App. 106 ; S. C. 14 W. R., 431.

Where a Hindu died, leaving a childless widow and a separated brother, it was held that, until a legal representative is appointed to the deceased's estate, his widow is the only person who can defend a suit as his representative, and that, while a decree obtained against the widow will enable a creditor to attach and sell, not only the widow's life-estate in the immoveable property, but also the reversionary estate of the remainderman, yet a decree obtained against the remainderman will not enable the creditor to touch the estate in the hands of the widow. When a decree has been obtained against A in his lifetime, and A dies before execution, A's estate is properly described in the proceedings in execution as the estate of A (sec. 210, Code of Civil Procedure) ; and in the certificate of sale, the purchaser is properly declared to have purchased the right, title, and interest of A in the property sold ; but this procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such cases the representative, and not the deceased person, is the defendant (secs. 104 and 203) ; and in the notification of sale (sec. 249), and in the certificate of sale (sec. 259), it ought to be set forth that what is sold is the right, title, and interest of the representative on the record. A *bona-fide* purchaser, without notice for valuable consideration at an auction-sale, is, as a general rule, entitled to protection, notwithstanding any irregularity or defect in the proceedings or decree in the suit. But when the decree is against the representative of a deceased person, the purchaser is bound to satisfy himself that the party sued as the representative of the deceased is his legal representative. The legal representative of a deceased person, though not a party to the suit, will be bound by the execution-sale, if he either knowingly allowed the suit to be defended by another person claiming to be the legal representative, or, if knowing of the sale, he stood by and allowed the purchaser to pay in the belief that he acquired a good title. *Edalji Hormasji v. Mahabu Begum* (Special Appeal No. 266 of 1869) considered.—8 Bom. H. C. R., (A. C.) 37.

Property must, under Act VIII of 1859, be attached before being sold in execution of decree, the words "attachment and sale" in sec. 203 being taken together and not read distributively.—1 Hyde's Rep, 158 ; 1 Ind. Jur., O. S., 125.

A, a Muhammadan, died possessed of immoveable property, and leaving a widow, a daughter, and a sister, B, his heiresses according to Muhammadan Law. B was entitled to one-sixth share of an undivided moiety of a certain portion of the property which was situated in Calcutta. After A's death, the L Bank sued his daughter and her husband and two of her husband's brothers in a Mufassal Court to realise certain mortgage-securities executed by A to the Bank, and obtained a decree by consent. Neither the widow nor B, who was then absent from the country, were parties to this suit. The Bank, in execution of their decree, caused certain property of A, including the undivided moiety of the Calcutta property, to be sold by the Sheriff of Calcutta. The defendant became the purchaser at this sale, and obtained possession of the property. The certificate of sale stated that what was sold was "the right, title, and interest of A, deceased, the ancestor, and of the defendants (naming them), the representatives, in a moiety of a piece of land situate," &c. B afterwards sold and assigned her share in (among other properties) the above-mentioned undivided moiety

of the Calcutta property to the plaintiff, who now sued the purchaser at the execution-sale to recover the subject of his purchase. *Held* by GARTH, C. J., and KEMP and JACKSON, JJ. (MARKBY and AINSLIE, JJ., dissenting), that the decree and the execution founded upon it did not affect the share of B in the estate of A, and consequently that the property in question did not pass to the defendant under the sale made by the Sheriff. *Per* GARTH, C. J.—A decree by consent against one heir of a deceased debtor cannot, under the Muhammadan Law, legally bind the other heirs. *Per* MARKBY, J.—Under the Muhammadan Law, the estate of an intestate decedent entire, together with all the debts due from and owing to the deceased. The creditor of an intestate Muhammadan must enforce his claim against the estate in a suit properly framed for the purpose. Such a suit is properly framed if all the persons in possession of that particular portion of the estate which it is intended to charge or made parties to it. The right of a Muhammadan heir claiming the property of his deceased ancestor who died indebted is a right of representation only, and, except as representative, he has no right to the property whatsoever. A person may be a representative within the meaning of sec. 203 of Act VIII of 1859 (corresponding with sec. 252 of Act X of 1877), so as to make the decree effectual for the purpose therein stated, although that person is not the heir.—I. L. R., 4 Cal. 142.

A plaintiff is entitled to sue the legal representative of his deceased debtor, and to obtain a decree against him, without proving that assets have come into his hands. It is sufficient if there are assets of which he may become possessed. The decree should mention that it is against the defendants in that character, and should be executed as directed by sec. 252 of the Civil Procedure Code (Act XIV of 1882). *Rayappa Chetty v. Ali Saheb* (2 M. H. C. R., 336) followed.—8 Bom. 309.

See I. L. R., 7 Madr. 255, noted under sec. 234.

**253.** Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant:

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where sale in execution of a decree was stayed on the security given by a third party, *held* that, on default by the defendant, the decree could not be summarily enforced against such surety under sec. 204 of Act VIII. of 1859.—4 B. L. R., App. 27; 13 W. R., 35.

H obtained a decree in the High Court against S for certain moveable and immoveable property. S appealed to the Privy Council. While that appeal was pending, H applied for the execution of her decree, and N became her surety for Rs. 10,000. The decree, however, was not executed. The Privy Council reversed the decision of the High Court, and dismissed the suit of H with costs. S then sought to execute his decree for costs

against N, the surety. *Held* that N was not liable.—6 B. L. R., App. 126. S. C. 14 W. R., 410.

Where a person became a surety, in the course of the proceedings on an appeal, to pay all such sums as may be decreed against the plaintiff on appeal, the decree, when passed, can be executed against the surety under sec. 204 of the Civil Procedure Code, and an appeal will lie from an order made in execution of such decree against the surety. Where a person became surety, and gave a security-bond undertaking to pay all sums of money that might be decreed against the plaintiff on the defendant's appeal, and the appeal was dismissed for default; and on the application of the plaintiff, the Recorder made an order cancelling the bond, and returned it to the surety, without notice to the defendants, and afterwards the defendant's appeal was on application restored, and a decree passed against the plaintiff, *held* that the Recorder's order was invalid, and execution could issue against the surety notwithstanding that order.—7 B. L. R., 81; 15 W. R., 538.

A surety-bond taken by the Court under sec. 8 of Act XXIII. of 1861, after judgment has been pronounced, can be enforced under sec. 204 of Act VIII. of 1859.—8 B. L. R., 205; 15 W. R., 21.

An application was made against one R S for execution under sec. 204 of Act VIII. of 1859. It appeared that a suit had been instituted by A C against H S and others in the District Court of Hooghly; that it had been dismissed with costs; that the plaintiff had appealed to the High Court from the decision of the Judge of Hooghly; that, pending the appeal, H S and his co-defendants had applied for and obtained an order from the High Court calling upon A C to give security for his costs in the Court below and of the appeal; that R S had, in pursuance of the order, charged his house in Calcutta with the payment of the costs to the extent of Rs. 2,000; that the appeal to the High Court was dismissed with costs; that the costs of the Court below and of the appeal amounted to Rs. 2,052-7-6; and that the present applicants had been unable to realize the costs by execution within the jurisdiction of the Hooghly Court. They now applied for execution against R S by the attachment and sale of the house charged by him with the payment of Rs. 2,000. MACPHERSON, J., made the order as prayed.—9 B.L.R., App. 17.

By virtue of sec. 11 of Act XXIII. of 1861, and the provisions of sec. 204 of the Code of Civil Procedure, an appeal lies from an order passed in a matter between a judgment-creditor and sureties on behalf of a judgment-debtor for the performance of the decree.—4 Bom. H. C. R., (A. C.) 119; 8 W. R., 24.

Where, by an arrangement sanctioned by the proper Court, the terms of a decree were varied, and provision was made for its payment by instalments, for the payment of a portion of which instalments a surety executed a bond hypothecating his property, *held* that the terms of sec. 204 of the Civil Procedure Code are not applicable to such an arrangement.—3 N.-W. P. H. C. R., 88.

When a person has become liable as security for the performance of a decree, sec. 204 of Act VIII. of 1859 gives a remedy to the decree-holder against the surety in addition to any remedy which he may have on the surety-bond. It does not prevent the decree holder from bringing a suit on the surety-bond to enforce the contract made with him by the surety, and the lien on the property mortgaged to secure the performance of that contract.—6 N.-W. P. H. C. R., 261.

In consideration of the plaintiffs being allowed to proceed with the execution of a decree which they had obtained in the High Court, A became surety upon a bond for the payment of what might be due to the defendants by such plaintiffs in the event of their decree being reversed or modified by the Privy Council, to which an appeal was then pending. *Held* that the summary procedure under sec. 204 of Act VIII. of 1859 might be enforced against A as such surety. Compare Act X. of 1877, sec. 253.—3 C. L. R., 505.

Where a Court, during the pendency of an inquiry under Act XXIII. of 1861, sec. 8, allowed the defendant to be at large upon security for his appearance when called upon, and when the Court had concluded the inquiry, it was found that the defendant had appeared, the liability of the surety was held to be at an end.—24 W. R., 292.

A surety must be taken to have entered into his contract only for the time during which the relation created by the instrument of suretyship exists, and with reference only to the person to whom he made himself responsible.—25 W. R., 250.

When security had been given on behalf of the respondent to an appeal under sec. 546 of the Code of Civil Procedure for the due performance of the decree of the Appellate Court and the appeal had been successful:—*Held*, that under the provisions of secs. 253 and 583, the decree of the Appellate Court could be enforced against the sureties in execution proceedings. Venkapa Naik v. Baslingapa (I. L. R., 12 Bom., 411), approved.—I. L. R., 13 Madr. 1.

A plaintiff, having preferred an appeal to Her Majesty in Council, was called upon to furnish security. Thereupon A, on behalf of appellant, executed a security bond for the costs of the respondent. The appeal was dismissed with costs by Her Majesty in Council. On an application by the respondent in the appeal for execution to issue against the estate of A, the surety (who had died in the meantime), *held* that the liability of the surety under the security-bond could not be enforced in execution of the decree of Her Majesty in Council. Bans Bahadur Singh v. Mughla Begum, (I. L. R., 3 Madr., 107) dissented from.—12 Cal. 402.

An appeal was preferred to the Privy Council from a final decree passed upon appeal by the High Court, and B and certain other persons on behalf of the appellant gave security for the costs of the respondent. The Privy Council dismissed the appeal, and ordered the appellant to pay the costs of the respondent. The respondent applied to the Court of first instance for the execution of that order against B and the other persons as sureties. *Held* that, under Act X of 1877, secs. 610 and 253, such order could be executed against the sureties.—2 Al. 604.

In 1874 the execution of the decree of an Appellate Court was stayed pending an application for review of judgment, upon the judgment-debtor giving security for the execution of the decree, and a surety was accepted on his behalf:—*Held* that the judgment-creditor could not proceed summarily against the surety under the provisions of sec. 253 of the Code of Civil Procedure, 1882.—7 Madr. 284.

See I. L. R., 3 Al. 809, noted under sec. 210; 15 Madr. 203, noted under sec. 211.

**254.** Every decree or order directing a party to pay money as compensation or costs, or as the alternative to some other relief

Decree for money.



granted by the decree or order, or otherwise, may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property in manner hereinafter provided, or by both.

#### Notes.

This section applies to Provincial Small Cause Courts.

A regularly perfected attachment is an essential preliminary to sales in execution of simple decrees for money, and where there has been no such attachment, any sale that may have taken place is not simply voidable, but "*de facto*" void.—I. L. R., 5 Al. 86.

A suit on a bond in which immoveable property was hypothecated was adjusted by the defendant agreeing to pay the amount claimed and costs, with interest, by instalments within a fixed time, and that, in the event of default, the plaintiff should be at liberty to bring such property to sale. The Court made a decree ordering the defendant to pay the plaintiff the amount claimed and costs, with interest, "in accordance with" such agreement. *Held* (TURNER, J., and OLDFIELD, J., dissenting) that such decree was a mere money-decree, and not one which gave the plaintiff a lien on such property.—3 Al. 216.

**255.** If the decree be for mesne-profits or any other matter, the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.

Decree for mesne-profits or other matter, amount of which to be subsequently ascertained.

#### Notes.

This section applies to Provincial Small Cause Courts.

When, in a suit for possession of land and mesne-profits at a rate stated in the plaint, a decree is passed which directs that the amount of mesne-profits be ascertained in execution of the decree, the plaintiff is not limited to the amount or rate stated in his plaint, though it may be used as evidence against him in favour of the defendant. *Baboojan Jah v. Byjnath Dutt Jha* (I. L. R., 6 Cal. 472; S. C., 7 C. L. R., 539) explained.—I. L. R., 9 Cal. 112.

See I. L. R., 19 Cal. 139, noted under sec. 230.

**256.** When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of one-thousand rupees, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court, or against his moveable property within the same limits.

Power to direct immediate execution of decree for money not exceeding Rs. 1,000.

#### Notes.

This section applies to Provincial Small Cause Courts.

See I. L. R., 3 Al. 701, noted under sec. 222.

Modes of paying money  
under decree.

**257.** All money payable under a decree shall be paid as follows (namely):—

(a) into the Court whose duty it is to execute the decree ; or

(b) out of Court to the decree-holder ; or

(c) otherwise as the Court which made the decree directs.

**Notes.**

This section applies to Provincial Small Cause Courts.

A sold a decree obtained by him under Reg. VII. of 1799 to B, but after the sale realized the decree from the judgment-debtor. On application by B for execution, on 2nd January 1862, the fraud was discovered, and B was referred by the Collector to the Civil Court. On 2nd October 1866, B brought his suit for recovery of his purchase-money from A. *Held* that the period of limitation ran from the discovering of the fraud. The suit was not barred. Sec. 206 of Act VIII. of 1859 does not apply to decrees under Reg. VII. of 1799.—1 B. L. R., (A. C.) 76.

Where a judgment-debtor executed a kistbandi, or instalment-bond, providing for the satisfaction of the decree which had been obtained against him, and subsequently failed to pay according to the terms of the kistbandi, *held* that the decree-holder could enforce his claim under the terms of the kistbandi by proceedings in execution, and need not file a fresh suit.—2 B. L. R., (A. C.) 223 ; 11 W. R., 86.

A judgment-creditor is entitled to prove payments made according to the terms of a kistbandi for the purpose of showing that his right to sue out execution under the kistbandi was not barred by limitation. *Query*, whether part-payments under a decree may not be proved, although they have not been made through the Court, or certified to the Court, under sec. 206 of Act VIII. of 1859.—2 B. L. R., (A. C.) 320 ; 11 W. R., 232 ; 15 W. R., 459.

Where a creditor has obtained a decree for money payable by instalments, the whole amount to become due on failure by the debtor to pay one of the instalments, he is, upon failure, entitled, notwithstanding sec. 206 of Act VIII. of 1859, to come into Court and certify to the Court, and prove payment of the earlier instalments, to show that execution of his decree is not barred.—4 B. L. R., (F. B.) 130 ; 13 W. R., (F. B.) 40 ; 15 W. R., 66.

A had obtained a decree against B, C, and D, in execution of which the Sheriff attached certain property belonging to B, C, and D, who were carrying on business in partnership. The property was sold, and the proceeds paid into Court ; and by order of Court, A received a sum in part-satisfaction of his decree. Subsequently A, at the request of B, and without receiving any consideration, gave him a letter in Bengali, purporting to be a release to him of the remainder of his decree, but such adjustment was not made through the Court. A afterwards applied for execution of his decree against B, C, and D, but his application was refused, the Court treating the letter as a release. A appealed. *Held*, on appeal, that the letter was not a release : there was no consideration for it. The adjustment of the decree should have been made through the Court or certified to it in accordance with sec. 206, Act VIII. of 1859.—6 B. L. R., 339 ; 15 W. R., O. C., 5.

Various applications were made to execute a decree, and on one of them the sum of Rs. 1,000 was paid. Further applications were after-

wards made, on which finally it was arranged that a further payment of Rs, 1,000 down should be made, and that the residue should be paid with interest by monthly instalments. The judgment-creditors sought to set aside the arrangement, and to execute their original decree as if no such arrangement had been made. *Held* that the decree could not be enforced in supersession of such agreement.—10 B. L. R., App. 28; 19 W. R., 155.

Where a decree had been obtained for a certain sum of money without interest, and afterwards a kistbandi was filed, by which the decree-holder and the judgment debtor agreed that the amount of the decree should be paid by instalments with interest, and the judgment-debtor had, by his conduct for several years, treated the kistbandi as if it were a decree, *held* that, under the circumstances of the case, the judgment-debtor could not afterwards object that the kistbandi could not be executed as a decree, and that a fresh suit should be brought upon the kistbandi; but the decree-holder was entitled to take proceedings on the kistbandi as if it were part of the original decree.—14 B.L.R., 287; 21 W.R., 310; 5 W. R., Mis., 19.

There is no procedure under Act VIII of 1859 under which execution can be taken out upon a kistbandi, filed in Court after decree, which has not been incorporated with the decree.—14 B. L. R., 288 note; 15 W. R., 542.

Where a decree was obtained for a sum of money, and afterwards by an arrangement between the judgment-debtor and the decree-holder it was agreed that the decree should be payable by instalments with interest at a very large rate, and payments had subsequently been made of large sums of money in the terms of the arrangement, and a balance remained due, it was held that the decree-holder could not recover in execution of the decree any sum beyond what was stated in the decree.—14 B. L. R., 291 note; 16 W. R., 275, 6 W. R., S. C. C. Ref., 1.

A kistbandi, or arrangement to pay by instalments the amount of a decree obtained upon a bond, does not effect an extinction of the original debt or the mortgagee's lien upon property mortgaged to him by the bond.—14 B. L. R., 423 note. S. C. 11 W. R., 481.

Plaintiff owed defendant a judgment-debt. He paid the debt, but not through the Court. Defendant then fraudulently applied to the Court to execute the decree, and the Court, being debarred by sec. 206 of the Code of Civil Procedure from recognizing payment made otherwise than through it, executed the decree by making the plaintiff pay again the sum decreed. Plaintiff sued to recover the amount overpaid. *Held* by the majority of the Court, SCOTLAND C. J., and INNES, J., dissenting) that such a suit is not maintainable.—3 M. H. C. R., 188.

Where a decree has been adjusted between the parties by a contract binding upon them, a Court is not bound to issue process of execution upon the original decree in violation of the terms of the contract, although the decree-holder refuses to certify the adjustment of the decree under sec. 206 of the Code of Civil Procedure, especially where the Court executing the decree is the Court to which the parties would go for the purpose of enforcing the contract.—7 M. H. C. R., 387.

*Held* that a question raised for the first time between the parties to a decree, at the time of its execution, although not expressly reserved in that decree for determination at the time of its execution, may be inquired into and determined by the Court executing the decree under sec. 11 of Act XXIII of 1861.—2 Bom. H. C. R., (A. C.) 393; 2nd Ed. 371.

*Held* that the rejection under sec. 206 of Act VIII of 1859 of a defendant's objection in a Mofussil Small Cause Court to the execution of a decree, on the ground that it had been adjusted out of Court, did not bar his right to bring a suit against the execution-creditor to recover the thing alleged to have been given in satisfaction of the decree.—4 Bom. H. C. R., (A. C.) 76.

K, an execution-creditor of C, applied to the Court by which the decree was passed, and caused C to be imprisoned under it. C then entered into a compromise upon certain terms with K for the adjustment of the decree, and K thereupon, but without certifying the terms of such adjustment to the Court, petitioned for the release of C, who was accordingly released. Subsequently K again applied to the Court to compel satisfaction of the whole amount of the decree against C. This application was opposed by C, on the ground that an adjustment of the decree had taken place between him and K. The Judge however, refused to enter into the question of the adjustment, as the terms of it had not been certified to the Court under sec. 206 of the Civil Procedure Code. *Held* on appeal that the Judge was in error; that it was the duty of K, on applying for the release of C, to certify the adjustment to the Court; that it would be unjust to allow him to take advantage of his own omission to do so; and that, not having done so, the presumption against him was that the decree had been satisfied in full, but that, under the circumstances, it would be the most equitable course to direct the Judge to inquire into the terms of the adjustment. Case remanded for that purpose.—4 Bom. H. C. R., (A. C.) 120.

H sued B to recover possession of a certain house. B answered that the house was his own; that H having fraudulently got possession of it, he, B, had filed a suit to recover possession; that a decree was passed in his favour in the lower Court, which, however, was reversed on appeal; that, pending special appeal, a compromise had been entered into between him and H, in pursuance of which he, B, was put in possession of the house. The terms of this compromise were not certified to the Court under sec. 206 of the Civil Procedure Code. *Held* that this compromise, having been effected after the decree in favour of B had been reversed, did not come within the meaning of sec. 206. and was therefore a good defence to the suit of H.—5 Bom. H. C. R., (A. C.) 78.

A suit will, notwithstanding sec. 206 of Act VIII of 1859, lie for damages for an alleged breach of contract in not certifying to the Court a payment of money in satisfaction of a decree, made out of and not through the Court, in consequence of which the same was fraudulently recovered a second time, by the person omitting to certify the said payment.—1 N. W. P. H. C. R., 155; Ed. 1873, 237; S. C. Agra H. C. R., (F. B.) Ed. 1874, 185.

A Court executing decrees, whilst giving effect to sec. 206 of Act VIII of 1859, should also take reasonable care that its process is not about to be abused for fraudulent purposes. It may, by examining the judgment-debtor and others having knowledge, inform itself of the position of the decree, and whether it has, or has not been, satisfied. This, however, is merely an enquiry to inform the Court, and it need not frame and decide an issue.—2 N. W. P. H. C. R., 48.

The suing on a kishundi in Court does not necessarily make it the instrument of a public adjustment through the Court, within the meaning of sec. 206, Act VIII of 1859.—7 W. R., 485.

A letter from a decree-holder to his vakeel to put in an acknowledgment into Court is not a settlement out of Court certified to the Court in the manner required by sec. 206, Act VIII of 1859, to warrant further investigation in the matter.—7 W. R., 510.

Where several of the acts required to be done in execution of a decree are such as can be done through a Court, and where all of them are acts the doing of which may be certified to the Court by the person in whose favour the decree was made, the policy of sec. 206 of the Code of Civil Procedure is to exclude the reception of evidence upon the point, or any question arising out of evidence before the Court. No adjustment, can be recognised unless made through the Court or certified by the person in whose favour the decree was made.—8 W. R., 319.

Sec. 206, Act VIII of 1859, does not bar a suit brought to recover money paid into the Collectorate as Government revenue, although the person on whose behalf the money was paid had an Act X decree against the person paying the money, as the entire amount of the decree was eventually recovered by taking out execution of the whole decree.—8 W. R., 449.

Where a judgment-debtor pays the amount decreed to the officer of the Court under the authority and pressure of the Court's process, he is entitled to protection; the latter clause of sec. 206, Act VIII of 1859, relating, not to such payments, but to voluntary adjustment.—9 W. R., 462.

A petition signed and filed in Court by a judgment-creditor certifying payment of the amount due to him by his judgment-debtor is a sufficient certificate of payment under the decree in the terms of sec. 206, Code of Civil Procedure.—12 W. R., 358.

Where a decree-holder agrees for a good consideration not to enforce his decree, the Court may legitimately, on the suit of the opposite party, issue an injunction against the former not to do what he has agreed not to do, Act VIII. of 1859, sec. 206, notwithstanding.—22 W. R., 194.

Act VIII of 1859, sec. 206, applied only to proceedings which were taken while the decree was in execution, and did not preclude the Court, before putting the decree in execution, from enquiring if it has been satisfied out of Court.—22 W. R., 270.

A suit to enforce a contract by which a dispute was adjusted between a decree-holder and judgment-debtor is not barred by Act VIII of 1859, sec. 206.—22 W. R., 298.

Where a party to a suit was directed by the High Court to pay the costs of the day, and his solicitor paid the money into Court under sec. 257 of the Code of Civil Procedure, *held* that section was not applicable, as the order was not a decree.—I. L. R., 12 Madr. 120.

**257A.** Every agreement to give time for the satisfaction of a judgment-debt shall be void, unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

Every agreement for the satisfaction of a judgment-debt, which provides for the payment, directly or indirectly of any sum in excess of

the sum due or to accrue due under the decree, shall be void, unless it is made with the like sanction.

Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt; and the surplus (if any) shall be recoverable by the judgment-debtor.

#### Notes.

This section applies to Provincial Small Cause Courts.

The plaintiff obtained a money-decree against the defendant Hur Patel, and in execution thereof attached his property. Thereupon, at Hur Patel's request, five persons gave a *havala* or oral undertaking to pay the amount of the decree, and the attachment was removed. It appeared that some payment was made under the *havala*. Subsequently Hur Patel and the defendants Nos. 2 and 3 executed a bond to the plaintiff reciting the *havala*, the payment thereunder, and agreeing to pay the amount of the decree with interest. Neither the *havala* nor the bond was brought to the notice of the Court for sanction, and the decree, which was capable of execution, was then destroyed. The plaintiff now sued to recover the debt due under the bond. The District Judge was of opinion that the part of the bond which contained a promise to pay interest was void, but that in respect of the principal amount of the decree it was not void. On reference to the High Court, *held* that the whole bond was void. The *havala* was an agreement such as is contemplated in para. 1 of sec. 257A of the Civil Procedure Code (Act XIV of 1882), and was void for want of sanction of the Court under that section. The bond, regarded as one in consideration of the *havala* or as an agreement for satisfaction of the decree, was also void under para. 2 of the same section for a similar reason.—I. L. R., 12 Bom. 499.

On the 16th July, 1886, S. obtained a decree against K. for Rs. 315 with costs. On the next day K. paid S. Rs. 200 in part satisfaction of the decree, and induced K. to accept a bond by which he (S.) gave up the costs and by which K. was to pay the balance of the decree with interest at the end of eight months. S. sued upon the bond. K. contended that the bond was void under sec. 257A of the Civil Procedure Code (XIV of 1882) and that the suit would not lie. *Held*, that the suit would lie. Since the amendment made in sec. 258 by Act VII of 1888 such payments or adjustments may be recognized by a Civil Court, except when executing the decree, and, therefore, a suit based upon such a payment or adjustment should be admitted. The concluding clause of sec. 258 has no direct bearing on sec. 257A, as it relates to a different subject-matter. *Quære*—Whether sec. 257A relates exclusively to agreements to extend the time for enforcing decree by execution, as ruled by the Calcutta High Court, or is applicable to all agreements according to the view taken by the Bombay High Court? Where there are different rulings of the different High Courts on a particular point, a Judge should follow the rulings of the High Court to which he is subordinate. *Jhabar Mahomed v. Modan Sonahar* (I. L. R., 11 Cal. 671), *Madhavray Anant v. Chilu* (P. J. for 1881, p. 315), *Ganesh Shivram v. Abdullabeg* (I. L. R., 8 Bom. 538), *Pandurang Ramchandra v. Narayan* (I. L. R., 8 Bom. 300), and *Davlatsing v. Pandu* (I. L. R., 9 Bom. 176), referred to.—15 Bom. 419.

The decree in a redemption-suit directed that the lands mortgaged should be allowed to be redeemed on payment of Rs. 30-7 0 by the plain-



tiff to the defendant. The decree was subsequently modified by substituting Rs. 91-2-6 for Rs. 30-7-0. On the 3rd October 1885, the parties entered into an agreement whereby (*inter alia*) the time to pay the decreed debt was extended to five years from that date, but no sanction of the Court was obtained. On the 18th February 1888, the parties applied to the Court to sanction the agreement of 1885. On reference to the High Court, *held* that the agreement in question required the Court's sanction under sec. 257A of the Civil Procedure Code (Act XIV. of 1882), for want of which it was void so far as it related to the judgment-debt, and that the sanction could not be given at the date it was applied for.—13 Bom. 54.

P having obtained a decree against B, the son of the latter gave the son of the former an instalment-bond for the judgment-debt without the sanction of the Court. In a suit by P's son to recover the debt on the bond, *held* that the suit would lie. Sec. 257A of the Civil Procedure Code (Act XIV. of 1882) applies only to agreements between the parties to the suit or decree.—13 Bom. 671.

Sec. 257A of the Civil Procedure Code, when it provides that "every agreement to give time for the satisfaction of a judgment debt shall be void" unless made for consideration and with the sanction of the Court, &c., does not make such agreements illegal, in the sense prohibited by law. It only prevents such agreements being enforced in a Court of Law. Where such an agreement to give time, never sanctioned by the Court as required by section 257A, formed part of the consideration for a bond, and had actually been enjoyed by the obligee to bond. *Held*, that such consideration, not being in its nature illegal, and not having as a fact failed, there was no reason why the obligor should not enforce the terms of the bond.—16 Bom. 618.

Although a Court executing a decree is bound by the terms thereof, and cannot add to or vary or go behind them, the effect of sec. 375 read with sec. 647 of the Civil Procedure Code is that, when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. Such a compromise does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by sec. 375, to give effect to the compromise. In execution-proceedings the word "suit" in sec. 375 must, with reference to sec. 647, be read as meaning "execution of decree." By reason of the words in sec. 375, "lawful agreement or compromise," the provisions of sec. 257A become applicable to such a case; and, so long as the requirements of that section are satisfied, the compromise becomes a part of the decree itself, and—at least as between the decree-holder and the judgment-debtor—can be given effect to in execution of the decree. When such a compromise has been duly made and sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can resile from the position assumed by them in the matter of the compromise. Even if such a compromise has been irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect until the order sanctioning it is set aside, and, until that happens, the parties are bound by it in all proceeding relating to the execution of the decree, and, where they have acted upon it, they are estopped thereafter from questioning its validity. *Sita Ram v. Dasrath Das* (I. L. R., 5 Al. 492) followed. *Debi Rai v. Gokal Prasad* (I. L. R., 3 Al. 585), *Ram Lakhan Rai v. Bakhtaur Rai* (I. L. R., 6 Al. 623), *Fateh*

Muhammad v. Gopal Das (I. L. R., 7 Al. 424), Ganga v. Murlidhar (I. L. R., 4 Al. 240), Sheo Golam Lal v. Beni Prosad (I. L. R., 5 Cal. 27), Lakshmana v. Sukiya Bai (I. L. R., 7 Madr. 400), Yella Chetti v. Munisami Reddi (I. L. R., 6 Madr. 101), Pisani v. Attorney-General of Gibraltar (I. L. R., 5 P. C. 516), and Sadasiva Pillai v. Ramalinga Pillai (L. R., 2 I. A. 219), referred to.—11 Al. 228.

On the 22nd March, 1886, the applicant presented an application to a Subordinate Judge, praying that the adjustment of certain decrees, dated the 28th March 1867, and 11th July 1871, might be certified, and a sanction granted to a *sankhat*, dated 18th March 1880, passed to him by the defendant in satisfaction of the said decrees and in substitution of to bonds dated February 1879. The Subordinate Judge, being of opinion that the application could not be granted, inasmuch as the execution of the decrees was then barred by limitation, referred the case to the High Court under sec. 617 of the Civil Procedure Code, (Act XIV of 1882). *Held*, that the question could not be referred under sec. 617 of the Civil Procedure Code (Act XIV of 1882), as the order applied for to the Subordinate Judge was appealable under sec. 2 of the Code. The question raised by the application related to the satisfaction of the decree within the meaning of sec. 244 of the Code.—11 Bom. 57.

An agreement entered into to pay interest not awarded by a decree in addition to the sum decreed without the sanction of the Court which passed the decree is void under sec. 257A of the Code of Civil Procedure, Act XIV of 1882, so far as it operates in satisfaction of the Judgment-debt.—9 Bom. 176.

The plaintiff's father had in his lifetime obtained a decree against the first defendant and two other persons. This decree having been partly satisfied, the first defendant and his son, who was no party to the decree, executed a bond for the amount still remaining due. At the date of the bond the decree was barred by limitation. No sanction for the bond was obtained under sec. 257A of the Civil Procedure Code. The adjustment was secured under sec. 258. The plaintiff now sued upon the bond. On reference the High Court. *Held*, that the bond did not require the sanction of the Court under sec. 257A of the Civil Procedure Code (Act XIV of 1882). That section relates to judgment-debts which are still enforceable. *Held*, also, that judgment-debt is a debt within the contemplation of sec. 25, clause (3) of the Contract Act IX of 1872.—14 Bom. 390.

The provisions of sec. 257A of Act XIV of 1882 are intended to prevent binding agreements between judgment-debtors and judgment-creditors for extending the time for *enforcing decrees by execution*, without consideration, and without sanction of the Court; and are not intended to prevent the parties from entering into a fresh contract for the payment of the judgment-debt by instalments or otherwise.—11 Cal. 671.

The plaintiff obtained a decree against the defendant under which the judgment-debtor was liable to pay the amount by instalments with interest at 4 per cent. Eventually, the defendant failing to pay, the plaintiff accepted a bond executed jointly by the defendant and his father, by which they both became liable for the amount of the decree with interest at 18 $\frac{3}{4}$  per cent. In a suit on the bond, it was contended that the bond was void under sec. 257A of the Civil Procedure Code, as being an agreement to give time for the satisfaction of the judgment-debt made for no consideration and without the sanction of the Court, and also without such sanction providing for payment of a sum in excess of the amount due under the decree; that it was void within the meaning of sec. 23 of the Contract Act

as being forbidden by, or of a nature to defeat the provisions of, sec. 257A of the Civil Procedure Code; and that, consequently, the suit on it was not maintainable. *Held*, that sec. 257A of the Code was not applicable. That section was framed to prohibit the enforcement of an agreement of the kind mentioned therein, if made without the sanction of the Court, in execution of the decree, but was not intended to take away the right of parties of entering into a fresh contract, either for payment of the judgment-debt, to give time for such payment, or for the payment of a larger sum than may be covered by the decree, if it be for a proper consideration. In this case the consideration for the bond was a lawful consideration; it could not be said that because satisfaction of the decree was not certified to the Court, there was no consideration. *Held*, also, the bond was not void under sec. 23 of the Contract Act. *Semble*: The words "any law" in that section refer to some *substantive* law, and not to an *adjective* law, such as the Procedure Code is.—16 Cal. 504.

The provisions of sec. 257A of the Code of Civil Procedure, 1877, apply only as between parties to the decree.—6 Madr. 101.

The decree-holder and judgment-debtor of a decree filed a petition (*sulehnama*) in the Court executing the decree, praying that the Court would sanction an arrangement providing for the payment of the decree by instalments and enhancing the rate of interest made payable by the decree. The Court sanctioned the arrangement. *Held* that the "*sulehnama*" was within sec. 257A of the Civil Procedure Code, and the decree might be executed in accordance with its provisions.—5 Al. 492.

On the 27th August, 1878, the holder of a decree for money and the judgment-debtor agreed that the amount of the decree should be payable by instalments, and that, if default were made in payment of any one instalment, the whole decree should be executed. The Court executing the decree sanctioned this agreement. On the 28th November 1881, default having been made, the decree-holder applied for recovery of the whole amount of the decree. *Held* that the application was not one to which No. 179, sch. ii. of the Limitation Act, 1877, was applicable, but No. 178, and the period of limitation began to run from the date of default. The principle recognized in *Baghubans Gir v. Sheosaran Gir* (I. L. R., 5 Al. 243) and *Kalyanbhai Dipchand v. Ghanshamlal Jadunathji* (I. L. R., 5 Bom. 29) applied.—5 Al. 596.

G, the father of the plaintiff, obtained two decrees: one against the defendant A and his father, and the other against A's father alone; and in satisfaction of these decrees obtained a bond without the sanction of the Court, and brought a suit to recover the sum due under the said bond. *Held* that the bond was void under the second clause of sec. 257A of the Civil Procedure Code (Act XIV of 1882).—8 Bom. 538.

See I. L. R., 6 Al. 623 and 12 Al. 571, noted under sec. 210.

**258.** If any money payable under a decree is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, or if any payment is made in pursuance of an agreement of the nature mentioned in section 257A, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree.

Payment to decree holder.

The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after due service of such notice, the decree-holder fails to appear on the day fixed, or, having appeared, fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognized as a payment or adjustment of the decree by any Court executing the decree.\*

**Notes.**

The section applies to Provincial Small Cause Courts.

In 1881 R obtained a decree against M for possession of certain property with costs. Subsequently a compromise of the questions at issue in the suit was come to between R and M, one of the terms of which was that R gave up his claim to costs. Satisfaction of the decree was not entered up in Court. In 1884 K, purporting to be acting on behalf of R, but without his knowledge or sanction, applied for execution of the decree for costs, and in the execution-proceedings which followed a share of M in a tank was sold and purchased by A. M thereupon brought a suit against A, R, K, and others to set aside the sale, alleging that the whole of the execution-proceedings had been taken without notice to him, and had been fraudulently taken by the defendants in collusion with one another in order to deprive him of his share in the tank. It was found that A's purchase was an innocent one, and untainted with fraud. *Held*, upon the authority of *Rewa Mahton v. Ram Kishen Singh* (L. R., 13 I. A. 106; S. C., I. L. R., 14 Cal. 18), that the sale could not be set aside. Such a sale could only be set aside if it were shown that the Court had no jurisdiction to execute the decree; but as the decree remained an unsatisfied decree so far as the Court was concerned, and capable of being executed, the compromise not have been certified to the Court, the Court had jurisdiction to execute it. *Held*, further, that the execution proceedings could not be held to be void, as, although instituted by a person who had no authority to institute them, they were instituted in the name of the decree-holder, and neither the Court nor the auction-purchaser was bound to see that the application was made *bona fide* on his behalf. *Pat Dasi v. Sharup Chand Mala* (I. L. R., 14 Cal. 376) commented on.— I. L. R., 15 Cal. 557.

A decree-holder having proceeded to execute his decree against his judgment-debtor, the latter objected, stating that the decree had been already satisfied, although the adjustment thereof had not been certified to the Court as required by sec. 258 of the Code of Civil Procedure. The judgment-debtor, being under the circumstances compelled to deposit the amount of the decree in Court, applied for and obtained sanction to prosecute the decree-holder for an offence under sec. 210 of the Penal Code. It was contended that the case did not fall within that section, as the satisfaction, not having been certified to the Court, could not be recognized

\* This paragraph has been substituted for the original by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 27.

by the Court executing the decree, and that consequently no offence had been committed. *Held* that the words "after it has been satisfied," used in sec. 210 of the Penal Code, indicate only the *fact* of the satisfaction of the decree. The fact that the satisfaction is of such a nature that the Court executing the decree could not recognize it does not prevent the decree-holder from being properly convicted of an offence under that section.—16 Cal. 126.

In a suit brought by a Hindu to recover certain land, defendant pleaded that he held the same under a mortgage granted to him by plaintiff's mother and guardian in satisfaction of a decree obtained against plaintiff's deceased father. Plaintiff contended that, as the mortgage was in adjustment of a decree, and the adjustment had not been certified to the Court, the mortgage could not be recognised by virtue of sec. 258 of the Code of Civil Procedure. *Held* that, as there had been no certified adjustment of the decree, the mortgage could not prevail against plaintiff's claim. *Haji Abdul Rahiman v. Khoja Kaki Aruth* (I. L. R., 11 Bom. 6) followed, and *Mallamma v. Venkappa* (I. L. R., 8 Madr. 277) distinguished.—11 Madr. 469.

In 1877, M executed a mortgage to S in consideration of a sum paid in cash, and a debt due by M to S under a decree. S did not certify satisfaction of the decree to the Court under sec. 258 of the Code of Civil Procedure, nor was this stipulated for in the instrument of mortgage. *Held*, in a suit to enforce the mortgage, that sec. 258 was no bar to the plaintiff's right to recover.—12 Madr. 61.

An appeal lies against an order dismissing an application made under Civil Procedure Code, sec. 258, that the adjustment of a decree be recorded as certified.—14 Madr. 99.

The plaintiff had been a surety for the defendant on a bond for Rs. 50 passed to G by the defendant. G obtained a decree against the plaintiff on this bond, and the plaintiff satisfied the decree by paying G Rs. 38 in full satisfaction. The payment was made out of Court, and was not certified to the Court. The plaintiff now sued the defendant to recover the money so paid by him to G. He called G as a witness, who acknowledged he had received Rs. 38 from the plaintiff in full satisfaction of the decree. *Held* that the last clause of sec. 258 of the Civil Procedure Code (Act XIV. of 1882) did not apply to such a case, and that the payment made by the plaintiff to G might be proved.—12 Bom. 235.

An application for execution of a decree payable by instalments was resisted by the judgment-debtor as barred by limitation on the ground that nothing had been paid under the decree, and that the application was made more than three years after the first instalment fell due. The decree-holder pleaded that he had waived the default in payment of the first instalment by accepting such payment shortly afterwards, and that the application was in time, having been made within three years from the date when the second instalment was due. *Held* that the decree-holder could not raise this plea, as the payment in question had not been certified to the Court executing the decree, and therefore could not, under sec. 258 of the Civil Procedure Code, be recognized. *Sham Lal v. Kanahia Lal and Zahur Husain v. Bakhtawar* not followed.—12 Al. 569.

Where a regular suit under sec. 283 of the Code of Civil Procedure was brought to establish the plaintiff's right to certain attached property on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor. *Held*



that it was not necessary that such transfer should be certified under the provisions of sec. 258 of the Code Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in sec. 258 above-mentioned relates only to the Court executing the decree.—13 Al. 339.

Where a decree has been satisfied out of Court, and the payment has not been recorded in accordance with sec. 258 of the Civil Procedure Code, it is nevertheless open to the *quondam* judgment-debtor, when suing to have a sale made by the *quondam* decree-holder after satisfaction of the decree set aside, to prove the payment of the decretal money otherwise than by a certificate under that section.—14 Cal. 376.

Under sec. 258 of the Civil Procedure Code (Act XIV of 1882) no Court can recognize an uncertified adjustment of a decree for any juridical purpose whatever. A suit will not lie to enforce an uncertified agreement of adjustment of a decree against a judgment-debtor, the consideration for which is, that it shall operate in satisfaction of the decree; as there is, in that case, no consideration which the Court can recognize, and, therefore, no valid consideration for the judgment-debtor's agreement. The plaintiff was the assignee of a decree obtained by one Haji Omar Khamesa against the defendants on the 5th May 1883. By that decree, Haji Omar Khamesa was declared entitled to recover Rs. 9,961-5-6 with interest at nine per cent. from the defendants; and payment was ordered to be made to him of the said sum by *weekly* instalments of Rs. 200. In order to secure the payment of the said instalments, the defendants were required to execute a mortgage to Haji Omar Khamesa of certain property, with power to him to sell the same, and to execute the decree for the whole amount, in case of default, for six months. Haji Omar Khamesa assigned the decree to the plaintiff in the present suit, and subsequent to the assignment (*viz.*, on the 21st July 1883), the defendants executed to the plaintiff the mortgage on which the present suit was brought. The mortgage-deed, after reciting the above facts, stated that the defendants had agreed to satisfy the amount of the decree, and it contained a covenant, by the defendants, that they would pay Rs. 9,961-5-6, with interest at six per cent., by *monthly* instalments of Rs. 400 from the 21st August 1883. The mortgage, therefore, differed from the decree, both with regard to the instalments and the rate of interest. The plaintiff sued to recover the sum of Rs. 4,207, being the amount of instalments due to him under the said mortgage. *Held*, that the suit would not lie as the mortgage was an adjustment of the decree, and had not been certified to the Court, as required by sec. 258 of the Civil Procedure Code (Act XIV. of 1882).—11 Bom. 6.

The plaintiff obtained a decree against the defendant for Rs. 60 and costs, Rs. 29-10-1, against which the defendant immediately appealed. Shortly afterwards the defendant sent Rs. 70 to the plaintiff's *vakil*, intimating by a letter that the remittance was in part-payment of the decree, and that an arrangement would be made to pay the balance. The plaintiff did not take out execution of the decree, but the part-payment was not certified to the Court. On appeal, the decree was reversed and the defendant applied for the refund of the amount which he had paid to the plaintiff. The Court of first instance granted the application. The plaintiff appealed, and the Appellate Court reversed the order, holding that, under the provisions of sec. 258 of the Civil Procedure Code, the payment made by the defendant not having been certified could not be recovered. *Held* by the High Court that the defendant was entitled to recover the amount paid to the plaintiff. The decree having been reversed on appeal the payment,



whether certified to the Court or not, could only be regarded as made without consideration, and the defendant was entitled to have it restored. The Court accordingly under sec. 622 of the Civil Procedure Code discharged the order of the lower Appellate Court, and restored the order of the Court of first instance.—11 Bom. 724.

The provision in sec. 258 of the Code of Civil Procedure, 1882, which forbids any Court to recognize a payment under, or an adjustment of, a decree, unless certified to the Court executing the decree, does not debar a suit for damages for a breach of a contract to certify.—8 Madr. 277.

In determining under sec. 258 of Act XIV of 1882 whether or no the cause shown by the decree-holder is sufficient, it is incumbent upon the Court to investigate and decide any questions of fact upon which the parties may not be agreed. In such an investigation the evidence may be given either orally or by affidavit. The term "to show cause" does not mean merely to allege causes, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court.—11 Cal. 166.

Sec. 258 which provides that no payment or adjustment of a decree not certified to the Court, as in the said section provided, shall be recognized by any Court, does not debar a Criminal Court from recognizing such payment where the decree-holder is charged with fraudulently executing a satisfied decree.—9 Madr. 101.

An adjustment of a decree not certified to the Court by either party within the time limited by law cannot be recognized as a bar to execution.—3 Madr. 113.

Where a judgment-debtor has, out of Court, partly satisfied his decree-holder subsequent to the transmission of the decree for execution to another Court, but before actual execution has been applied for, he is entitled, on execution in full being demanded, to an order from the Court to which the decree is transferred for execution, calling upon the decree-holder to certify the fact of such part-payment.—5 Cal. 448.

In 1878, a decree-holder, having received certain grain from the judgment-debtor in satisfaction of the decree, failed to certify satisfaction of the decree to the Court in accordance with the provisions of sec. 258 of the Code of Civil Procedure, 1877, and executed the decree nevertheless. In a suit for damages against the decree holder it was held that the judgment debtor's remedy for the wrong suffered was not taken away by the provisions of secs. 244 and 258 of the Code.—5 Madr. 397.

N, having obtained a decree in a suit against K, requested him to discharge certain sums due on outstanding bonds which N had given to third parties, promising to credit the sums so paid to the amount due under the aforesaid decree. K paid as requested, but N took out execution in full of the decree, and the Court refused to recognize the payments made by K out of Court. In a suit by K for the money paid as aforesaid, *held* that, the payments not having been made directly in adjustment of a decree, the suit was not barred.—1 Madr. 203.

Where a decree-holder, declared to be entitled to possession of certain lands, subsequent to decree executed a patta in favour of his judgment-debtor, who has then in possession, and afterwards took out execution under his decree, *held* (on an objection by the judgment-debtor that, under these circumstances, he has entitled to possession) that, satisfaction of the decree not having been entered up, such objection could not be dealt with under sec. 244 of the Civil Procedure Code. *Held* also that sec. 258 of the Civil

Procedure Code deals with the adjustment of any decree, and not merely with the adjustment of a money-decree.—6 Cal. 786 ; 8 C. L. R., 36.

Certain immoveable property having been attached in execution of a decree for money dated in 1879, directing the sale of such property, T, who had purchased such property in 1880, objected to the attachment. His objection having been disallowed, he used to establish his right to the property and for the removal of the attachment. He claimed on the ground, amongst others, that the decree of 1879 has been wholly adjusted. The alleged adjustment had not been certified under sec. 258 of the Civil Procedure Code. *Held* that the provisions of that section did not debar the Courts trying the suit from determining as between T and the decree-holder whether the decree of 1879 had been adjusted or not. *Sita Ram v. Mahipal* (I. L. R., 3 Al. 533) and *Shadi v. Ganga Sahai* (I. L. R., 3 Al. 538) followed.—5 Al. 269.

The provisions of sec. 206 of the Civil Procedure Code Act VIII. of 1859, only prevent the Court executing the decree from recognizing a payment made out of Court, and do not bar a suit for the refund of such payment. G held a decree against D, who satisfied it out of Court, and obtained a receipt from G to the effect that it was satisfied. Notwithstanding this, G executed the decree, and recovered the amount of it through the Court, although D pleaded satisfaction in the execution-proceedings, and produced the receipt. In a suit brought by D against G for refund of the money received by G out of Court, the defendant contended that the suit was not maintainable. *Held* that it was maintainable according to the law as it stood before the passing of Act XII of 1879. *Gunnamani v. Paran Kishore* (5 B. L. R., 223) and *Gulawad v. Rahimtulla* (4 Bom. H. C. R., 76) followed. *Quere*.—Whether such a suit is maintainable under sec. 36 of Act XII of 1879, which has been substituted for sec. 258 of the Civil Procedure Code (Act X of 1877). *Held* also that the statement contained in the receipt passed by G to D, to the effect that the decree had been satisfied, was sufficient to shift the burden of proof to the defendant to show that it was an incorrect statement.—4 Bom. 295.

Where under a bond a decree was adjusted by making a small deduction, and by providing for the payment of the balance as part of the entire amount of the bond. *Held*, that since the amendment made in section 258 of the Civil Procedure Code (Act XIV of 1882) by section 27 of Act VII of 1888 (Act amending the Civil Procedure Code of 1882) such adjustment may be recognized by a Civil Court, except in execution.—16 Bom. 589.

The plaintiff held a decree against the defendant, and in execution of it attached the defendant's property. A compromise was then made, by which the defendant executed to the plaintiff the bond sued upon, in satisfaction of the judgment-debt. The compromise, however, was not certified to the Court. *Held* that the bond was without consideration. The adjustment of the decree, not having been certified to the Court, was not binding on the plaintiff, and therefore constituted no valid consideration.—8 Bom. 300.

The holder of a money-decree agreed to accept, in satisfaction of the amount thereof a part-payment in cash, and a lease of certain lands for five years, rent free. The judgment-debtor made the payment, and gave the lease agreed on. Afterwards the decree-holder executed the decree against the judgment-debtor, and then the judgment-debtor brought the present suit for a declaration that the money-decree was satisfied, and for damages against the decree-holder. *Held*, that such a suit would lie. *Guna-*

*mani Dasi v. Prankishori Dasi*, 5 B. L. R., 223 ; *Viraraghava Reddi v. Subbaka*, I. L. R., 5 Madr. 397 ; *Chembrakandi Musutti v. Themdyal Puthalath Shekharan Nayar*, I. L. R., 6 Madr., 41 ; *Sita Ram v. Mahipal*, I. L. R., 3 Al. 533 ; *Shadi v. Gunga Sahai*, I. L. R., 3 Al. 538 ; and *Ishan Chunder Bundopadhyaya v. Indro Narain Gossami*, I. L. R., 9 Cal., 788, followed ; *Patankar v. Devji*, I. L. R., 6 Bom. 146, not followed.—10 Cal. 354.

See I. L. R., 15 Madr. 343, noted under sec. 231 ; 11 Bom. 506, noted under sec. 232 ; 6 Bom. 146, 3 Al. 533, 3 Al. 538, 9 Cal. 831, 15 Cal. 187 and 15 Madr. 302, noted under sec. 244 ; 15 Bom. 419, noted under sec. 257A ; 13 Madr. 236, noted under sec. 7 of the Limitation Act.

**259.** If the decree be for any specific moveable, or for any share in a specific moveable, or for the recovery of a wife, it may be enforced by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the imprisonment of the judgment-debtor, or by attaching his property, or by both imprisonment and attachment if necessary.

When any attachment under this section has remained in force for six months, if the judgment-debtor has not obeyed the decree, and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed under section 208, such amount, and, in other cases, such compensation, as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

If the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or if, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease to exist.

#### Notes.

This section applies to Provincial Small Cause Courts (except so far as relates to recovery of wives.)

N had obtained a decree that "the defendants do, within six weeks after service upon them of this decree, remove the obstruction and reopen the pathway or lane leading from the north-west end of the plaintiffs-house northwards to a public road, as the same existed before the commencement of the suit, and as described in the plaint." Held that, under sec. 200, the only way in which the decree could be executed was by the imprisonment of the party against whom the decree was made, or by attaching his property, or by both imprisonment and attachment of property, if necessary. Accordingly the decree ordering the removal of the obstruction was reversed as illegal.—10 B. L. R., App. 12 ; 18 W. R., 282.

*Per MARKBY, J.*—In a suit by a husband for restitution of conjugal rights, a decree that “the case be decreed awarding the plaintiff to take defendant as his married wife” is not a proper form of decree. The decree may order the wife to return to her husband’s protection, but such a decree is not one which can be enforced in the manner provided by sec. 200, Act VIII. of 1859, as being an order “for the performance of a particular act.”—14 B. L. R., 298 ; 23 W. R., 179.

The Court will not order the father of a Hindu girl, in a suit to which the girl is not a party, to specifically perform the marriage of his daughter with a person to whom the daughter has been betrothed. It will, however, award damages against the father for breach by him of the contract of betrothal. *Semble*—That, according to Hindu law, a betrothal is not to be treated as an actual and complete marriage. No order for enforcing a decree by imprisonment under sec. 200 of the Code of Civil Procedure should be made until the defendant has had an opportunity of obeying the decree, or has contumaciously refused to obey it.—7 Bom. H. C. R., (O. C.) 122.

In a suit for restitution of conjugal rights brought against a wife and certain persons said to be detaining her from her husband, the proper form of decree is one enjoining the wife to return to her husband, and the other co-defendants to abstain from preventing her return.—2 N.-W. P. H.C. R., 314.

In suits for restitution of conjugal rights the decree should be in the form that the wife do return to her husband, with which decretal order if she fails to comply, she may be dealt with under the provisions of the Code of Civil Procedure relating to attachment and imprisonment for non performance of the act decreed, for a wife cannot be delivered in execution as a chattel.—2 Agra H. C. R., 337 ; 3 Agra H. C. R., 88.

*Quære.*—Whether, under the present procedure, the Court can enforce its order upon a wife to return to her husband’s by giving her over bodily, into her husband’s hands. Such disobedience would seem to fall within sec. 200 of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.—8 W. R., (P. C.) 3 ; 11 Moore’s I. A. 551.

A, who had been directed by a decree to refrain from preventing her daughter returning to her husband, after the date of the decree permitted her daughter, who was of age, to reside in her house. *Held* that such conduct on the part of A was no such evidence of interference with her daughter’s return as would justify the execution of the decree against her, under the provisions of sec. 200 of Act VIII of 1859 (corresponding with secs. 259 and 260, Act XIV of 1882).—I. L. R., 1 Al. 501.

**260.** When the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for the performance of, or abstention from, any other particular act, has been made, has had an opportunity of obeying the decree or injunction, and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both.

When any attachment under this section has remained in force for one year, if the judgment-debtor has not obeyed the decree, and the decree-holder has applied to have the at-

Decree for specific performance or restitution of conjugal rights.

tached property sold, the property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and may pay the balance (if any) to the judgment-debtor on his application.

If the judgment-debtor has obeyed the decree, and paid all costs of executing the same, which he is bound to pay, or if, at the end of one year from the date of the attachment, no application to have the property sold has been made and granted, the attachment shall cease to exist.

**Notes.**

By a decree relating to certain joint property belonging to the plaintiff and defendant, but which had previously been held in the sole name of the defendant, it was directed that the plaintiff and defendant should jointly manage the property, and that the names of both should appear in all papers connected with such property. The plaintiff subsequently applied to have his name registered in the collectorate, but was opposed by the defendant, who, it appeared, also allowed the amlahs of the estate to continue to use his sole name. *Held* that the Court had, under the circumstances, jurisdiction under sec. 260 of the Civil Procedure Code to attach the defendant's property until he had obeyed the decree by having the joint names of himself and the plaintiff inserted in all documents belonging to the estate.—8 C. L. R., 487.

See I. L. R., 8 Cal. 174, noted under sec. 235; 10 Cal. 817, noted under sec. 239.

**261.** If the decree be for the execution of a conveyance, or for the endorsement of negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement in accordance with the terms of the decree, and deliver the same to the Court.

Decree for execution of conveyances, or endorsement of negotiable instruments.

The Court shall thereupon cause the draft to be served on the judgment-debtor in manner hereinbefore provided for serving a summons, together with a notice in writing stating that his objections (if any) thereto shall be made within such time (mentioning it) as the Court fixes in this behalf.

The decree-holder may also tender a duplicate of the draft to the Court for execution, upon the proper stamp-paper if a stamp is required by law.

On proof of such service, the Court, or such officer as it appoints in this behalf, shall execute the duplicate so tendered, or may, if necessary, alter the same, so as to bring it into accordance with the terms of the decree, and execute the duplicate so altered :

Provided that, if any party object to the draft so served as aforesaid, his objections shall, within the time so fixed, be stated in writing, and argued before the Court ; and the Court shall thereupon pass such order as it thinks fit, and execute, or alter and execute, the duplicate in accordance therewith.

#### Notes.

The Registrar of the High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him by entering into any covenants on his behalf. The power of the Registrar to execute such a conveyance rests upon statutory authority. General covenants for title and quiet enjoyment extend to the case of a defect known to the purchaser at the time of the sale, unless the intention of the parties that they should not do so is clearly expressed in the covenants themselves. "Conveyance," as used in Rule 436 (Belchambers' Rules and Orders), means such an instrument as may be necessary to transfer the estate, if he has any, belonging to the person on behalf of whom the Registrar executes the transfer to the purchaser. Circumstances under which a *parda-nashin* lady will be relieved from liability under covenants contained in a conveyance executed to her. D, an heir of one X, a deceased Hindu lady, sold and conveyed to M, in March 1878, a moiety in certain premises belonging to the estate of X. Subsequently a decree was made for partition of the estate left by X in a suit to which D, A, R, G and S were parties, and an order was made in that suit directing the premises, of which D had so sold a moiety, to be sold by the Registrar, and the parties were directed to join in the conveyance, the Registrar being directed to approve and execute the same on behalf of G, who was an infant. At the sale the plaintiff purchased the premises, and thereafter D refused to execute the conveyance, which included the usual covenants for title and quiet enjoyment. A summons was thereupon taken out against him, and an order was made directing the Registrar to execute the conveyance on his behalf. The conveyance was then executed in September 1885 by A, S, and R, and by the Registrar on behalf of D and the minor G. In a suit instituted by M under the conveyance of 1878, the Court held that he was entitled to possession, as against the plaintiffs, of the moiety of the premises covered by his conveyance. The plaintiff, therefore, brought a suit against D, A, R, G, and S to recover damages for breach of the covenants for title and quiet enjoyment. It was not found that R had any good independent advice in the matter, or that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself. *Held* that, although the Registrar had authority to execute the conveyance on behalf of D and G, he had no authority to enter into the covenants on their behalf, and that the suit should be dismissed as against them. *Held*, also, that, having regard to the position of R, the suit should also be dismissed as against her.—I. L. R., 16 Cal. 330.

Where a *bona fide* contract, whether oral or written, is made for the sale of property, and a third party afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior contract prevails against the subsequent purchaser, although the latter's purchase may have been registered, and although he has obtained possession under his purchase,—10 Cal. 710.



**262.** The execution of a conveyance, or the endorsement of a negotiable instrument, by the Court under the last preceding section, may be in the following form: "*C. D.*, Judge of the Court of (or as the case may be), for *A B* in a suit by *E F* against *A B*," or in such other form as the High Court may, from time to time, prescribe, and shall have the same effect as the execution of the conveyance or endorsement of the instrument by the party ordered to execute or endorse the same.

**Note**—See I. L. R., 10 Cal. 710 & 16 Cal. 330, noted under sec. 261.

**263.** If the decree be for the delivery of any immovable property, possession thereof shall be delivered over to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, and, if need be, by removing any person bound by the decree who refuses to vacate the property.

**Note.**

In 1877 the plaintiffs sued the defendant for possession of certain properties, and obtained a decree. In execution of this decree, the plaintiff, on 12th of July 1879, obtained formal possession of the properties sued for. The defendant continued to remain in actual possession and occupation of a portion of the premises, and refused to give up possession of the same to the plaintiff, who served him with a two months' notice to quit in June 1881. The plaintiff did not evict the defendant in execution of the decree obtained by him against the defendant, but instituted a fresh suit for that purpose. *Held* that such a suit would lie. *Sembla*, that the delivery of formal possession in execution of a decree for possession gives a cause of action against a defendant who remains in occupation of the premises, which may be enforced in a regular suit.—I. L. R., 11 Cal. 93.

**264.** If the decree be for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same, and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property:

Provided that, if the occupant can be found, a notice in writing containing such substance shall be served upon him, and in such case no proclamation need be made.

**Notes.**

A decree-holder purchased, in execution of his decree, the right, title, and interest of the judgment-debtor, a member of a joint Hindu family, in the family dwelling-house and land attached thereto. *Held, Per* NORMAN, TREVOR, LOCH, and BAYLEY, JJ, that sec. 224 of Act VIII. of 1859 did not apply; that A was entitled to actual possession of the share of his judgment-debtor in the house as well as in the land, but his share must be marked out so as to cause the least possible inconvenience to the other members of the family. *Per* KEMP, J.—An equivalent in value of the share in the house should be apportioned to him out of the land, which greatly exceeded the dwelling-house in value.—B. L. R., Sup. Vol., 172; 2 W. R., Mis., 30; 8 W. R., 239; 18 W. R., 23.

Where compliance with the formalities prescribed by sec. 224, Act VIII. of 1859, and a legal receipt for possession, were found as facts, they were held to give such a right under a Civil Court's decree as would prevail over one founded on mere actual receipt of rent.—9 W. R., 358.

In order to a legal possession being given under sec. 224, Act VIII. of 1859, it was essential that all the requirements of that section be carried out.—15 W. R., 99.

Delivery of possession by going through the process prescribed by sec. 244 of Act VIII of 1859 is the only way in which the decree of the Court awarding possession to the plaintiff can be enforced; and as, in contemplation of law, both parties must be considered as being present at the time when the delivery is made, such delivery must, as against the defendant, be deemed equivalent to actual possession. As against third parties such symbolical possession is of no avail, because they are not parties to proceedings. But if the defendant subsequently dispossesses the plaintiff by receiving the rent and profits, the plaintiff will have twelve years from such dispossession to bring another suit.—I. L. R., 5 Cal. 584.

**265.** If the decree be for the partition or for the separate possession of a share of an undivided estate paying revenue the Government, the partition of the estate or the separation of the share shall be made by the Collector and according to the law (if any) for the time being in force for the partition, or the separate possession of shares, of such estates.

**Notes.**

The meaning of sec. 265 of the Code of Civil Procedure is that, where a revenue-paying estate has to be partitioned into several revenue-paying estates such partition must be carried out by the Collector. *Zahrn v. Gowri Sunkar* (I. L. R., 15 Cal. 198) approved.—I. L. R., 16 Cal. 203.

The duty of the Collector, to whom a decree has been referred under sec. 265 of the Civil Procedure Code (Act XIV of 1882) for partition, is not confined to mere division of the lands decreed to be divided, but includes the delivery of the shares to their respective allottees.—11 Bom. 662.

Sec. 265 does not apply to property held on raiyatwari tenure, but to permanently settled estates.—6 Madr. 97.

In 1862 it was held by the Sadr Court that sec. 225 of Act VIII of 1859 did not apply to raiyatwari estates. This ruling having always been acted on in the Madras Presidency, *held* by the Full Bench that a different construction should not, under these circumstances, be placed on sec. 265 of

the Code of Civil Procedure, 1882. *Muttu v. Kudalalaga* (I. L. R., 6 Madr. 97) confirmed.—7 Madr. 382.

V mortgaged to the plaintiff his house and certain undivided land in which H and others, Hindu co-parceners, had a share. R bought the interest of H in the land at a Court sale, and let to H and V, who, failing to pay rent, were sued by R, who got a decree for possession. This decree transferred for execution to the Collector, who sold the land, and rateably distributed the proceeds, except to V, who declined to take the amount tendered as his share. The plaintiff sued V and the purchasers under R's decree to recover his mortgage debt by a sale of the property mortgaged to him. *Held* that R's decree, not being for partition of the family property, or for the separate possession of a share, was not one contemplated by sec. 265 of the Code of Civil Procedure. The proceedings of the Collector were without jurisdiction, and the plaintiff was entitled to ignore them, and assert his claim under the mortgage. That the defendants being in actual possession—albeit through a sale under a void decree—could not be ousted in the present suit, and were entitled to say that the plaintiff had not proved his title to sell the specific lands mortgaged.—8 Bom. 539.

When the Collector makes a partition under sec. 265 of the Code of Civil Procedure (Act XIV of 1882), the Civil Court has no power to examine his work or to direct him to make a fresh partition. *Dev Gopal Savant v. Vasudev Vithal Savant* (I. L. R., 12 Bom. 372) followed.—15 Bom. 527.

M obtained against R a decree for possession of "a one-fourth share of the two follow lands, Nos. 490 and 541, measuring 7 bighas and 2 bighas 16 biswas respectively, after removal of the trees planted thereon." The Court, in executing the decree, placed the decree-holder in joint possession of the two plots, to the extent of the one-fourth share decreed to him, but declined to remove the trees until the said share had been specifically ascertained and partitioned by the Collector, in reference to sec. 265 of the Civil Procedure Code. *Held* that the decree could not be understood to entitle the plaintiff to remove the trees from a larger area than that to which he was entitled under that decree; and that, so long as that area remained joint and unascertained, the plaintiff could not execute the decree in the manner sought. *Held* also that the decree in the present case could not be called a "decree for the partition or for the separate possession of a share of an undivided estate paying revenue to Government," within the meaning of sec. 265 of the Civil Procedure Code, so as to require the intervention of the Collector for the purpose of executing the decree; and that the Court of first instance, in order to meet the exigencies of the decree, should have separated the one-fourth to which the plaintiff was declared entitled, and, in executing the decree, should have ordered that the trees standing on the one-fourth area should be uprooted.—6 Al. 452.

Under sec. 265 of the Civil Procedure Code (Act XIV of 1882) a Civil Court cannot effect partition of lands paying revenue to Government. The Collector alone is empowered under that section to do so. The general Hindu law as to partition, which lays down that, except in certain special cases determined by family custom or usage, partition of all family property can be made, is equally applicable to *sheri* lands leased by Government for a certain number of years; there is no Act of Legislature which excludes lands leased by Government from its operation.—16 Bom. 528.

In 1851 an estate was brought under *butwara* under the provisions of

Regulation XIX of 1814. At such *butwara* a portion of the estate, being covered with water, and unfit for cultivation, was not divided, but left joint amongst all the co-sharers, the land-revenue payable on account of the whole estate being apportioned amongst the several estates into which the portion divided was split up. Subsequently, on the portion remaining joint becoming dry and fit for cultivation, an application was made by one of the co-sharers to the Collector to partition the same under the provisions of Beng. Act VIII of 1876, but that officer refused to do so, on the ground that the land "did not bear an assessed revenue, and was not shown in the *towji*." In a suit brought under the above circumstances to compel the Collector to make the partition, and in the alternative to have it made by the Civil Court, *held* that, though the reason given by the Collector for refusing was an erroneous one, he was not bound to make the partition under the provisions of Beng. Act VIII of 1876, as the land in suit was not liable for the payment of one and the same demand of land-revenue, and was therefore not a joint undivided estate within the terms of sec. 4, cl. (9) of that Act. *Held* also that the word "estate," as used in sec. 265 of the Civil Procedure Code, must not be construed in the same limited and defective sense in which it is used in Act VIII of 1876, but must be taken to be there used in its ordinary signification, and that consequently the plaintiff was entitled to a decree for partition under the provisions of that section. *Chundernath Nandi v. Hur Narain Deb* (I. L. R., 7 Cal. 153,) approved.—10 Cal. 435.

See I. L. R., 7 Cal. 153, noted under sec. 13.

### *F.—Of Attachment of Property.*

**266.** The following property is liable to attachment and sale in execution of a decree (namely),  
 Property liable to attachment and sale in execution of decree. lands, houses, or other buildings goods, money, bank-notes, cheques, bills of exchange, hundis, promissory-notes, Government securities, bonds, or other securities for money, debts, shares in the capital or joint-stock of any railway, banking, or other public Company or Corporation, and, except as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power, which he may exercise, for his own benefit, and whether the same be held in the name of the judgment-debtor or by another person, in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale (namely) :—

(a) the necessary wearing apparel "and bedding"\* of the judgment-debtor, his wife, and children;

(b) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle

\* See Act No. XII. of 1891.

“ and seed-grain”\* as may in the opinion of the Court, be necessary to enable him to earn his livelihood as such ;

(c) the materials of houses and other buildings belonging to and occupied by agriculturists ;

(d) books of account ;

(e) mere rights to sue for damages ;

(f) any right of personal service ;

(g) stipends and gratuities allowed to military and civil pensioners of Government, and political pensions ;

(h) the salary of a public officer or of any servant of a Railway Company or local authority to the extent of—

(i) the whole of the salary where the salary does not exceed twenty rupees monthly ;

(ii) twenty rupees monthly where the salary exceeds twenty rupees and does not exceed forty rupees monthly; and

(iii) one moiety of the salary in any other case ;†

(i) the pay and allowances of persons to whom the Native Articles of War apply ;

(j) the wages of labourers and domestic servants ;

(k) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;

(l) a right to future maintenance ;

(m) any allowance declared by any law passed under the Indian Councils Act, 1861, by a Governor or a Lieutenant-Governor in Council to be exempt from liability to attachment or sale in execution of a decree ;‡

(n) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which under any law applicable to him is exempt from sale for the recovery of an arrear of such revenue ;§

*Explanation.*—The particulars mentioned in clauses (g), (h), (i), “ (j)”, and (m)¶ are exempt from attachment or sale, whether before or after they are actually payable ;

Provided also that nothing in this section shall be deemed—

\* The words quoted have been inserted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 28.

† Cl. h has been substituted for the original by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 28.

‡ Cls. m and n have been added by the same Act and section.

§ Cls. m and n have been added by Act VII. of 1888, sec. 28.

¶ The letters and word quoted have been substituted by the same Act and section for the word and letter “ and (j ).”

(a) to exempt the materials of houses and other buildings from attachment or sale in execution of decrees for rent, or

(b) to affect the Army Act, 1881, or any similar law for the time being in force.

This section applies to Provincial Small Cause Courts (except so far as relates to immoveable property.)

The defendants in this suit were sirdars of coolies. A decree was obtained against them by the plaintiff in respect of goods supplied for the coolies. It was proved that by, virtue of custom, a sirdar of coolies is entitled to have the wages of coolies paid to him, so that he may deduct the amounts due to him by the respective coolies for food supplied by him to them, but it was not found that the coolies were hired on the basis of such custom. In execution of the decree an order was made upon the officer of the Public Works Department, in whose employ the coolies were, attaching all monies which are or may become payable to the debtor, whether on their own personal account or on account of coolies over whom they are sirdars. PEACOCK, C. J.—We are of opinion that the attachment cannot be maintained. Monies payable to the sirdars, on account of the coolies, could not be attached. Nothing more could be attached than the money payable to the sirdars on their own personal account. It is clear that, according to the custom, the contract is not made with a sirdar to pay him so much a month or fortnight, as the case may be, for providing so many coolies, but that the contract is for wages to the coolies themselves, which are payable to the sirdar, in order that he may deduct what is due by the coolies to him. Even if the contract had been entered into upon the basis of the custom found, the wages of the coolies did not constitute a debt to the sirdars, but debts to the coolies themselves, which, for a certain purpose, might be paid into the hands of the sirdar. We are of opinion that, under the circumstances, Major Perkins was not indebted to the sirdars; and therefore, that the wages of the coolies were not attachable under sec. 236 of Act VIII. of 1859. The money was, however, attached under sec. 237. The finding does not bring the case within that section. There is no finding that Major Perkins had any monies in his hands. Even if the fact had been found that Major Perkins had been supplied by the Government with money for the purpose of paying the expenses of public works entrusted to his charge, such money would not in our opinion, fall within the word, "desposit" within the meaning of sec. 237. If it could be shown that any one or more of the coolies was or were indebted to the sirdars for supplies furnished to them by the sirdars, the amount due from each cooly to the sirdar, and for which he had a lien on such cooly's wages might be attached. But the amounts so due from all the coolies constituting the gang could not be attached in the general way attempted by the attachment actually issued. It would be very mischievous, and would probably stop the supply of labour for public works, if the whole of the wages, of the coolies could be attached, in the manner proposed, in satisfaction of a decree against their sirdar. This is borne out by the statement of the cooly Indraban, which is forwarded with the finding. He says: "We have left Major Perkins's service. It is three months since. We are now with Mr. Mann. Our pay was decreed. We have not got our pay. We have therefore left Major Perkins's service." By the words "our pay was decreed," we understand



him to refer to the attachment of the coolies' pay under the decree against Badal Sing.—1 B. L. R., (S. N.) 15; 10 W. R., 149.

Salaries or other debts due from the Railway Company to any of its servants can be attached in satisfaction of a Small Cause Court decree under Act VIII. of 1859, sec. 236. The attaching Court must make a written order to be fixed up in some conspicuous part of the Court-house, and a copy is to be delivered or sent registered by post to the debtor. The registered letter should be addressed to the agent of the Railway Company at the head office of the Company. It need not be sent through the High Court, although the head office is within the jurisdiction of the High Court.—2 B. L. R., (A. C.) 109; 10 W. R., 447.

A decree-holder, who was also a partner of the judgment-debtor, sought to attach, in execution of his decree, the share of the judgment-debtor in the assets of the partnership business, the business then being in the hands of the Receiver of the Court under a decree for dissolution and winding up. *Held* that such share of the judgment-debtor was not property within the meaning of sec. 205 of Act VIII. of 1859, and therefore not liable to attachment in execution.—5 B. L. R., 382.

A decree-holder in execution attached and seized certain property which belonged to the judgment-debtor in partnership with another person, who alone at the time of attachment was in actual possession. *Held* that such property was the subject of attachment in execution of the decree against the one partner, but such attachment must be limited to his share, and the attachment should be by prohibitory order, not by actual manual seizure.—5 B. L. R., 386.

Under sec. 205 of the Civil Procedure Code, sums to be attached must not be inchoate, but existing and definite; and although liquidated demands in their nature definite and certain, though *sub lite* and unproved, may be seized, a mere expectancy or a mere right of suit cannot be attached; the attachment must operate at the time of attachment, and not be anticipatory, so as to fasten on some future state of property in which the suit may result. A claim which may accrue under a pending award cannot be sold in execution.—7 B. L. R., 186 14 Moore's I. A. 40. see 8 Bom. H. C. R., (A. C.) 150.

A decree of Court falls within the description of "other property" in sec. 205 of the Civil Procedure Code, and is therefore liable to attachment, which should be made under sec. 237.—7 B. L. R., 318; 15 W. R., 34.

The interest of an heir, according to the Hindu law, expectant on the death of a widow in possession, is not property, and therefore not liable to attachment and sale in execution of a decree under sec. 205 of Act VIII of 1859.—7 B. L. R., 341; 15 W. R., (F. B.) 17; 6 W. R., 34; but see 7 B. L. R., 343 note; 12 W. R., 54.

The stipend of a Carnatic stipendiary is not liable to attachment in execution of a decree obtained against the stipendiary, it being one of the description of personal grants expressly protected from attachment in satisfaction of any decree or order of a Court by sec. 3, Reg. IV. of 1831, extended by Act XXIII of 1838. These enactments are not impliedly repealed by secs. 205 and 237 of the Code of Civil Procedure.—4 M.H.C.R., 277.

Arrears of Yeomiah pension due to the estate of deceased Yeomiahdar, which have accidentally accumulated, are not subject to attachment in satisfaction of a decree of a Civil Court obtained against the representatives of the Yeomiahdar.—5 M. H. C. R., 371.

A *bona fide* assignment by a debtor of his entire property to trustees for the benefit of his creditors divests him of any interest which can be the subject of attachment subsequently issued in execution of a decree against such debtor, until the trusts of the deed of assignment have been carried out.—1 Bom. H. C. R., (A. C.) 233.

Books of account cannot be taken in execution.—3 Bom. H. C. R., (O. C.) 42 ; 3 N.-W. P. H. C. R., 334.

Articles of such a perishable nature that they cannot be kept for fifteen days, and sold according to the Civil Procedure Code, ought not to be taken in execution.—5 Bom. H. C. R., (A. C.) 156.

The whole salary of a peon in the service of a mamlatdar under Government is liable to attachment as it becomes due.—7 Bom. H. C. R., (A. C.) 110.

Ornaments on the person of a Hindu wife, forming part of her *stri-dhan*, cannot be taken under an execution against her husband. On certain occasions, however, the husband may take them, but the right is personal to him.—8 Bom. H. C. R., (A. C.) 129.

Necessary wearing apparel is not liable to attachment under sec. 205 of the Code of Civil Procedure.—9 Bom. H. C. R., (A. C.) 272.

The official remuneration of the officiating hereditary officer is not liable to civil process so long as it is in the hands of the Collector or other disbursing officer, but as soon as it is in the hands of the hereditary officer himself, it is deprived of any special protection.—10 Bom. H. C. R., (A. C.) 400.

Where a person deposited upon the works of another certain materials to be used in carrying out a contract with such second person, and the latter had recognised and accepted such deposit by the advance of the value thereof, *held* that such materials had vested in the person with whom they were deposited as a purchaser, and were not liable to attachment under a decree against the depositor.—2 N.-W. P. H. C. R., 337.

Although a Court will not allow account-books to be attached and brought to sale as mere waste paper, yet to prevent a judgment-debtor from making away with his books, and defeating a decree-holder, it will be competent to a Court executing a decree, if execution is applied for by attachment of debts, to require the judgment-debtor to produce his books in Court, and leave them in the custody of the Court.—3 N.-W. P. H. C. R., 334.

The right of a Hindu son during his father's lifetime in ancestral property, *viz.*, a right of joint enjoyment thereof under the father's management, and a right of partition under certain circumstances, together with the right of succeeding the father in the management after his death, may be vested rights, and are undoubtedly rights of an incipient proprietary character, but they do not constitute a transferable or inheritable property, and they cannot survive the person in whom they are vested.—4 N.-W. P. H. C. R., 137.

The pay of a military officer cannot be attached in the hands of the paymaster in the execution of a decree where no provision for its stoppage has been made in the decree.—7 N.-W. P. H. C. R., 331.

*Quaere.*—Whether a mere expectancy is liable to attachment and sale in execution of decree.—6 C. L. R., 528 ; 10 C. L. R., 61.

The pay of an officer of the Small Cause Court will be set aside by an order of the High Court, in satisfaction of judgment obtained in that Court.—Bourke's Rep., (O. C.) 259.

A sum receivable by way of assignment is not liable to be attached and sold in execution of decree.—2 Hay's Rep., 142.

A ship-owner having mortgaged his ship has still an interest in her seizable in attachment under the Civil Procedure Code. An attachment on a vessel in respect of the mortgagor's right and interest does not affect the validity of a sale under a prior mortgage.—1 Ind. Jur., N. S., 241.

R C D, a Hindu, died possessed of property, leaving as his heiress his widow, R D. He also left four daughters, two of whom died in the lifetime of their mother, each leaving a son, R D died, leaving her surviving two daughters, P D and J D, who succeeded to the estate of R C D. *Held* that J B, one of the sons of J D, had no such interest in the property as could be attached and sold in execution of a decree against him.—2 Ind. Jur., N. S., 277; 15 W. R., (F. B.) 18 note.

A decree is held to be part of a judgment-debtor's effects, and not to fall under the head of immoveable property.—W. R., 1864, Mis., 28.

A decree for possession of land is of the nature of immoveable property, and a Judge has no jurisdiction to interfere with the order of a lower Court setting aside the sale of such a decree.—4 W. R., Mis., 22.

Where a deed is executed stipulating the grant of a regular maintenance payable from the grantor's estate, and recoverable, in the event of non-payment, from that estate, the allowance so granted is property which can be attached under the provisions of sec. 205, Act VIII of 1859.—11 W. R., 138.

Where a part of the military pay of a sergeant employed under the Executive Engineer was erroneously remitted by his superior to a Small Cause Court, which had directed execution against the sergeant's pay, it was held that the sum remitted should be refunded to the Executive Engineer.—14 W. R., 441.

An annuity, the payment of which is a charge upon an estate, is property which can be attached under the provisions of sec. 205, Act VIII of 1859, at the instance of the person who has inherited the estate from the grantor of the annuity, and by whom the annuity is payable.—17 W. R., 254.

The salary of a telegraph officer which is due for past services is a debt which may be attached under sec. 236, Act VIII of 1859.—18 W. R., 124.

*Quære*.—May not the creditor of a member of a joint Hindu family have, under Act VIII of 1859, sec. 205, some remedy against the property to which his debtor may be entitled?—22 W. R., 214.

A prospective right of maintenance cannot be attached, and a contingency of this kind is not included in Act VIII of 1859, sec. 205, as something capable of attachment.—23 W. R., 427.

Standing crops are, for the purposes of the Code of Civil Procedure, immoveable property.—I. L. R., 11 Madr. 193.

In execution of a decree in a District Munsif's Court, certain property having been sold, a balance, after satisfying the decree, remained in favour of the judgment-debtor X. After the date of sale, but before the whole of the purchase-money had been paid into Court, X applied to the Court by petition, praying that the amount due to him might be paid to A, to whom, he alleged, he had assigned it. Before any order was made on

this petition, B, C, D and E, in execution of separate decrees against X, attached the sum in Court. The District Munsif ordered that B, C, D and E should be paid before A. A brought a suit against B, C, D, and E in another District Munsif's Court for a declaration that he was entitled to the money and to set aside the said order. The Munsif set aside the order, and declared the plaintiff to be entitled to the amount. B, C, D, and E severally appealed against this decree, and the District Court passed a decree in each appeal, dismissing A's suit. A presented one second appeal, making B, C, D, and E parties thereto, against the four decrees of the District Court. *Held* (1) that A was bound to file a separate appeal against each of the decrees passed by the District Court; (2) that A (having by permission of the Court amended his second appeal and filed three more second appeals) was entitled to a decree, declaring his title to the amount claimed.—11 *Madr.* 280.

A, having obtained a decree against B, who was a *bhagdar*, attached his *bhag* in execution, including the *gabhan* or site upon which B's house was built. B applied to have the attachment removed from the *gabhan*, on the ground that he was an agriculturist, and that, therefore, the *gabhan* of his house was protected from attachment by cl. c. of sec. 266 of the Civil Procedure Code (Act XIV of 1882). *Held* that the *gabhan* was subject to attachment, and was not protected by the above clause. B did not hold as an agriculturist. He could not have occupied the house, except as a *bhagdar*, and it was as part of a *bhag* that the site was attached. The protection of sec. 266, cl. c, was intended for agriculturists in the strictest sense, and for agriculturists in that sole character.—12 *Bom.* 363.

The *jotishi vritti*, being right to receive certain emoluments as a reward for personal service, is not liable to attachment under sec. 266 (f) of the Code of Civil Procedure (Act XIV of 1882). *Semble*.—Under the Hindu law, *vrittis* are to be regarded as generally *extra commercium*.—12 *Bom.* 366.

A percentage received by a *khot* for collecting the assessment on *dhara* lands is not "salary," nor is such a *khot* a "public officer," within the contemplation of sec. 266, cl. h, of the Civil Procedure Code (Act XIV of 1882). The Collector, therefore, cannot object to the attachment of such percentage in execution.—13 *Bom.* 673.

A decree upon a hypothecation-bond which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor, though an order for costs contained therein may be so executed.—10 *Al.* 127.

One N, the sole owner of a certain village, had a son J. J had two wives. By his first wife he had a son U. J's second wife was G, by whom he had a son whose widow is K, the defendant in the suit. J died, leaving U his son, G his widow, and K his son's widow, and on his death U inherited the village. Prior to the year 1874 U had made a gift to G of 105 bighas situate in the village. In 1874 the rights and interests of U in the village were sold by auction and purchased by T, the ancestor of the plaintiffs. G by a deed of gift conveyed the 105 bighas to K, and ultimately died on 26th January 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to G in lieu of her maintenance which she was to hold rent-free for her life, and that she had been in possession thereof for twenty years. Further, that U had the right to resume the land, and assess it to rent on the death of G, and that all the rights and interests of U in the land were

attached and sold in 1874. On second appeal it was contended that the interest of U in the land at the time of the sale of the village by auction was in the nature of a mere expectancy, and therefore could not be sold, and was not sold. *Held* that U gave to G the usufruct of the land for her life in lieu of her maintenance. That after the gift the interest of U in the land was of the same character and carried with it the same consequences as the reversion, which the lessor would have for land leased for life or years and analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. That U had a vested right in the land which was capable of being sold, and that right passed to the auction-purchaser at the sale of 1874. Counsel for appellant cited the following cases in the course of his argument: *Koraj Koonwar v. Komui Koonwar* (6 W. R., C.R., 34), *Ram Chunder Tanta Doss v. Dhurmo Narain Chukarbatty* (15 W. R., F.B. R., 17), *Tuffuzzool Husain Khan v. Raghunath Pershad* (14 Moore's I. A. 41).—10 Al. 462.

The plaintiff having purchased at an execution sale the interest of the judgment-debtor in a partnership, of which the undivided father (deceased) of the judgment-debtor had been a member, now sued the other partners praying that an account be taken and that the share of the judgment-debtor be paid to him:—*Held*, that the execution sale was not bad in law and that the present suit was accordingly maintainable. *Dwarika Mohun Das v. Luckhimoni Dasi* (I. L. R., 14 Cal. 384) dissented from.—13 Madr. 447.

The *mangalsutra*, a neck-ornament which is worn by a Hindu married woman during the life-time of her husband, and never removed, is a part of her necessary wearing apparel, and is exempted from execution under sec. 266 of the Code of Civil Procedure (Act XIV of 1882).—I.L.R., 9 Bom. 106.

The sale of arms by the Nazir of the Court, in execution of a decree, is a sale by a public servant in discharge of his duty, and is, therefore, excluded by sec. 1, cl. (b) from the operation of the Indian Arms Act (XI of 1878). It is expedient for the Court ordering such sale to give notice of the sale and of the purchaser's name and address, as contemplated by sec. 5 of that Act, to the Magistrate of the District or to the police-officer in charge of the nearest police-station.—9 Bom. 518.

Where a judgment-debtor is entitled to a debt secured by a collateral hypothecation of land, and the decree-holder attaches and sells the judgment-debtor's interest in the bond, such interest is immoveable property for the purpose of attachment and sale under the Code of Civil Procedure, 1882. *Per* TURNER, C. J.—*Quære*—Whether the decree-holder could not sell the debt apart from the security as moveable property.—9 Madr. 5.

The nature of an *upadhikpana vritti* on the river Godavari at Nasik was stated to be as follows:—“The *vritti* is an hereditary priestly office, by virtue of which certain religious ceremonies are performed on the river Godavari on behalf of pilgrims who pay fees to the holders of such priestly offices for performance of such religious ceremonies at or about the time of their performance. By law and usage, a certain relationship grows up between certain pilgrims or worshippers and a particular priest, and when such relationship exists, such pilgrims or worshippers are called *yajmans*, or clients of the priest, whose right to offer and perform the religious ceremonies in question for such *yajmans* becomes exclusive against rival priests, so far that, under the Hindu law as applied and followed in this Presidency, if any such *yajmans* accept the religious services of another priest, they must

compensate the priest, whose *yajmans* they are, by giving to him a reasonable fee :—*Held*, that such a *vritti* is a “right of personal service” within the meaning of clause (f) of sec. 266 of the Civil Procedure Code (Act XIV of 1882), and, therefore, protected from attachment.—10 Bom. 395.

Sec. 151 of the Army Act, 1881, not being affected by the provisions of sec. 266, the attachment by a Civil Court of a moiety of the monthly salary of a debtor subject to military law, not exceeding Rs. 20, is legal.—9 Madr. 170.

The doors and window-shutters of a *pucca* building cannot be separately attached in execution of decree, forming as they do part of an immoveable property, and having no separate existence.—11 Cal. 164.

By a deed of assignment the usufruct of certain land was given to a Hindu widow for her maintenance, the deed expressly stipulating that the same was not to be in any way alienated. A judgment-creditor of the widow caused the land to be attached in execution of a money-decree. The widow contended that the land was protected from attachment under sec. 266 of the Civil Procedure Code (Act XIV of 1882). Both the lower Courts disallowed the widow's contention. On appeal to the High Court, *held*, reversing the orders of the lower Courts, that, having regard to the proviso against alienation contained in the deed of assignment, the usufructuary interest in the land assigned to the widow was one over which she had no power of disposal, and, consequently, could not be attached and sold in execution of a money-decree against her.—10 Bom. 342.

Neither the whole corpus, nor any specific portion of the corpus, of an estate in the hands of a trustee who is a judgment-debtor is rendered liable to attachment in execution of the decree against him, because a surplus of income is in his hands for his own benefit after due performance of the trusts ; nor does such corpus, or any part of it, come, for that reason, within the meaning of sec. 266 of the Code of Civil Procedure, which only authorizes the attachment of property over which the judgment-debtor has a disposing power, exerciseable for his own benefit. Where a trust had been created for specific purposes, *viz.*, the performance of religious and other duties, and the trustee had duly appointed another trustee in his place, the latter being entitled to hold the trust-estate, *held* that, a decree having been made against the trustee personally, the corpus of the trust-estate could not be sold to satisfy the claim of the judgment-creditor, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee, on the ground that there was, or might be, a margin of profit coming to him personally after the performance of the trusts. *Held*, also, that, in a suit in which all the parties interested were not before the Court, there could be no decision as to the extent of the trusts, nor as to whether any surplus profits of the trust-estate would, or would not, after the performance of the trusts, belong to the trustee personally.—15 Cal. 329.

Upon a claim by a puisne mortgagee to redeem prior incumbrances, and in the alternative, for a decree ordering a sale of the property mortgaged, the sale was decreed, with application of the purchase-money to pay incumbrances in their due order ; and with redemption by the plaintiff of a prior mortgagee, who was to have an option to redeem. Previously to the mortgage, a fractional interest in the property (which interest was purchased by the plaintiff at a judicial sale) had been the subject of a settlement by a Mahomedan on his wife, under the condition that if he should have no child by her, his two sons by another wife should each have an



estate therein. He died without other children. *Held*, that the two sons had taken definite interests capable of being attached, within sec. 266 of the Civil Procedure Code, not being mere expectancies. *Held*, also, that a judicial sale of property, purporting to be of all the interest of a judgment-debtor, carries with it any enlargement thereof that may have occurred after the attachment and before the sale; and that, accordingly, the above-mentioned settlor having died without a child by that wife, between the date of the attachment and the sale, the sons' augmented interests passed thereby. The plaintiff in this suit had succeeded to four, out of five, mortgages, subsequent to his own, which had been executed before a decree obtained by a mortgagee. This decree had been purchased by the first defendant, who also bought the property at the execution sale. The plaintiff had also succeeded to several mortgages executed pending the suit in which the decree was made. *Held*, that a distinction must be made in respect of whether the mortgages so transferred to the plaintiff had been executed before or after the bringing of the above suit. As regards the mortgages executed before it, the plaintiff not having been a party to that suit, was entitled to redeem the first defendant who was purchaser of the decree. As regards the mortgages executed after that suit was brought, the plaintiff was bound by the decree, and his interest in the mortgages, transferred *pendente lite*, passed to the purchaser. On the other hand, persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit, between the prior mortgagee and the mortgagor, to which they have not been made parties. As regards the Court's power to regulate the interest, *held*, that although, in the decree for sale, the rate of interest on the debt, payable to the mortgage decree-holder, was reducible from the date of the decree from the rate stipulated, to the Court rate, an order to that effect could only be made for the benefit of the judgment-debtor, as a party to the suit. The plaintiff, seeking to redeem a mortgage prior to the suit must pay the interest at the rate agreed upon in the mortgage; there being no authority, either under sec. 10 of Act XXIII of 1861, or under the Civil Procedure Code, sec. 209, to reduce it to the Court rate.—18 Cal. 164.

Under clause (h) of sec. 266 of the Code of Civil Procedure, 1882, a moiety of the salary of a public officer drawing half-pay (exceeding Rs. 20 per mensem) on sick leave is liable to attachment.—6 Madr. 179.

A debt secured by mortgage of immoveable property cannot be sold in execution of a decree under the provisions of the Civil Procedure Code applicable to moveable property.—9 Cal. 511.

Although it is probable that the enactments of section 266, Civil Procedure Code, 1882, were not meant to cover pensions payable by a foreign State when remitted for payment to their pensioner in India, they certainly include all pensions of a political nature payable directly by the Government of India. A pension guaranteed payable by the latter by a treaty obligation contracted with another sovereign power is in the strictest sense a political pension. An allowance, payable by the Government of India under an arrangement made between the King of Oudh and the Governor-General in 1842 for the benefit of members of the King's family and household, and their respective heirs in perpetuity, and payable to one of such heirs, who has inherited it, as his share in the interest in the Oudh loan of 1842, is a political pension within the meaning of section 266, sub-section (g), Civil Procedure Code, 1882. The arrangement of 1842 cannot be treated as merely a provision out of the King's private estate for the maintenance of members of his family, there having been in a State like that of Oudh

no distinction between State property and private property vested in the sovereign.—18 Cal. 216.

Act X of 1877, sec. 266, proviso c, does not prohibit the sale (in execution of decree) of property specifically mortgaged, albeit the property be materials of a house belonging to or occupied by an agriculturist.—4 Bom. 25.

A decree being attached as directed by section 273 of the Civil Procedure Code, its adjustment subsequent to such attachment cannot be recognized by the Court.—16 Bom. 522.

*Held* that secs. 266 and 295 must be read together, and that an ordinary judgment-creditor is not entitled, under sec. 295, to a rateable proportion of the assets realized by the sale of such house or building under a decree obtained by another creditor for rent due to him in respect of the said house or building.—4 Bom. 429.

The right to sue for mesne-profits is a "right to sue for damages" within the meaning of sec. 266, cl. (e) of the Code of Civil Procedure, and, therefore, cannot be sold in execution of decree. Where, therefore, the plaintiff purchased the right to sue for mesne-profits at a sale in execution of a decree, *held* that a suit by him to enforce the right was not maintainable.—9 Cal. 695; 12 C. L. R., 440.

Persons who agree to spin cotton belonging to a spinning and weaving company, and to receive a certain amount of money for a certain quantity of cotton spun by them, are labourers within the meaning of sec. 266 of the Code of Civil Procedure (Act X of 1877), and therefore their remuneration is wages, which, under clause j of the section, cannot be attached in execution of a decree.—5 Bom. 132.

The right or interest which the vendor of immoveable property has in the purchase-money, where it has been agreed that the same shall be paid on the execution of the conveyance, is not, so long as the conveyance has not been executed, a debt, but a merely possible right or interest, and as such, under sec. 266 of Act X. of 1877, is not liable to attachment and sale in the execution of a decree. The person who purchases such a right or interest at a sale in the execution of a decree takes nothing by his purchase.—3 Al. 12.

Debts due to a British subject by the Gaikwar Government, or by a subject of that Government or of a State in the Province of Kathiawar, are not debts which, under sec. 266 of the Code of Civil Procedure (Act X of 1877), are liable to attachment in execution of a decree. Claims over which no Court in British India has jurisdiction are not debts liable to be attached under sec. 266 of the Civil Procedure Code (Act X of 1877). The mere circumstance that the garnishee is, at the time of the application for attachment, beyond the limits of British India, would not of itself render the debts not liable to be attached.—5 Bom. 249.

The expression, "materials of houses and other buildings belonging to and occupied by, agriculturists," used in sec. 266, cl. c, of the Code of Civil Procedure, is intended to exempt from attachment and sale the house dwelt in by an agriculturist as such, and the farm-buildings appended to such dwelling. The exemption does not extend to other houses not in the physical occupation of an agriculturist owner as a dwelling appropriate or convenient for his calling. The exemption extends, after the death of an agriculturist debtor, to his representative who occupies the house in good faith as an agriculturist, and who does not take it up merely with the view of defrauding his creditor.—7 Bom. 530.

A heritable right to receive a certain monthly allowance originally assigned in lien of a share of landed property is not a mere right to maintenance on anything else exempted by the proviso to sec. 266 of the Civil Procedure Code, and is saleable in execution of a decree.—10 Cal. 521.

Before property of a judgment-debtor can be exempted from execution as falling under the head of the property described in sec. 266 of the Code of Civil Procedure, it is necessary that the Court should first express its opinion that such property is necessary to enable the execution-debtor to earn his livelihood, and the Court which must decide this point is the Court which issues the execution. Sec. 14 (a), part II, chapter V. of the general rules and Circular Orders of the High Court, commented on.—10 Cal. 29.

The bar in sec. 266 of the Civil Procedure Code to the attachment of gratuities allowed by Government to its ex-servants, military and civil, is not limited to such gratuities as are allowed to "pensioners," but applies to gratuity granted in consideration of past services.—6 Al. 173.

K, a servant in the employment of the East India Railway Company, was recommended, by the Traffic Manager, a bonus in consideration of long and good services. This recommendation was sanctioned, and the amount of the bonus was received by the District Paymaster. Before payment to K, the money was attached in execution of a decree obtained against him by J. *Held* that, inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the 1st July 1882, and was not evidenced by a registered instrument, it could only be effected by actual delivery; that, as there had been no such delivery as completed the transfer (sec. 123 of the Transfer of Property Act, and sec. 90 of the Contract Act), the money was not at K's disposal, and he could not have enforced payment; and that the money was therefore not liable to attachment in execution of a decree against him.—6 Al. 634.

See I. L. R., 4 Bom. 163, noted under sec. 1; 14 Cal. 241, noted under sec. 6 of the Transfer of Property Act.

**267.** The Court may, of its own motion, or on the application of the decree-holder, summon any person whom it thinks necessary and examine him in respect to any property liable to be seized in satisfaction of the decree, and may require the person summoned to produce any document in his possession or power relating to such property, and, before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued.

#### Notes.

This section applies to Provincial Small Cause Courts.

When a debt alleged to be due by a third party to a judgment-debtor has been attached by the judgment-creditor, the Court may, under sec. 268 of the Civil Procedure Code (Act XIV of 1882), make an order upon the garnishee for the payment of such debt to the judgment-creditor in case the former admits it to be due, or for so much as he admits to be due, to the judgment-debtor. Where however, the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed under sec. 503 of the Civil Procedure Code (Act XIV of 1882).—I. L. R., 11 Bom. 448.

**268.** In the case of (a) a debt not secured by a negotiable instrument, (b) a share in the capital of any public Company or Corporation, (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court, the attachment shall be made by a written order prohibiting,—

Attachment of debt, share, and other property not in possession of judgment-debtor.

(a) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court ;

(b) in the case of the share, the person in whose name the share may be standing, from transferring the same or receiving any dividend thereon ;

(c) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

A copy of such order shall be fixed up in some conspicuous part of the Court-house, and another copy of the same shall be sent, in the case of the debt, to the debtor ; in the case of the share, to the proper officer of the Company or Corporation ; and in the case of the other moveable property except as aforesaid, to the person in possession of the same.

A debtor prohibited under clause (a) of this section may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

In the case of the salary of a public officer or the servant of a Railway Company, the attachment shall be made by a written order, requiring the officer whose duty it is to disburse the salary to withhold, every month, such portion as the Court may direct, until the further orders of the Court.

A copy of every such order shall be fixed up in a conspicuous part of the Court-house, and shall be served on the officer so required.

Every such officer may, from time to time, pay into Court any portion so withheld, and such payment shall discharge the Government or the Railway Company, as the case may be, as effectually as payment to the judgment-debtor.

#### Notes.

This section applies to Provincial Small Cause Courts.

S got a decree against V for money, and having attached a bond hypothecating certain land as security for a debt, executed in favour of V,

under sec. 269 of the Code of Civil Procedure, 1877, purchased the same. S then sued on the bond. The suit was dismissed on the ground that the attachment had not been made by obtaining an order under sec. 268. S then attached the bond as immoveable property under sec. 274, and purchased it and the mortgagee's interest therein. S again sued to recover the amount due by sale of the land hypothecated. The defendants contended that S had no title, because there had been no attachment under sec. 268. *Held* that the objection was bad, and that S was entitled to the relief claimed.—I. L. R., 11 Madr. 403.

The interest of the obligee in a bond hypothecating certain land as security for a debt having been attached under sec. 274 of the Code of Civil Procedure and sold, a suit was brought by the purchaser upon the said bond. It was objected that the suit was not maintainable, because the bond had not been also attached as a debt under sec. 268 :—*Held* that the fact of the bond not having been attached as a debt under sec. 268 did not affect the right of the purchaser to realize the amount due under it.—10 Madr. 169.

A decree-holder by a prohibitory order made under sec. 268 (a) of the Civil Procedure Code attached a debt due to his judgment-debtor. The debt was not paid into Court :—*Held*, that the Court cannot, under sec. 268 of the Code of Civil Procedure, call on a person subject to a prohibitory order to pay or show cause why he should not pay his debt into Court. The Court is bound to satisfy itself that a debt is due, the debt must then be sold and delivery made under secs. 284 and 301 of the Code of Civil Procedure.—10 Madr. 194.

Where money deposited with a railway company by one of its servants as a guarantee for the due performance of his duties was attached by a judgment-creditor of such servant under sec. 268 :—*Held*, that the creditor was not entitled to have his decree satisfied out of the deposit, but was entitled to a stop order under cl. (c) of sec. 268, and also to payment of the interest (if any) due by the company on such deposit to the servant.—9 Madr. 203.

In execution of a decree obtained by them against J and M, the plaintiffs attached a decree obtained by J and M against D, and on the allegation that J and M, in order to avoid the consequence of this attachment, executed a *benami* conveyance of their interest under the attached decree to B and P, and afterwards with the same object took in adjustment and satisfaction of that decree two bonds in favour of R and I respectively, by which immoveable property was pledged as collateral security, the plaintiffs attached these two bonds by prohibitory order, under sec. 268, and purchased them at the sale in execution of their decree. In a suit on the bonds against D as the principal defendant with J, M, B, P, R, and I joined as parties, *held* that the plaintiffs were entitled to enforce the lien created by the bonds against the immoveable property specified in them, notwithstanding that no attachment had been made in accordance with the provisions of sec. 274 of the Code ; a debt secured by a mortgage-lien on immoveable property not being " immoveable property " within the meaning of that section.—12 Cal. 546.

Under the provisions of sec. 268 of the Code of Civil Procedure (Act X of 1877), bonds cannot be sold till the end of the six months from the date of attachment. A Court of Small Causes cannot appoint a receiver. Bonds, therefore, on which recovery will be time-barred before the date on which a sale can legally be made, cannot be made available for satisfaction of the judgment-creditor's debt.—2 Bom. 558.

A decree-holder, by a prohibitory order issued under Act X of 1877, sec. 268, attached a debt due to his judgment-debtor. The person served with the order applied, under sec. 278, to have the attachment removed. *Held* that the application could not be entertained under sec. 278, that section having no application to the case; but that, before issuing a proclamation of sale, in execution of a decree, of the debt so attached, it is the duty of the Court, under sec. 287, to ascertain all the Court considers it material for the intending purchaser to know in order to judge of the nature and value of the property proclaimed for sale. If the property, of which sale is sought, is a debt, and the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence, or otherwise, of the debt, and, if it comes to the conclusion that no debt exists, should abstain from proceeding to sale.—4 Bom. 323.

Sec. 268, clause (a) of the Civil Procedure Code, does not mean that, while a debt is under attachment, the person to whom the debt was originally owing, should be barred from bringing a suit in respect of it. What it prohibits is the recovery of the debt, and the payment of it by the debtor to the creditor. *Semble*—An order of attachment under sec. 268 of the Civil Procedure Code is not an injunction or order staying a suit within the meaning of sec. 15 of the Limitation Act (XV of 1877.—13 Al. 76.

An attachment before judgment under sec. 485 read with sec. 486 and sec. 268 (a) of the Civil Procedure Code, of a debt secured by a bond; or an injunction obtained by a third party and restraining the attaching creditor from subsequently bringing the bond to sale in execution of his decree: is not an injunction or order staying the institution of a suit upon the bond by the obligee, within the meaning of sec. 15 of the Limitation Act. *Shib Singh v. Sita Ram* followed.—14 Al. 162.

See 1 B. L. R., S. N., 15, 10 W. R., 149, 2 B. L. R., 109 and 10 W. R., 447, noted under sec. 266; I. L. R., 6 Al. 243, noted under sec. 223; 3 Al. 12, noted under sec. 266; 11 Bom. 448, noted under sec. 267; 16 Bom. 91, noted under sec. 295.

**269.** If the property be moveable property in the possession of the judgment-debtor, other than the property mentioned in the first proviso to section 266, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Attachment of moveable property in possession of judgment-debtor.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody will exceed its value, the proper officer may sell it at once.

Proviso.

The Local Government may, from time to time, make rules for the maintenance and custody, while under attachment, of live-stock and other moveable property, and the officer attaching property under this section shall, notwith-

Power to make rules for maintenance of attached live-stock.



standing the provisions of the former part of this section, set in accordance with such rules.

**Notes.**

This section applies to Provincial Small Cause Courts.

Under sec. 233, Act VIII of 1859, a nazir, authorized to execute a warrant by attachment of moveable property, has power to remove locks put by the judgment-debtor on the doors of godowns, or other places where his property is stored, and put his own locks thereon, for the purpose of attachment and safe custody of the property.—5 B. L. R., App. 27; 13 W. R., 339.

See I. L. R., 11 Madr. 403, noted under sec. 268.

**270.** If the property be a negotiable instrument not deposited in a Court, nor in the custody, of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court, and held subject to the further orders of the Court.

**Note.**—This section applies to Provincial Small Cause Courts.

**271.** No person executing any process under this Code, directing or authorizing seizure of moveable property, shall enter any dwelling-house after sunset and before sunrise, or shall break open any outer door of a dwelling-house. But, when any such person has duly gained access to any dwelling-house, he may unfasten and open the door of any room in which he has reason to believe any such property to be :

Provided that, if the room be in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to her that she is at liberty to withdraw; and, after allowing a reasonable time for such woman to withdraw, and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

**Notes.**

This section applies to Provincial Small Cause Courts.

It is not necessary that a special order of Court should be made, empowering an officer authorized to arrest a parda-nashin lady to enter the zanana of the house in which she resides. Under sec. 336 of the Civil Procedure Code, if the officer is able to enter the house, he may break into any room in the house, including the zanana, in order to effect the arrest.—I. L. R., 7 Cal. 19.

A bailiff or nazir has authority to break open the door of a shop in

order to execute a writ of attachment, the previously existing law on the subject not being altered by Act X of 1877, sec. 271.—3 Bom. 89.

See 5 B. L. R., App. 27 & 15 W. R., 339, noted under sec. 289.

**272.** If the property be deposited in, or be in the custody of, any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice issues :

Attachment of property deposited in Court or with Government officer.

Provided that, if such property is deposited in, or is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment, or otherwise, shall be determined by such Court.

Proviso.

#### Notes.

This section applies to Provincial Small Cause Courts.

An attachment was placed under Civil Procedure Code, sec. 272, on letters in the post office addressed to certain judgment-debtors. The day before the attachment the senders of the letters had applied to have the letters returned to them :—*Held*, that the postmaster held the letters in trust for, or on behalf of the judgment-debtors, and they were accordingly liable to attachment on the application of the decree-holder.—I. L. R., 13 Madr. 242.

A suit will lie to set aside an order such as is contemplated by the proviso to sec. 272 of the Code of Civil Procedure, that is, an order determining any question of title or priority as between the decree-holder and any other person in respect of money in deposit in a Court of justice. The mode of investigation and the nature of the order to be made under sec. 272, and the extent to which such an order is final, are provided for in secs. 278—283 of the Code of Civil Procedure.—19 Cal. 286.

*Held* that attachment under sec. 237 of Act VIII of 1859 was not applicable to a right to receive money for ever ; that such an attachment is only good so far as it relates to any specific amount, which may be set forth in the request to the officer in whose hands the monies are, as being then payable or likely to become payable.—3 Cal. 414.

In execution of a decree of a Munsif's Court, the plaintiff attached certain money, the proceeds of decrees which her judgment-debtor had obtained against third parties, then lying in a Small Cause Court to her credit, and subsequently obtained an order from the Munsif directing the same to be paid to her in satisfaction of her decree, which order was duly communicated to the Small Cause Court Judge. Subsequently, the defendant, who held another decree against the same judgment-debtor, attached the same sale-proceeds. The Small Cause Court Judge then proceeded, under sec. 272 of the Civil Procedure Code, to inquire whether the plaintiff was entitled to any priority over the second attaching creditor, and, having decided that question in the negative, divided the sale-proceeds rateably between them. In a suit brought by the plaintiff, under the above circum-

stances, to recover from the defendant the portion of the sale-proceeds so paid to him, *held* that sec. 295 of the Civil Procedure Code had no application, inasmuch as the plaintiff had not applied to the Small Cause Court Judge to execute her decree, and it had never been transferred to the Court for execution; and that the provision in sec. 272 is merely intended to mean that any question of title or priority to be determined by the Court in which or in whose custody the property is, and not by the Court which made the order of attachment. *Held* also that, previous to the order by the Munsif directing the payment to be made to the plaintiff, the Small Cause Court Judge would have had jurisdiction to deal with the question he had tried; but, as that order was made prior to the attachment by the defendant, the judgment-debtor had no interest in the money which could be so attached, the effect of that order being to vest the property in the money in the plaintiff, and to take it out of the disposal of the Small Cause Court Judge, and consequently the order for distribution was wrong, and the plaintiff was entitled to the decree she sought. *Quære*.—Whether an order made by a Court under sec. 272 was intended by the Legislature to be a final order? —7 Cal. 553.

See I. L. R., 15 Cal. 371, noted under sec. 232.

**273.** If the property be a decree for money passed by the Court which passed the decree sought to be executed, the attachment shall be made by an order of the Court directing the proceeds of the former decree to be applied in satisfaction of the latter decree.

If the property be a decree for money passed by any other Court, the attachment shall be made by a notice in writing to such Court under the hand of the Judge of the Court which passed the decree sought to be executed, requesting the former Court to stay the execution of its decree until such notice is cancelled by the Court from which it was sent. The Court receiving such notice shall stay execution accordingly, unless and until

(a) the Court which passed the decree sought to be executed cancels the notice, or

(b) the holder of the decree sought to be executed applies to the Court receiving such notice to execute its own decree.

On receiving such application, the Court shall proceed to execute the decree, and apply the proceeds in satisfaction of the decree sought to be executed.

In the case of all other decrees the attachment shall be made by a notice in writing, under the hand of the Judge of the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, when such

decree has been passed by any other Court, also by sending to such Court a like notice in writing to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. Every Court receiving such notice shall give effect to the same until it is so cancelled.

The holder of any decree attached under this section shall be bound to give the Court executing the same such information and aid as may reasonably be required.

Decree-holders to give information.

#### Notes.

This section applies to Provincial Small Cause Courts, (so far as it relates to decrees for moveable property).

Sec. 273 having expressly provided a mode for the attachment of decrees, the procedure laid down in sec. 274 relating to immoveable property has no application to the attachment of a decree for redemption.—I. L. R., 10 Bom. 444.

A decree being attached as directed by section 273 of the Civil Procedure Code, its adjustment subsequent to such attachment cannot be recognized by the Court.—16 Bom. 522.

A decree for money obtained by a judgment-debtor is not a debt, which, by virtue of sec. 266 of the Code of Civil Procedure, can be attached and sold. Where a decree-holder desires to render a decree obtained by his judgment-debtor available for the satisfaction of his own decree, the procedure laid down by sec. 273 of the Code of Civil Procedure must be followed.—6 Madr. 418.

*Held* that Act X of 1877 does not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree, and the attachment of a decree for money in the mode ordained in sec. 273 cannot lead to its sale. *Held* also that the last clause but one of sec. 273 applies to other than money-decrees. Where two decrees for money, although they were not passed by the same Court, were being executed by the same Court, *held* that the provisions of the first clause of sec. 273 of Act X of 1877 were applicable on principal.—2 Al. 290.

**274.** If the property be immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from receiving the same from him by purchase, gift, or otherwise.

Attachment or immoveable property.

The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be fixed up in a conspicuous part of the property and of the Court-house.

When the property is land paying revenue to Government, a copy of the order shall also be fixed up in the office of the Collector of the District in which land is situate.

**Notes.**

In execution of a money-decree, an order was issued under sec. 274 for the attachment of property which was the joint ancestral estate of the judgment-debtor and his father. A copy of this order was not fixed up in the office of the Collector of the district in which the land was situated, as required by sec. 274. The sale was ordered and a day fixed for sale, but in consequence of postponements made at the judgment-debtor's request, no sale took place. In the meantime the judgment-debtor died, and the decree-holder applied for execution against the father as representative of the judgment-debtor, whose interest had survived to him:—*Held* that the decree-holder had, by the proceedings taken in execution during the son's lifetime, obtained rights over his interest which could not be defeated by his death before sale. *Suraj Bansi Koer v. Shoe Persad Singh* (I. L. R., 5 Cal. 148; L. R., 6 Ind. App. 108) followed:—*Held* also that, though the defect in the manner in which the attachment was made might render the attachment ineffectual for the purpose of voiding alienations made, the attachment was effectual against the judgment-debtor, and the defect did not afford a ground for declaring the execution-proceedings ineffectual.—I. L. R., 7 Al. 731.

*Held* that the fact of a sale of immoveable property in execution of a decree having taken place before thirty days from the proclamation of sale being made on the property had expired was not a material irregularity in the publication of the sale. *Mohunt Megh Lall Pooree v. Shib Pershad Madi* (I. L. R., 7 Cal. 34) dissented from.—4 Al. 300.

In execution of a simple money decree against the holders of a *muafi* interest in a certain village, who did not possess any zemindari interest in that village, an attachment was obtained by the decree-holder in 1884 of "an eight biswas zemindari share of mauza D," and under that attachment a sale took place in January 1886. Meanwhile in December 1885, a decree for pre-emption in respect of a sale by the judgment-debtors in 1881 of their *muafi* interests in the village, was decreed in favour of persons who were not parties to the litigation in which the attachment of 1884 was effected. The plaintiffs (who were in possession) sued for a declaration of their right to the *muafi* interests as against the auction-purchaser under the sale of January 1886. *Held* that the attachment in 1884 was not a good attachment of the *muafi* interests of the judgment-debtors, and the auction purchaser could not be held to have purchased those *muafi* interests, and the title of the plaintiffs under their pre-emptive decree of December 1885 must prevail.—13 Al. 119.

A suit on a mortgage foreclosed under Reg. XVII of 1806, sec. 8, comprising property attached before the date of the mortgage under sec. 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was, that the mortgage, falling within the provisions of sec. 240 of the Act, was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended that the attachment could not prevail, it not having been proved affirmatively that the requirements of sec. 239, relating to the intimation of the attachment, had been complied with. *Held* that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question. *Semble*.—A re-attachment of property

after decree does not imply an abandonment of an attachment obtained before decree.—6 Cal. 129.

The defendant obtained a decree against D, father of the plaintiffs, for satisfaction of his debt by the sale of a moiety of a village mortgaged to him by D. In execution of it he attached the mortgaged property, the attachment being made, under Act X of 1877, sec. 274, by an order prohibiting D from transferring or charging the property in any way, and all persons from receiving it from him by purchase, gift, or otherwise. The plaintiffs thereupon applied for the removal of the attachment, but their application was rejected. They then sued for a declaration of their right to two-thirds of the property. The District Judge, who tried the suit, rejected it on the ground that it, was barred by Act I of 1877, sec. 42, because the plaintiffs might have sought further relief than a mere declaration of title, and omitted to do so. He was of opinion that the attachment constituted a dispossession, and that the plaintiffs might have asked to be replaced in possession, or, at any rate, for the removal of the attachment. *Held* by the High Court on appeal that the plaint was not open to objection, on the ground that it only asked for a declaratory decree, without any consequential relief; that the prohibitory order to D did not constitute a dispossession of D, and still less of the plaintiffs; and that they could not have properly asked for removal of the attachment by a cancellation of the prohibitory order to D so long as they admitted that D had an interest in the attached property; and also that the plaintiffs could not have properly asked for any consequential relief in their suit, but that, when they instituted it, they were entitled, and, indeed, bound to ask for a declaration of their right, if only to prevent a purchaser at the sale, under the defendant's decree against D, from afterwards alleging that he had purchased without notice of the plaintiff's claim.—4 Bom. 529.

The proclamation of sale required by sec. 274 of the Civil Procedure Code, to be made at some place adjacent to the property to be sold, and the fixing up of a copy of the order in a conspicuous part of the property, are acts which must precede the posting of the notices in the Court-house as required by sec. 290. Where the sale-proceeds of a portion of several parcels of property are sufficient to satisfy the decree of a judgment-creditor who has attached the property, another judgment-creditor, although he has not attached the property, is still entitled to have the remainder of the property sold to satisfy his decree under the provisions of sec. 295 of the Civil Procedure Code. Three mauzas were attached in execution of decrees obtained by A and B. Prior to the sale, C, who had also obtained a decree against the owner of the land, applied for leave to execute his decree, in order that he might participate in the sale-proceeds under sec. 295 of the Civil Procedure Code. Upon the day fixed for the sale, the Deputy Commissioner was unable, through illness, to attend; and he postponed the sale for three days. Two of the mauzas were sold, and realized more than enough to satisfy the decrees of A and B. The third was then sold in satisfaction of C's decree. Upon an application by the judgment-debtor to set aside the sale on the ground of irregularity, it appeared that notice of the sale had been posted in the Court-house more than thirty days before the date fixed for the sale, but had only been published on the properties to be sold five days before that date; that notice of the existence of a mortgage on the properties, but no further particulars, was given, and the mortgagee was allowed to purchase; and the Deputy Commissioner had accepted the reports of the Nazir and Court-peon as to the proclamation of sale, and had refused to allow the judgment-debtor to give evidence of its in-



sufficiency. *Held* that the proclamation of sale on the property having taken place only five days prior to the date of sale, and the particulars of the mortgage not having been given, there had been such material irregularities in the publication as to entitle the judgment-debtor to give evidence of them and the other allegations made by him, in order to show that he had suffered material injury by reason of such irregularities. *Held* also that the Deputy Commissioner was not entitled to proceed upon the reports of the Nazir and Court-peon, but was bound to hear the evidence tendered by the judgment-debtor, though he was justified, under sec. 291, in postponing the sale as he had done. *Held*, further, that the third judgment creditor, who had not attached the property, was still entitled to have the sale proceeded, with and his decree satisfied under the provisions of sec. 295.—7 Cal. 34.

See I. L. R., 7 Cal. 466, noted under sec. 278; 3 Al. 698, noted under sec. 237; 10 Madr. 169 & 11 Madr. 403, noted under sec. 268; 17 Cal. 769. noted under sec. 244.

**275.** If the amount decreed with costs, and all charges and expenses resulting from the attachment of any property, be paid into Court, or if satisfaction of the decree be otherwise made through the Court, or if the decree is set aside or reversed, an order shall be issued, on the application of any person interested in the property, for the withdrawal of the attachment.

**Note.**—This section applies to Provincial Small Cause Courts.

**276.** When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage, or otherwise, and any payment of the debt or dividend, or a delivery of the share, to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment.

#### Notes.

This section applies to Provincial Small Cause Courts.

*Held* (MARKBY, J., *dissenting*) that a private *bona fide* alienation for value of property attached under Act VIII of 1859, made during the continuance of the attachment, is, by sec. 240 of that Act, null and void only as against the attaching creditor or persons who may acquire rights under or through the attachment, and not as against the whole world.—*Anandal Das v. Radhamohan Shawa*, 2 B. L. R., (F. B.) 49; 11 W. R., (O. C.) 1. Same case affirmed in the Privy Council.—10 B. L. R., 134; 17 W. R., 313; 14 Moore's I. A., 543; 12 B. L. R., 413 note; 14 W. R., 25; 13 W. R., 134.

A obtained a decree against B for a sum payable by instalments. B made default in payment of an instalment, so A attached certain immoveable property belonging to B. While under attachment, B sold the property to C, and out of the proceeds paid into Court the full amount of the

debt then due, and for which the property had been attached. A took out the money, but applied for and obtained an order from the Munsif that the property should remain under attachment, in order to satisfy any future sum which should fall due under the decree, and in payment of which B should make default. B failed to pay a further instalment when due, and A obtained an order for sale of the property. A himself became the purchaser, and was put in possession by the Court, notwithstanding the claim of C, who had been in possession ever since his purchase. In a suit by C to recover possession, *held* the Court had no power to make the order continuing the attachment, the right of attachment being only for sums actually due, and the whole amount for which execution issued being satisfied, out of the proceeds, the alienation of the property to C was not void as against A.—4 B. L. R., (A. C.) 20; 12 W. R., 457.

In execution of a decree, A, the judgment-creditor, obtained an order for the attachment of certain property of B, the judgment-debtor, but it was not executed as required by Act VIII of 1859. The property was, however, advertised for sale, and A obtained an order staying the sale, on a petition alleging that A had agreed to give him time on condition that the attachment should remain good, and declaring that he (B) would not alienate the property until the whole of the decree was satisfied. Subsequently B mortgaged a portion of this property to C. A signed his decree to D, upon whose application the property was attached and sold, and E became the purchaser. C having taken steps to foreclose the mortgage E, to prevent such foreclosure, paid the amount into Court. *Held* that E could not maintain a suit against C to recover the amount so paid by him. The mortgage by B was not an alienation null and void under sec. 240, Act VIII of 1859. B's petition did not create a charge upon the property in favour of A.—4 B. L. R., (A. C.) 24; S. C. 12 W. R., 491.

The purchaser of the right, title, and interest of a judgment-debtor in certain immoveable property at an auction-sale, which took place at the instance of a second attaching creditor, was held to take the property subject to an incumbrance created by the judgment-debtor pending the first, but prior to the second, attachment, although the first attaching creditor was first paid out of the proceeds of the sale. Whether the sale ought not to have been under the first attachment, as against which the incumbrance would have been void?—9 B. L. R., 180; 18 W. R., 279.

Alienation of property while under attachment is null and void; and the removal of the attachment will not render such alienation valid.—12 B. L. R., 414 note; 15 W. R., 222.

The plaintiff sued to recover certain land which had been hypothecated to him in 1843, and subsequently sold to him in 1868, while under attachment in execution of a decree in a suit brought by the plaintiff to establish his hypothecatory claim. The third defendant claimed under a mortgage prior in date to the hypothecation to the plaintiff, and under a sale, prior in date to the sale to the plaintiff, made to the third defendant whilst the land was under attachment in execution of the decree to the plaintiff. *Held* that the sale to the third defendant, which was made, not under any agreement with the plaintiff, for the satisfaction of the decree through the Court, was invalid by reason of sec. 240 of the Civil Procedure Code; but that the alienation to the plaintiff, the decree-holder, during the attachment to satisfy the decree, which was duly sanctioned by the approval of the Court which issued the process of attachment, was valid.—6 M. H. C. R., 65.

A private alienation of property, while under attachment, is null and void only as regards the attaching creditor and those who claim under or through the attachment. *Anund Lal Doss v. Jullodhur Shaw* (17 Cal. W. R., Civ. Rul., 313) followed. The fact that a puisne attaching creditor mentioned in his application for attachment and sale of certain property of his judgment-debtor that the same property had already been attached at the instance of another execution-creditor does not render the puisne creditor a claimant through the first attaching creditor. A puisne attaching creditor cannot be regarded as claiming through a prior attaching creditor, though the assignee of an attaching creditor's rights, or the next-of-kin of a deceased attaching creditor, may be said to claim under or through him. Act VIII of 1859, sec. 240, is for the benefit of an attaching creditor (subsequent to, and in defiance of, whose attachment, the private alienation, thereby declared void, has been made), and of those claiming under or through him, and not for the benefit of puisne attaching creditors, whose attachment is laid later than such private alienation. Secs. 270 and 271 of the Civil Procedure Code apply only to cases where there has been a sale under the first attachment.—11 Bom. H. C. R., (A. C.) 159.

An alienation of property attached in execution of a decree, made for the *bona fide* purpose of satisfying the decree in respect of which the attachment has been made, and where the consideration for the alienation is applied to, and is found to be sufficient for, satisfaction of the decree, is not invalid under sec. 240 of the Code of Civil Procedure.—1 N.-W. P. H. C. R., 60; Ed. 1873, 214.

A judgment-debtor satisfied a decree under which attachment of his property had been made. He reported the satisfaction to the Court, and on the following day he executed a mortgage of his property. The day after the execution of the mortgage, the attachment was removed by the Court. *Held* that the mortgage, if *bona fide*, was not null and void under sec. 240 of the Code of Civil Procedure.—1 N.-W. P. H. C. R., 71; Ed. 1873, 125.

The Official Assignee of the Insolvent Court is entitled, under the vesting order, to possession of the insolvent's estate, even when that estate has been attached in execution of a decree, and an order directing the sale of it has been passed. But if a sale has taken place before the vesting order, the property in the subject of the attachment has passed from the judgment-debtor to the auction-purchaser, and the proceeds of the sale are primarily charged with the satisfaction of the decree or decrees in execution of which the sale has been made. The expression "private alienation" in sec. 240 of the Code of Civil Procedure does not refer to an alienation effected by a vesting order of the Insolvent Court under sec. 7 of the Indian Insolvent Act; such an alienation is rather an alienation by operation of law than one by the judgment-debtor. *Semble*, that sec. 89 of the Code of Civil Procedure was introduced, not for the purpose of restraining the ordinary effect of attachment, but for the purpose of preventing the same view being taken of attachments before judgment as had been taken by the Indian Courts of the writ or sequestration. When attachment of property has preceded decree, no fresh attachment is necessary subsequent to decree.—1 N.-W. P. H. C. R., Pt. 6, p. 81; Ed. 1873, 172.

Although, under the provisions of sec. 240 of Act VIII of 1859, a private alienation by sale of property after attachment can be impugned by the holder of the decree in execution of which it was attached, if obstructive of the execution, yet such alienation cannot be impugned by the holder of the decree, under those provisions, because it obstructs the execution of

another decree obtained by him subsequently to the date of alienation.—6 N.-W. P. H. C. R., 217.

While certain immoveable property was under attachment, the judgment-debtor mortgaged it for value to the Mussoorie Savings' Bank, with the knowledge of the attaching creditor, the Delhi Bank, which acquiesced in, and benefited by, the mortgage. The property was subsequently released from attachment, but was again attached, and was brought to sale in execution of the decree held by the Delhi Bank, and purchased by the defendants. The Mussoorie Savings' Bank sued the auction-purchasers, claiming the right to bring the property to sale on the ground of its being under mortgage to the Bank prior to its purchase by the defendants. It was held that, under the circumstances, the defendants must take the consequences of having purchased the property without having satisfied themselves as to its condition. Had it not been for the conduct of the Delhi Bank, however, the rule that a private *bona fide* alienation for value of property attached under Act VIII of 1859 is, by virtue of sec. 240 of the Act, null and void only as against the attaching creditor or persons who may acquire rights under or through the attachment, would have saved the defendants, and it would have done so notwithstanding that the sale took place in pursuance of a second attachment.—6 N.-W. P. H. C. R., 296.

Any alienation of property after attachment is illegal under sec. 240, Act VIII of 1859.—7 W. R., 511 ; 9 W. R., 167 ; 9 W. R., 307.

*Held* by LOCH and E. JACKSON, JJ., that a mortgage of any kind made after attachment is such an alienation as is contemplated by sec. 240, Act VIII of 1859, and is null and void.—9 W. R., 544.

Before an attachment can be relied on under sec. 240, Code of Civil Procedure, for the purpose of invalidating any subsequent alienation, it must be shown to have been duly made by a written order issued and published, *viz.*, the prohibitory notice prescribed by law.—13 W. R., 136.

Where landed property is attached in execution of a decree, the party attaching is bound by a lease obtained for it prior to his attachment.—15 W. R., 75.

A judgment-debtor, whose property had been attached in execution of a money-decree, sold the property, and out of the price paid into Court the amount of the decree, and prayed that the attachment might be removed. While the attachment was subsisting, and prior to the sale, the holders of other money-decrees against the same judgment-debtor preferred applications, purporting to be made under sec. 295 and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditors. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bona fide* transaction, entered into for valuable consideration :—*Held* that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in manner provided by sec. 274, their claims were not entitled to the protection conferred by sec. 276 against private alienations of property under attachment ; that these claims were not enforceable under the attachment which was made ; that the sale by the judgment-debtor was valid ; and that execution of the decrees could not take place. *Per* MAHMOOD, J.—That sec. 276 being a restriction of private rights of alienation, should be strictly construed ; that before property can be subjected to such restriction, there must be a perfected attachment ; that the orders passed under sec. 295 did not amount to such attachment ; and that, even assuming them to amount to such attachment, they

not having been duly intimated and notified could not make the prohibition of sec. 276 applicable to the case. *Mahadeo Dubey v. Bhola Nath Dichit* (I. L. R., 5 Al. 86), *Anand Lall Dass v. Jallothur Shaw* (14 Moore's I. A. 543), *Rameswar Singh v. Ramtanu Ghose* (4 B. L. R., (A. C.) 24), *Indro Chunder Baboo v. Dunlop* (10 W. R., 264), *Gobind Singh v. Zalim Singh* (I. L. R., 6 Al. 33), and *Gumani v. Hardwar Pandey* (I. L. R., 3 Al. 698), referred to. Also *per* MAHMOOD, J.—While sec. 295 of the Code gives a special right to judgment-creditors as distinguished from simple creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, and that its result should appear in assets realized by the sale, and therefore, until the sale takes place, no such right can be enforced. *Bishen Chunder Surma Chowdhry v. Mun Mohinee Dabee* (8 W. R., 501), referred to.—I. L. R., 7 Al. 702.

The interest of a tenant in certain land having been attached by his creditor in execution of a decree for money, the landlord attached the same land for arrears of rent, brought it to sale, and purchased it under the provisions of the Rent Recovery Act. The creditor subsequently purchased the interest of the tenant, which was sold in execution of his decree. In a suit by the landlord to have the sale to the creditor declared invalid, *held* that the landlord's purchase was subject to the creditor's attachment.—8 Madr. 573.

An attaching creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment.—6 Cal. 663.

A renewal of mortgage already existing on the property prior to attachment, which does not enhance the charge, is not an alienation within the meaning of sec. 276 of the Code of Civil Procedure.—4 Madr. 417.

Where, certain immoveable property having been attached, the execution-case was subsequently struck off the file, and the judgment-debtor applied again for attachment of the same property, *held*, looking to the particular circumstances of the case, that a private alienation of the property, after the date of such application, but before attachment, was not void under the provisions of sec. 240 of Act VIII of 1859. The principle of the High Court's decision in *Ahmed Hossain Khan v. Muhammad Azeem Khan* (H. C. R., N.-W. P., 1869, p. 51) followed.—1 Al. 616.

By agreement between L and Q, the parties to a suit, the matters in difference between them were referred to arbitration. An award was made directing that L should transfer certain property to Q by way of sale. Between the day the award was made and the day a decree was made in accordance with the award such property was attached in execution of a decree against L. After the attachment, L, in compliance with the decree made in accordance with the award, executed a conveyance of such property to Q. *Held* by the Full Bench (affirming the decision of STRAIGHT, J., and reversing that of SPANKIE, J.) that such conveyance was not a "private alienation" in the sense of sec. 276 of Act X of 1877, and was therefore not void under that section as against a claim enforceable under such attachment.—4 Al. 219.

Certain land was attached in the execution of a decree in the manner required by sec. 235 of Act VIII of 1859, but a copy of the order of attachment was not, as required by sec. 239 of that Act, fixed up in a conspicuous part, or in any part at all, of the Court-house of the Court executing the decree; nor was it sent to, or fixed up in, the office of the Collector of the District in which the land was situated. Subsequently to the attachment of the land, the judgment-debtor privately alienated it by sale. *Held*

that, as the attachment had not been made known as prescribed by law, the provisions of sec. 240 of Act VIII of 1859 did not apply, and the sale was not null and void. *Indarchander v. Agra and Masterman's Bank* (10 W. R., 264; 1 B. L. R., S. N., 20) followed.—2 Al. 58.

The title obtained by the purchaser on a private sale of property in satisfaction of a decree differs from that acquired upon a sale in execution. Under a private sale, the purchaser derives title through the vendor, and cannot acquire a title better than his. Under an execution-sale, the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment-debtor, acquires that title, by operation of law, adversely to the judgment-debtor, and freed from all alienations and incumbrances effected by him after the attachment of the property sold. In 1858, the respondent obtained a decree against B. In 1863, in satisfaction thereof, he caused to be attached a decree for mesne-profits made in favour of B against the appellants in 1860. In May 1865, the respondent obtained an order for the sale thereof; but, instead of proceeding to execution-sale, he purchased, in 1866, the whole of the mesne-profits due under the decree of 1860, by private sale from B. Meanwhile, in September 1865, an order of Court had been made, between B and the appellants, on their consent (but without the respondent being a party to it), whereby the decree for mesne-profits was set off, *pro tanto*, against a prior decree for a larger amount, which the appellants had obtained against B. *Held* that the sale of 1866, having been a private one, and not in process of execution, the respondent only obtained such title as B had in the decree of 1860—*viz.*, a title subject to the effect of the order of September 1865.—7 Cal. 107; L. R., 8 I. A. 65; 10 C. L. R., 281.

A private alienation of property under attachment is void under sec. 276 of the Civil Procedure Code, "as against all claims enforceable under the attachment" only. *Held*, therefore, where property attached in execution of a decree was alienated, and was, after such alienation, again attached, the first attachment having expired, and was brought to sale in pursuance of the second attachment, and the purchaser sued for possession of the property, claiming on the ground that the alienation of the property was void under the provisions of sec. 276, that, as no claim was enforced or was enforceable under the first attachment, under which the property was alienated, but the purchaser was claiming under the second attachment, such alienation could not be assailed under the provisions of sec. 276.—6 Al. 33.

See I. L. R., 6 Cal. 129, noted under sec. 274; 3 Al. 698, noted under sec. 237; 15 Cal. 202, noted under sec. 213; 12 Al. 440, noted under sec. 234; 16 Bom. 91, noted under sec. 295.

**277.** If the property attached is coin or currency-notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Court may direct coin or currency-notes attached to be paid to party entitled.

#### Notes.

This section applies to Provincial Small Cause Courts.

Sec. 237 of the Civil Procedure Code, 1859, gave no authority to a Civil Court to dispose of claims to money in deposit with a Collector, nor



did sec. 242 give such a Court authority to dispose of claims to money under attachment.—13 W. R., 301.

**278.** If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Investigation of claims to, and objections to attachment of, attached property.

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

If the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

#### Notes.

This section applies to Provincial Small Cause Courts.

Certain lands were attached under a decree against the ancestor of the plaintiff, but on the intervention of the defendant under sec. 246, Act VIII of 1859, they were released to him. *Held* that was not an order made between plaintiffs and defendant, such as to make it necessary for the former to sue for declaration of title within one year.—2 B. L. R., App. 49.

Where a claim was made under sec. 246 of Act VIII of 1859, by a third party, to some timber which had been attached by a prohibitory order under sec. 234, *held per* PEACOCK, C. J., L. S. JACKSON, PHEAR, and MACPHERSON, JJ. (MITTER, J., *dissenting*), the claimant must begin. The *onus* is on him to prove that the goods attached were his property, or in his possession, and therefore not in the possession of the judgment-debtor. His evidence must be confined to proving his own claim, and he cannot be allowed to shew a title in a third person with whom he has no connection. *Held (per* MITTER, J.) that on the proper construction of the words, "proceed to investigate the same with like powers as if the claimant had been originally made a defendant," the *onus* of proof as against the claimant is on the decree-holder. *Nito Kali Debi v. Kripanath Roy* (8 W. R., 358) overruled.—2 B. L. R., (F. B.) 91; 11 W. R., (F. B.) 8.

An Appellate Court is competent at any stage to allow objections to be taken to an apparent defect in the plaint. *Held* that a party against whom an order has been obtained under sec. 246, Act VIII of 1859, must, if he sue for its reversal, assert substantially the same right as that which has been contended for in the execution. *Held* by JACKSON, J., that, in a suit for declaration of title, defendants must have given a cause of action by impugning it antecedently to plaint filed, even though their written statement be hostile.—2 B. L. R., (A. C.) 212; S. C. 11 W. R., 40.

An objection not taken in cross-appeal before the lower Appellate Court cannot be taken in special appeal. But if the case be remanded for new trial, such objection may then be taken before the Court of first instance. On attachment of certain property, plaintiff and defendants pre-

ferred their respective claims thereto. The plaintiff's claim was disallowed; but the defendant's claim was allowed. The plaintiff, after the lapse of a year from the date of the order disallowing his claim, sued to recover possession of the said property. The defence was that the suit was barred by lapse of time under cl. 5, sec. 1, Act XIV of 1859, and sec. 246, Act VIII of 1859. *Held* cl. 5, sec. 1, Act XIV of 1859, and sec. 246, Act VIII of 1859, do not apply to such a suit.—2 B. L. R., (A. C.) 254; S. C. 11 W. R., 134.

A decree-holder caused the right, title, and interest of his debtor in certain land to be attached in execution. A claim was preferred under sec. 246, Act VIII of 1859, against the attachment by a previous purchaser, but was rejected. The claimant then instituted the present suit for confirmation of his possession upon reversal of the said order. The defence set up was that the purchase was merely benami. *Held* that the *onus* was upon the plaintiff to make out his title.—3 B. L. R., (A. C.) 70; 11 W. R., 422; 25 W. R., 79.

In a suit brought under sec. 246, Act VIII. of 1859, for establishment of right, *held* that the plaintiff's failure to prove his possession at the time of the institution of the suit is not sufficient for its dismissal. The question of title should be tried according to the meaning of that section. Sec. 246, Act VIII. of 1859, distinguished from sec. 15. It is often the case that fraud cannot be established by positive proofs, and on the other hand it is not to be presumed from circumstances of mere suspicion. It is generally shewn by such circumstantial evidence as overcomes the natural presumption of honesty and fair dealing, and satisfies a reasonable mind that such presumption has been displaced. The investigation of a case upon a portion of the evidence, excluding the other portion under a mistaken impression that it was not legal evidence but conjecture, is an investigation erroneous in law, and is likely to produce an error in the decision of the case on its merits. The mode in which evidence is to be dealt with discussed.—3 B. L. R., (A. C.) 108; 11 W. R. 482.

Two several judgment-creditors attached certain property, which was released upon the claim of a third party, under sec. 246 of Act VIII of 1859. One of them sued the successful claimant, and obtained a decree declaring the property in dispute to belong to the judgment-debtor, and thereupon caused the property to be sold, and became the purchaser thereof. Thereupon, an assignee of the other judgment-creditor sued him, alleging an earlier lien, and praying a sale in satisfaction thereof. The defence set up was that, as the plaintiff did not come into Court to set aside the order under sec. 246 within a year from the date thereof, he was barred from bringing the present suit. *Held* that the omission to bring a separate suit for that purpose did not bar him from obtaining a declaration of his prior lien.—3 B. L. R., App. 122; S. C. 12 W. R., 221.

In execution of a decree against A, "the moiety or half share of A" in certain lands is attached. M files a petition under sec. 246 of Act VII. of 1859, in which he admits that A has a one-eighth share in the lands, but alleges that A has only a one eighth share, and that a two-eighths share belongs to himself, M. *Held* that this was a claim to property attached in execution under sec. 246 of Act VIII of 1859, which the Court under that section is bound to investigate and adjudicate upon. In execution of a decree against A, "the right, title, and interest of A" in certain lands are attached. M files a petition under sec. 246 of Act VIII. of 1859, in which he admits that A was a one-twentieth share, but alleges that A is entitled to no more than

a one-twentieth share, and that he, M, has a two-twentieths share. *Held* that, assuming the attachment of A's right, title, and interest to be an irregular attachment under sec. 213, M, whose lands were included within such attachment, was entitled to come in, and claim his own two-twentieths share, and the Court was bound to investigate his claim under sec. 246 of Act VIII. of 1859. *Held* also, in both cases, that M was entitled to have the attachment removed so far as his share was concerned. *Held* also (*per* PHEAR, J.) that in the first case M was entitled to have the attachment removed, so far as regards the margin in excess of A's actual share; and that in the second case he was entitled to have the whole attachment discharged.—4 B. L. R., (F. B.) 175; S. C. 13 W. R., (F. B.) 63.

A obtained a money-decree upon a bond in a Small Cause Court against B, by which it was declared that certain landed property hypothecated by the bond was to be primarily liable for the debt. The decree was transferred to the Court of the Sadr Amin of the same district; the property was put up for sale, and it was purchased by C. Prior to sale, B alienated the property to D, who after sale preferred his claim to it under sec. 246 of Act VIII. of 1859, which was disallowed. More than a year after this, D brought his suit against C to recover possession. In special appeal, it was held that, the decree of the Small Cause Court being on the face of it without jurisdiction, the suit was not barred, and the case was remanded to be tried on the merits.—7 B. L. R., 235; 7 B. L. R., 238 note; 15 W. R., 311; S. C. 14 W. R., 367.

Property attached was, on the claim of a third party, released by the Court without proceeding under the provisions of sec. 246, Act VIII. of 1859. The attaching creditor sued more than a year afterwards for a declaration that the property belonged to the judgment-debtor. *Held* that the suit was not barred.—8 B. L. R., App. 39; 16 W. R., 22.

Plaintiff stated in his plaint that he was proprietor of certain land which was let to M, and that, whilst M was in possession, and whilst there were still some few months to run before his tenancy expired, a creditor took out execution against him, and put up for sale the future profits of the property (*wasilat*) which would come into the hands of M, alleging that M's interest was not that of tenant, but that of a usufructuary mortgagee. Upon this the plaintiff put in a claim under sec. 246, but his claim was rejected. Thereupon he brought a suit under that section to establish the fact that M's interest in the property was that of a tenant only, and not that of a usufructuary mortgagee. It was stated by the plaintiff that, on the expiration of M's settlement, he re-let it to a fresh tenant. *Held* that the suit would not lie, as no real cause of action, or specific subject-matter of injury, had been shown. What was sought was a vague declaration of right, the actual destruction or injury of which was not shown.—9 B. L. R., App. 28; 17 W. R., 304.

Where it was sought to execute a decree, obtained against a person who had died since the date of the decree, by attaching certain immoveable property in the possession of the personal representative of the deceased judgment debtor, and such personal representative claimed to hold the property, not in her representative character, but in her own right, *held* that her claim was not a claim under sec. 246, Act VIII. of 1859, but that the case came under secs. 210 and 211. It was a matter between the parties to the suit relating to the execution of the decree, and, as such, was, under sec. 11, Act XXIII. of 1861, to be determined by the Court executing the decree, and not to form the subject of a regular suit. The order rejecting

the claim was therefore open to appeal.—12 B. L. R., 65; 12 B. L. R., 66 note; 10 W. R., 199.

A suit brought under the provisions of sec. 246 of Act VIII. of 1859 to set aside an order allowing a claim to attached property and releasing the property from attachment is a suit to try the title and establish the right of the person who brings the suit; and such a suit must be valued according to the value of the property, and cannot be brought upon a stamp of Rs. 10, under art. 17 of sch. 2 of the Court Fees Act,—15 B. L. R., App. 1: 22 W. R., 422.

A summary order under Act XIX of 1841, for possession of property left by a deceased person, is no bar to a regular suit to try the title to such property and to obtain possession under that title; it is, therefore, unnecessary to set aside the order before granting relief in the suit. Hence the period of limitation for such regular suit is that provided by cl. 12, sec. 1, Act XIV. of 1859, namely, twelve years, and not one year, as provided by cl. 5 of the same section.—B. L. R., Sap. Vol., 633; S. C. 2 Ind. Jur., N. S., 191; 7 W. R., 199.

Certain property was sold in 1858 in execution of a decree as the property of the present second defendant's brother. Plaintiffs presented petitions claiming a right in the property, and protesting against the sale. Their petitions were rejected, and they were referred to a regular suit, which they brought in 1861. Under the old law, the time within which a suit might be brought on such a cause of action was twelve years. Sec. 246 of Act VIII. of 1859 shortened the period to one year. *Held*, reversing the decision of the Civil Judge, that the plaintiff's action was not barred. The period of limitation contained in sec. 246, Act VIII. of 1859, is applicable only to a case in which the procedure prescribed by that section has been adopted.—3 M. H. C. R., 139.

The effect of the last sentence of sec. 246, Act VIII. of 1859, is to exclude a party to an investigation under that section from any other remedy than that expressly provided for him by that section, *viz.*, a regular suit to be brought within one year from the date of the order made against him, and such party cannot wait till the sale of the attached property has taken place and been confirmed, and then bring his suit within one year from the last date.—3 M. H. C. R., 220.

The plaintiff sued to obtain a decree declaring that the ancestral land possessed by the family of the plaintiff was not liable to seizure and sale in satisfaction of an *ex-parte* decree obtained by the defendant in a suit against the yejaman of the plaintiff's family, on the ground that the decree had been obtained collusively and fraudulently for a debt alleged to have been contracted for the benefit of the family. The decree against the yejaman was passed on the 22nd June 1857, and upon attachment of the family property the plaintiffs made a claim under sec. 246 of the Civil Procedure Code, alleging their independent right to the property, and resisting a sale. The claim was disallowed on the 18th October 1861, and an appeal from that decision was dismissed on the 15th November 1861. The present suit was instituted on the 2nd February 1864. *Held* that this was not a suit to which the limitation provided by sec. 246 of the Civil Procedure Code, or by cl. 5, sec. 1 of Act XIV. of 1859, was applicable, and that the suit was not barred.—4 M. H. C. R., 263.

In a suit for a partition of family property in the possession of the plaintiff and defendants, part of the property was attached at the instance of one of the defendants in 1852, and the remainder of the property in 1864,

Nothing was done with respect to the first attachment, but in 1865 a petition was presented by the plaintiff praying for the removal of the attachments. The petition was rejected, and the plaintiff brought his suit within one year from the date of rejection of his petition. The plaintiff and defendants remained in possession notwithstanding the attachments. *Held* that the plaintiff's suit was not barred by the Act for the limitation of suits.—4 M. H. C. R., 281.

The plaintiff was, by an order of the Civil Court in execution of a decree to which the plaintiff was no party, ejected from the possession of a mutta. He brought a suit more than three years afterwards to eject the legal representative of the person who was so put in possession. *Held* (reversing the decree of the Civil Court) that the order of the Civil Court was not a summary decision within the meaning of cl. 5, sec. 1, Act XIV of 1859, and that the suit was not barred. That clause is only applicable to orders which the Civil Courts are empowered to pass deciding matters of disputed property raised for hearing and determination by a summary proceeding between the parties disputing.—4 M. H. C. R., 297.

The plaintiff brought a suit to establish his right to certain property as against the claim which the defendant had successfully made under sec. 246 of the Civil Procedure Code in execution of a decree obtained against the plaintiff. The order of the Court directed the release of the property from attachment. The present suit was brought more than one year from the date of the order. *Held, per* SCOTLAND, C. J., BITTLESTON and COLLETT, JJ. (INNES, J. doubting), that the plaintiff was a party against whom the order was "given" within the meaning of the section, and that the suit was barred by the section.—4 M. H. C. R., 472.

Suit for redemption of an otti by an alleged purchaser of the same, and for recovery of land on which he had purchased a kanam. The defence that the purchase was made by the father of the 1st defendant, and that the plaintiff was, constructively, a mere trustee. The Munsif decreed for the plaintiff, and the Principal Sadr Amin reversed his decree, because the suit was not brought within a year of a release of the property from attachment under a claim of the defendants, which attachment was made in execution of two decrees for money against the present plaintiff. It appeared that in the proceedings had, releasing the property from attachment, no notice was issued to the judgment-debtor (present plaintiff). *Held* that the decision of the Principal Sadr Amin was wrong. In the present case, the claimants in possession were not so according to any of the modes of derivation which sec. 246 enumerates as authorizing the continuance of the possession and the dismissal of the claim. The possession was in the claimants, and there was nothing in the rights of the judgment-debtor which could make such possession his possession. This being so, even assuming that he was a party to the order made, such order could not be said to be against him, because his claim was one which could not have been determined by any order made under sec. 246. The order so made was perfectly consistent with his present contention. Special Appeal No. 541 of 1868 (4 M. H. C. R., 472, distinguished).—6 M. H. C. R., 416.

Where the plaintiff filed a suit to set aside a sale of land after he had been unsuccessful in an application made under sec. 246 of the Civil Procedure Code to raise an attachment that had been laid on such land, *held*, that the *onus* lay on the plaintiff to prove his title, and not on the purchaser to prove that of the judgment-debtor.—5 Bom. H. C. R., (A. C.) 76.

A mortgagee in possession of mortgaged premises that have been attach-



ed by prohibitory order under sec. 235 of the Code of Civil Procedure in execution of a decree obtained against his mortgagor is entitled to come in under sec. 246 of the Civil Procedure Code, and have the attachment raised.—10 Bom. H. C. R., (O. C.) 100.

An order of the Court of the Mamlatdar under the last clause of sec. 1 of Bom. Act V. of 1864, recognizing the possession of a party, and enjoining others from disturbing that possession, is not an order under Act XVI. of 1838; and the limitation of three years, prescribed in art. 7 of sec. 1 of Act XIV of 1859, does not apply to a suit brought to establish a right against the operation of such an order in the regular Civil Court. Although such an order of the Mamlatdar is a summary decision, the suit in the Civil Court is not a suit to set aside the order itself, but for possession in opposition to that recognized by the Mamlatdar's injunction, and is not, therefore, within the limitation of one year prescribed by art. 5 of sec. 1 of Act XIV. of 1859.—10 Bom. H. C. R., (A. C.) 479.

N caused certain property to be attached as the property of his judgment-debtor. M preferred a claim to the property, and objected to its sale. The Munsif, without an investigation in conformity with the provisions of sec. 246 of Act VIII of 1859, released the property from attachment, and directed N to bring a regular suit. N sued to establish his right to bring the property to sale, alleging that his cause of action arose on the day the order was passed releasing it from attachment. *Held* that the suit was not barred by reason of not having been instituted within one year from the date of the order.—6 N.-W. P. H. C. R., 185.

M, to whom C, his judgment-debtor, had made over certain goods, attached the same in execution of his decree as the property of his judgment debtor, but on a claim being preferred to the goods by D and B under sec. 246 of Act VIII, of 1859, they were ordered to be released from attachment; they remained, however, in the possession of M. D and B having sued M to recover the value of the goods, the lower Court held that, inasmuch as M failed to sue within a year to set aside the order of the miscellaneous department, and to establish his right to take the property in satisfaction of his decree as belonging to his judgment-debtor, the plaintiff's right to it must be admitted without further enquiry or proof, and decreed the claim on the basis of that order alone. It was held in special appeal that the defendant was not debarred by that order or by the law of limitation from disputing the plaintiff's right to the goods, and that the plaintiffs were bound to prove their right to entitle themselves to a decree, and that the miscellaneous order was not conclusive proof of their right, and still less such an adjudication on the question as precluded a re-adjudication of it.—7 N.-W. P. H. C. R., 85.

It was held that the mere fact that the plaintiff sued to recover possession, by virtue of inheritance, of one-fourth only of certain immoveable property, to which he had laid claim, when attached in execution of decree, on the ground that it belonged to the common ancestor of himself and the judgment-debtor, and there had been a partition of the ancestral estate, and the property attached had fallen by the partition to his lot, and was in his exclusive possession, did not relieve him from the necessity of bringing a suit within one year from the date of the order, passed by the Court executing the decree under sec. 246, Act VIII of 1859, to the effect that the partition had not been established, nor had he proved that he held exclusive possession of the property attached.—7 N.-W. P. H. C. R., 113.

A suit to recover money paid by the defendant into Court, which



was payable to the plaintiff, and which was afterwards recovered by the defendant in the execution of a decree against a third person, under an order of the Court executing the decree, was not barred by limitation, under the provisions of Act IX. of 1871, sch. ii, art. 15, by reason of not having been instituted within one year from the date of the order. The suit was substantially one for damages, to which art. 26, sch. ii. of the same enactment applied, and was barred as not having been brought within a year from the date of the taking by the defendant of the money claimed.—7 N.-W. P. H. C. R., 174.

Certain property having been attached in execution of a decree, the plaintiff intervened claiming the property, and was directed to adduce evidence, which, however, he failed to do, and the case was struck off *Held* that the order striking off the case must be taken as an order disallowing the claim, and that the plaintiff was bound to bring his suit to establish his claim within one year from the date of the order.—12 C. L. R., 43.

A claim to property under sec. 246, Act VIII. of 1859, is virtually a suit for land.—1 Hyde's Rep., 136.

Property being attached under a decree obtained before Act VIII. of 1859, a third party claimed to be entitled as against the judgment creditor under a bill of sale. The Judge enquired into his claim, found that the assignment was fraudulent, and ordered that the property should be sold under the decree. *Held* that the order of the Judge was a summary decision of a Civil Court within sec. 1, cl. 5, and that a suit by the claimant for the recovery of the property instituted after the expiration of a year from the date of the order was barred by that clause.—Marsh. Rep., 520.

*Held* that the Judge's order relating to the landed property of a person dying intestate, being apparently an order made without jurisdiction, had no legal operation, and was not a summary order within the meaning of the 5th clause of sec. I, Act XIV. of 1859.—1 Agra H. C. R., 241.

Where an order is passed in the miscellaneous department without enquiry in conformity with the provisions of sec. 246, Act VIII. of 1859, it is not to be regarded as an order within the terms of that section, and a suit to set aside such order would not necessarily be barred if not instituted within a year.—3 Agra H. C. R., 397.

Money paid to release an attachment in execution of a decree cannot be made the subject of a claim under Act VIII. of 1859, sec. 246.—1 Ind. Jur., N. S., 248.

Certain property had been attached in execution of a decree under the 235th section of Act VIII. of 1859, which was specified in the schedule annexed to the order of attachment as "the right, title, and interest of R H, deceased, in the hands of B D and W D, his widows." M D claimed the property under the 246th section of Act VIII. of 1859, and proved that the property was in his possession, and not in the possession of B D or W D. *Held* that the property must be released from the attachment.—2 Ind. Jur., N. S., 339.

When intervenors claim a share of attached property, the Court should define the respective shares of the debtor and the intervenors, and sell the debtor's definite share only. If the Court omits to do so, and sells the undefined rights and interests, there is no decision under sec. 246, Act VIII. of 1859, of which the purchaser, by lying in wait without possession for one year, can take advantage.—4 W. R., 35.

Sec. 246, Act VIII. of 1859, made no distinction in favour of cases not

decided on the merits, but made it imperative on the party whose claim to attached property had been rejected, under any circumstances, to sue within one year.—5 W. R., 214.

Whether, with reference to cl. 5, sec. 1, a suit will lie to set aside a summary order after the expiration of one year.—6 W. R., 21.

Where property is seized as belonging to A as representative of B, deceased, and A claims the property as his own, and denies that it ever belonged to B or B's estate, A's claim is properly dealt with under sec. 246 of Act VIII. of 1859.—6 W. R., Mis., 61.

There is nothing in sec. 246, Act VIII. of 1859, which restricts claims under it to titles derived from the judgment-debtor, or out of the estate. It comprises all claims or objections to the sale of lands in execution of decrees.—6 W. R., 164.

Sec. 269, Act VIII. of 1859, does not contemplate that the party in actual possession must sue regularly to get possession within one year, but that the person who is not in actual possession shall do so.—7 W. R., 87.

The final decision, award, or order contemplated by cl. 5, sec. 1, was a final decision of the Court which had competent jurisdiction to determine the case finally, and not the order of a Court superior to such Court dismissing an appeal from the decision of such Court for want of jurisdiction.—7 W. R., 151.

A party failing to establish his claim to attached property under sec. 246, Act VIII. of 1859, on the point of possession, is not debarred from afterwards bringing a suit to establish title within the period allowed by law for bringing such suit.—8 W. R., 73.

In disposing of a claim under sec. 246, Act VIII. of 1859, if the Court be of opinion that the property attached ought not to be sold, the proper order for the Court to make is a simple order to release the property from attachment.—8 W. R., 93.

A suit brought, not to set aside an order of release under sec. 246 of Act VIII. of 1859, but to recover possession from the successful claimant of the property released, was not governed by the limitation prescribed by cl. 5, sec. 1.—8 W. R., 93.

The provisions of this section were prospective, and did not apply to proceedings in execution under the old procedure.—9 W. R., 292.

The limitation of one year, in sec. 246, Act VIII. of 1859, did not apply to a suit for declaration of right and confirmation of possession.—12 W. R., 33.

In a suit for possession after rejection of a claim under sec. 246, Act VIII. of 1859, there was nothing in that section to prevent a defendant from pleading that, whatever title plaintiff might have had at some previous time, it was extinguished by his having had no possession for twelve years preceding the suit.—13 W. R., 78.

In a suit to set aside a summary award under sec. 246, Civil Procedure Code, a Judge is bound to find facts upon the evidence tendered and taken in the case, and not upon any evidence taken in the summary cause.—14 W. R., 95.

A judge has no jurisdiction to try the same objector's claim, under sec. 246, Act VIII. of 1859, a second time as against the same attachment, or to re-open a question finally decided on the former occasion. The title of the objector, as compared with that of the debtor in possession, is not a point for adjudication under sec. 246.—14 W. R., 144.

The law of limitation, under sec. 246, Act VIII. of 1859, could not apply to a person whom the Court had refused to make a party to the proceedings under that section, because he came in too late to be made such a party.—14 W. R., 364.

Where an unsuccessful claimant, under sec. 246, Code of Civil Procedure, sues for confirmation of alleged possession and adjudication of title, the onus in the first instance is on plaintiff, and an important question in the case is, who was in possession at the time of the attachment.—15 W. R., 202.

The only question proper to be decided under sec. 246, Act VIII. of 1859, is whether the property attached is in the possession of the judgment-debtor or some person in trust for him, or whether it is in the possession of a third party not in trust for the judgment-debtor.—16 W. R., 119.

Whether a person holding by purchase from the judgment-debtor is in a position to succeed under Act VIII. of 1859, sec. 246.—17 W. R., 480.

Certain property having been mortgaged by B D to L, the mortgagee obtained a decree for its sale, had it sold in execution, and purchased it himself, subject to any right which certain parties (B and G) who had objected under Act VIII. of 1859, sec. 246, might be able to establish. After this L sold the property to the plaintiff, who, not being able to get possession, brought a suit against the defendants in whose hands some or all of the property seemed to be, and who set up that they had purchased it from B G and B D. *Held* that the suit was not barred, because it had not been instituted within twelve months of the date when the objections of B and G were allowed.—20 W. R., 393.

A decree-holder in execution having attached certain lands, the judgment-debtors objected that the lands were not their property, but held by them as shebais of a religious endowment. The Munsif found that, although the land formed part of some which had been released by Government as appropriated to religious purposes, they were held by the defendants entirely to their own use, and overruled the objection. *Held* that the order was one under Act VIII of 1859, sec. 246, and that no appeal lay to the Judge.—21 W. R., 365.

Where a person whose property has been attached in execution of a decree against another person, and whose claim, under sec. 246 of Act VIII of 1859 has been rejected, brings a suit under the provisions of sec. 247 of Act VIII of 1859, it is no objection to that suit that, previously to the filing thereof, the decree (in execution of which the property had been attached) was satisfied by the judgment-debtor, and the property released from attachment.—I. L. R., 9 Cal. 10.

Certain property was attached in the hands of the petitioner (who had preferred a claim under section 278 of the Code of Civil Procedure), on the ground that he had become a trustee for the judgment-debtor by virtue of an alleged agreement on his part to discharge the decree-holder's debt contained in a hibanama by which the judgment-debtor had transferred the property to him. The petitioner having obtained a rule under section 622 of the Code, *held*, that the property having been transferred to the petitioner and being now admittedly his property, the lower Court had acted without jurisdiction in directing execution to issue against the property. *Per AMEER ALI, J.*—When a claim is preferred under section 278, what the Court has to see is whether the property, though standing in the name of the claimant or of some other person is in the possession of the judgment-debtor or not. The mere fact that the judgment-debtor has some bene-

ficial interest in the income would not render the property liable under section 281. If the claimant satisfies the Court that he has some interest in, or is possessed of, the property attached, and it does not appear that the possession of the claimant was in reality that of the judgment-debtor, the claim must be allowed.—18 Cal 290.

An order made upon a claim to attached property filed in the Small Cause Court of Calcutta under section 278 of the Civil Procedure Code, 1882, is an order in the suit within the meaning of the Presidency Small Cause Courts' Act, 1882, section 37, and is final, subject only to the right to apply for a new trial. Where such a claim has been disallowed, a suit brought under section 283 of the Civil Procedure Code by the person against whom that order has been passed to establish the right which he claims to the property in dispute is not maintainable in any Court. The exclusion by the Small Cause Court, under the powers conferred on it by section 23 of the Presidency Small Cause Courts' Act, 1882, of section 283 of the Civil Procedure Code, has not been effected by Act X of 1888.—18 Cal 296.

Under secs. 289 and 274 of the Civil Procedure Code, it is necessary that a Copy of the sale-proclamation should be affixed to some conspicuous place on the property attached; and the omission to do so is a material irregularity within the meaning of sec. 311 of the Code of Civil Procedure. If it is proved that the price obtained for property sold at an execution-sale is greatly inadequate, and if it be also proved that there has been a material irregularity in publishing or conducting the sale, the Court will presume that the irregularity was the cause of the inadequacy of price, until proof is given to the contrary.—7 Cal. 466.

An objection was made to the attachment of certain property in the execution of a decree by the judgment-debtor, on the ground that such property was in his possession, not as his own property, but on account of an endowment. This objection was one of the nature to be dealt with under Act X of 1877, sec. 278 and the following sections. The court executing the decree made an order against the decree-holder releasing the property from attachment. *Held* that such order was not appealable, the fact that the objection was made by the judgment-debtor notwithstanding, and the decree-holder's proper remedy was to institute a suit under Act X of 1877, sec. 283.—2 Al. 752.

The holders of a taluk hypothecated certain other property belonging to them as security for the rent. A decree for rent was obtained against them. Prior to attachment, the taluqdars assigned their interest in eight annas of the hypothecated property to A, and made a mourosi lease of the remaining eight annas to them. The decree-holder then obtained an order for summary sale for the rent due for 1876-77. She then attempted to sell the property hypothecated to her. An objection by A was allowed. A regular suit was then instituted by the decree-holder against A, and it was declared that she was, after selling the taluq, entitled to sell the hypothecated property. The decree-holder again attempted to execute her rent-decree by attaching and selling the hypothecated property, and an objection by A was disallowed. *Held* that no appeal lay from the order disallowing the objection, as A could not be considered to be a 'representative' of the taluqdars within the meaning of cl. 244, cl. c, of the Civil Procedure Code, and was, therefore, debarred from appealing under secs. 278 and 283.—7 Cal. 403.

A and B attached, in execution of their decree, property of C and his

two brothers, their judgment-debtors. Subsequently D obtained a decree against C alone, and, on the 11th January 1884, applied for attachment of the one-third share of C in the property attached by A and B, which belonged to C and his two brothers jointly. No order was on that date passed on the application. On the 14th January 1884, E purchased from C his one-third share in the attached properties, and the purchase-money was, by arrangement between the brothers, applied in satisfying the debt due to A and B. On the 28th January 1884, an order was passed on the application of the 11th January 1884, granting the attachment asked for by D. And on the 23rd April 1884, E preferred his claim to the one-third share purchased by him, and which had been since the purchase attached by D. The claim was disallowed on the ground that E had no title to the property *h<sub>e</sub>* having purchased whilst the property was under attachment. *Held* on appeal that the Judge should have, in accordance with sec. 280 of the Code of Civil Procedure, confined himself to determining whether or not the property was in the possession of E on his own account at the time that D attached the property.—10 Cal. 1057.

A decree-holder, having attached the property of his judgment-debtors in execution of the decree, obtained an order for sale of the attached property. Prior to sale, the judgment-debtors made an application to be declared insolvents, and obtained an order under Stat. 11 and 12 Vic, cl. 21, sec. 7, by which their property was vested in the Official Assignee. An application was then made by the Official Assignee to the Court in which the execution of the decree was pending, for the release of the property from attachment, and that the property might be made over to him. The Court dismissed the application. On appeal, the District Judge reversed the first Court's order:—*Held* that the Court of first instance had only jurisdiction in the matter under sec. 278 of the Code, and disposed of it under that section, and that the Districts Judge had no Jurisdiction to entertain the appeal.—7 Al. 752.

Suits under sec. 283 of the Code, although they are brought for the purpose of establishing rights which have been negatived in execution-proceedings, are neither described in the Code nor dealt within practice, as appeals from the orders of lower Courts; they are substantive suits to all intents and purposes, and must be tried like any other suits subject to the ordinary rules of procedure and evidence. There is nothing in the provisions of secs. 278 to 283 of the Code limiting in a suit under, sec. 283 a plaintiff's right to compensation for his loss, or the defendant's responsibility for his wrongful act; and if the existence of the summary procedure (in secs. 278 to 282) leads to delay, and that delay to further loss, the consequences must fall upon the defendant.—12 Cal. 966.

An attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of the rent of his separate share, is not such an attachment as is contemplated by sec. 170 of the Bengal Tenancy Act.—17 Cal. 390.

Orders for attachment in security under sec. 483 of the Civil Procedure Code being issued on the *ex-parte* application of the creditor, who is bound to specify the property which he desires to have attached and its estimated value, it follows that the attachment is the direct act of the creditor, for which he is immediately responsible. Should the goods be proved not to belong to the debtor, the litigation and delay, and also any depreciation of the goods by an intermediate fall in the market, between attachment and sale, are the natural and necessary consequences of the

creditor's unlawful act. The plaintiff having taken, without success, the summary proceeding under sec. 278, to get the release of goods attached under sec. 487, in a suit to which he was not a party, afterwards, in a suit brought by him in accordance with sec. 283, established his right of property in the goods: *Held*, that (a), in order to entitle him to the full indemnity for the wrongful attachment he was not bound to allege and prove that the defendants had resisted his previous application under sec. 278 maliciously, or without probable cause; and that (b), the goods having been sold under the Court's order, the difference in market value of the goods at the time of their attachment (November 1883) and their price when they were sold (June 1884), the selling prices having fallen immediately, must be added to the damages. *Held*, also that, without bringing under review the judgment under sec. 278, the effect of the judgment in the suit brought in accordance with sec. 283 was to supersede the order under sec. 278, and to render it inconclusive. The procedure on attachment not being the same in India as in England, where a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods taken in execution in satisfaction of his debt, that proposition does not hold good under the Indian procedure; and *Walker v. Olding* 1 H. & C., 621; 9 Jur. N. S., 53; 32 L. J., Exch., 142; is inapplicable to the latter.—17 Cal. 436.

A judgment-creditor of the plaintiff, having obtained a decree against the plaintiff, attached the house in dispute. The defendant intervened in 1878, and set up a previous purchase of the house by himself from the plaintiff. The attachment was removed. The judgment-creditor brought a suit against the defendant for declaration that the property belonged to the plaintiff, and, as such, was liable to be attached and sold in execution. At the hearing of this suit the judgment-creditor did not appear. The defendant appeared, and produced a sale-deed, which the Court found proved, and dismissed the judgment-creditor's suit. The plaintiff now brought the present suit against the defendant to recover possession of the house. The defendant contended (*inter alia*) that the dismissal of the former suit, brought by the plaintiff's judgment-creditor, operated as *res judicata* under sec. 13 of the Civil Procedure Code (Act XIV of 1882). Both the lower Courts disallowed the defendant's contention, holding that the suit was not barred. On appeal by the defendant to the High Court, *held*, confirming the lower Court's decree, that the dismissal of the former suit did not operate as *res judicata* in the absence of any evidence to show that the judgment-creditor, in point of fact, represented the plaintiff so as to constitute him a party to the suit. It was contended for the defendant that the plaintiff, as the judgment-debtor, might, at any rate, be regarded as a party against whom the order in the execution-proceedings in 1878 was made, and that the present suit was, therefore, barred by limitation. *Held* that the plaintiff could not be regarded as a party to those proceedings. Whether a judgment-debtor is to be regarded as a party to an investigation under sec. 278 of the Code, must depend upon the facts of each case. As the question of limitation was raised for the first time in second appeal, it could not be decided against the plaintiff.—11 Bom. 114.

Where property has been made the subject of attachment under Chapter XIX of the Civil Procedure Code, the right of an objector to assert his claim to be the true owner of the property under sec. 278, and the jurisdiction of the Court to entertain the objection, are not ousted by the mere circumstances that the judgment-debtor has been declared an insol-



vent, and his property vested in a Receiver under Chapter XX. It is the judgment-debtor's property only, not that of the objector, that is thus vested.—9 Al. 232.

Proceedings by way of claim under sec. 278 of the Civil Procedure Code are applicable only to cases of money-decrees where property has been attached, and not to claims preferred to properties directed to be sold under mortgage-decrees.—14 Cal. 631.

See I. L. R., 4 Bom. 323, noted under sec. 268 ; 14 Al. 417, noted under sec. 13 ; 10 Al. 80, noted under sec. 492 ; 7 Madr. 255 & 12 Al. 313, noted under sec. 234 ; 17 Cal. 260, noted under sec. 281 ; 17 Cal. 711, noted under sec. 244 ; 19 Cal. 286, noted under sec. 272.

**279.** The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Evidence to be adduced by claimant.

**Notes.**

This section applies to Provincial Small Cause Courts.

An order striking off an objection to the attachment of property attached in execution of decree for default of prosecution is not "conclusive" as regards the right which the objector claimed to the property, within the meaning of sec. 283 of Act X of 1877. *Held*, therefore, where a person objected to the attachment of certain moveable property attached in execution of a decree, claiming it as his own, and his objection was struck off for default of prosecution, that such person might sue for damages for the wrongful attachment of such property without suing to establish the right which he claimed thereto.—I. L. R., 3 Al. 504.

See I. L. R., 18 Cal. 290, noted under sec. 278 ; 15 Madr. 477, noted sec. 13.

**280.** If, upon the said investigation, the Court is satisfied that, for the reason stated in the claim or objection, such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property, wholly or to such extent as it thinks fit, from attachment.

Release of property from attachment.

**Notes.**

This section applies to Provincial Small Cause Courts.

A suit to establish the plaintiff's right to the exclusive possession of personal property of which the plaintiff and her husband had been dispossessed by actual seizure in execution of a decree against the plaintiff's husband is cognizable by a Small Cause Court.—5 M. H. C. R., 191.

Where plaintiffs' sheep had been attached in satisfaction of a decree

against a third party, and the second defendant had purchased the property at the Court-sale, *held* that a suit merely to recover the sheep or their value is cognizable by a Small Cause Court.—8 M. H. C. R., 36.

A Suit brought by a decree-holder to decide whether moveable property taken in execution is or is not the property of his judgment-debtor, is not a suit cognizable by a Court of Small Causes.—6 Bom. H. C. R., (A. C.) 27.

A suit brought by an owner to recover moveable property, of which he has been dispossessed by an attachment-order, may, when the value of the property is less than Rs. 500, be maintained in a Court of Small Causes, it being a suit for personal property. A suit "to have sold by auction certain property in respect of which the plaintiff obtained a decree for a right of lien," and also to set aside the miscellaneous "order passed by the Munsiff," is not cognizable by a Court of Small Causes.—3 N.-W. P. H. C. R., 155 ; 3 N.-W. P. H. C. R., App. 156.

The question to be determined under sec. 280 of the Civil Procedure Code is the question of possession ; the words "possession of the judgment-debtor or of some person in trust for him" refer to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether or not valid trusts may result in particular instances.—14 Cal. 617.

Sec. 283 does not constitute an exception to the procedure laid down by sec. 545. Where property has been released from attachment under sec. 280, and subsequently declared liable to attachment by a decree against which an appeal is pending, as sale of such property before the final result of the appeal is not illegal by virtue of the provisions of sec. 283.—6 Madr. 98.

On the 7th April, 1877, one Nusserwanji Ardasir Santook executed a trust-deed whereby certain immoveable property belonging to him was conveyed to trustees in trust for himself for life or until he became insolvent, or attempted to alienate, assign or incumber the same, and then for his wife and children. At the date of the deed, Nusserwanji was largely indebted, and two or three months prior to the date of the deed he had deposited bulk of his moveable property with a friend, who endeavoured to compromise with his (Nusserwanji's) creditors, and who applied the said property in paying off a portion of his debts. About a fortnight after the trust-deed was executed, Nusserwanji filed a suit against one Hormasji Ardasir Santook and others. That suit was dismissed, and Nusserwanji was ordered to pay Hormasji's costs. In execution of that decree for costs Hormasji, in July, 1882, attached a house which was part of the property settled by the trust-deed of April, 1877. Thereupon the trustee of the deed claimed to have the attachment removed, alleging that he was in possession as trustee. He took out a summons for that purpose, which was dismissed on the 19th December, 1882, without prejudice to the rights of the parties to file a suit in respect of the subject-matter thereof. No suit, however, was filed by any of the parties, and the house was sold in execution. Hormasji, the execution-creditor, bought it at the sale, and was put into possession, which he retained until his death in December, 1888. After his death his executors took possession. They desired to sell it, but were unable to do so, in consequence of the claim put forward by Nusserwanji's wife and children (defendants Nos. 1, 3 and 4) under the trust-deed of 1877. They accordingly filed this suit against Nusserwanji's wife and chil-

dren (defendants Nos. 1, 3 and 4), and the surviving trustee of the trust (defendant No. 2), praying for a declaration that the defendants had no right or interest, present or future or contingent, in the said property; that they (the plaintiffs) as executors of Hormasji were absolutely entitled to it, and that the trust deed was fraudulent and void against the plaintiffs and other creditors of Nusserwanji. It was contended that the suit was barred under article 95 of Schedule II of the Limitation Act, XV of 1877, having been filed more than three years after 1882, at which date the fraud was alleged by Hormasji himself and relied on by him in the attachment proceedings. *Held*, that the suit did not fall within article 95 and was not barred. The substantial prayer of the plaint was declaration that the plaintiffs were absolute owners of the property in suit, and the basis on which that prayer was rested was the sale to Hormasji in 1883. The "relief" asked for was the declaration of the plaintiffs' absolute title: the "ground" of the relief was the acquisition of that title by virtue of the certificate of sale coupled with a denial of it by the defendants. Such a case did not come within the purview of article 95. It was further contended that the effect of the order in December, 1882, dismissing the summons which had been taken out by the trustees to have the attachment removed, was to declare the trust settlement invalid, and that as no steps had been taken by the trustee against whom that order was made to establish the validity of the trust within a year from the date of that order, the defendants could not now rely on their rights as *cestuis que trust* under that deed. It was argued that the Judge in dismissing the summons must have intended to pronounce the whole settlement invalid, having regard to section 280 of the Civil Procedure Code (Act XIV of 1882), because otherwise he ought, according to that section, to have ordered, in express terms, the removal of the attachment from the reversionary estate of wife and children. *Held*, that the portion of section 280 relied on only applies where the property is in the possession of the judgment debtor "partly on his own account and partly on account of some other person." Here the property was, at the time of the attachment and had been for some months previously, in the sole possession of the trustee, and neither wholly nor partly in the possession of the judgment-debtor. The conditions under which the latter part of section 280 becomes applicable were not present in the present case, and the Judge in dealing with the summons was not, therefore, called on to make any declaration as to the precise limits of the interest in the property upon which he held the attachment to be maintainable. *Held*, that there was no such order passed against the interests represented by the first, third and fourth defendants as to come under the terms of section 283 of the Civil Procedure Code. *Held*, on the evidence, that the deed of settlement was fraudulent and void as against creditors. It was proved that at or before the date of the settlement, Nusserwanji was largely indebted. Nearly the whole of his moveable property had been deposited with a friend, in order that the creditors might be compromised with and a portion of his debts paid off, and under those circumstances he made a settlement of this immoveable property, which was all that could really be said to have then belonged to him on the eve of the litigation which was about to commence. But *held*, also, dismissing the suit, that the plaintiffs were only entitled to an estate for the life of Nusserwanji. They were the representatives of Hormasji and his claim, upon which this suit was founded, arose by virtue of his having purchased the right title and interest of Nusserwanji the settlor, and the right so purchased did not include the right to set aside his own deed. *Held*, also, that the plaintiffs were not entitled to succeed inasmuch as this suit

was not filed by them on behalf of and for the benefit of all the creditors of Nusserwanji. *Semble*, a claim to set aside a deed of settlement as fraudulent and void as against creditors can only be made by creditors whose claims are not barred by limitation. *Quære*, whether the existence of creditors who were creditors at the date of the deed of settlement is necessary.—16 Bom. 1.

Sec. 283 of the Civil Procedure Code enables a party, against whom an order has been made in execution-proceedings, to bring a suit to establish his rights, whatever they may be ; but it says nothing as to the nature of the suit, or the Court in which it is to be brought. Whether the party is to sue in the Civil Court, or in the Small Cause Court, depends entirely upon the nature of the claim and the right which is sought to be enforced. A person whose goods are illegally sold under an execution does not lose his right to them, although he may have claimed them unsuccessfully in the execution-proceedings. He may follow them into the hands of the purchaser or of any other person, and sue for them or their value without reference to anything which has taken place in the execution-proceedings, except that, under art. 11. sch, ii., Act XV of 1877, he must bring his suit within one year from the time when the adverse order in the execution-proceedings was made. Where goods have been illegally seized and sold in execution, a suit by the owner thereof against the purchaser, for the goods of their value, will lie in a Small Cause Court, if the value of the goods is within the amount limited by law for the jurisdiction of such Court ; but if the plaintiff makes the decree-holder and the judgment-debtor parties to the suit, and requires a declaration of his right to the property, such a suit will not lie in the Small Cause Court. A suit for a declaration of right by a person against whom an order has been passed under sec. 280 of the Civil Procedure Code will not lie in the Small Cause Court. *Ram Dhun Biswas v. Kefal Biswas* (10 W. R., 141), *Moozdeen Gazeer v. Dinobundhoo Gossamee* (13 W. R., 99), and *Womesh Chander Bose v. Muddun Mohan Sircar* (2 W. R., 44), discussed and explained.—7 Cal, 608.

See I. L. R., 15 Madr. 477, noted under sec. 13 ; 6 Al. 21, noted under sec. 244 ; 10 Cal. 1057 and 18 Cal. 290, noted under sec. 278 ; 17 Cal. 260, noted under sec. 281.

**281.** If the Court is satisfied that the property was, at the time it was attached, in possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall dis allow the claim.

Disallowance of claim to release of property attached.

#### Notes.

This section applies to Provincial Small Cause Courts.

The effect of an order made under sec. 281 of the Civil Procedure Code disallowing a claim to attached property, is to give the auction purchaser a title as against the claimant unless the order is set aside by a suit ; and a suit for that purpose can only be brought within a year from the date of the order. *Sardhari Lal v. Ambika Pershad*, I. L. R., 15 Cal. 521 ; I. L. R., 15 I. A., 123, referred to.—I. L. R., 17 Cal. 260.

A suit under sec. 283 of the Civil Procedure Code by a party against

whom an order under sec. 281 has been passed to establish his right to moveable property, attached in execution of a decree passed by a Civil Court, and for such property, the same being less than Rs. 500 in value, is not a suit cognizable in a Court of Small Causes.—5 Al. 462.

The heirs of the deceased obligor of a bond were sued thereon, on the ground that they were in possession of the property of the deceased, and a decree was made in this suit for the recovery of the amount claimed "from the property of the deceased." In execution of this decree the plaintiff caused certain property to be attached as belonging to the deceased. The defendants objected to the attachment, on the ground that the property belonged to them. The Court executing the decree proceeded to investigate this objection, and, finding that the property did not belong to the defendants, but to the deceased, disallowed it. *Held* that the proceedings upon such objection were taken under sec. 281 of the Civil Procedure Code, and the order disallowing it was therefore not appealable.—6 Al. 109.

See I. L. R., 4 Al. 190, noted under sec. 244 ; 7 Cal. 608, noted under sec. 280 ; 10 Cal. 1057 and 18 Cal. 290, noted under sec. 278.

**282.** If the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or lien.

Continuance of attach-  
subject to claim of

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 6 Cal. 663, noted under sec. 276 ; 6 Al. 109 and 17 Cal. 260, noted under sec. 281.

**283.** The party against whom an order under section 280, 281, or 282, is passed, may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit (if any), the order shall be conclusive.

Saving of suits of esta-  
lish right to attached pro-  
perty.

**Notes.**

This section applies to Provincial Small Cause Courts.

A Munsif has jurisdiction to try a suit brought under sec. 283 of the Civil Procedure Code to test the question whether a property which has been attached in execution is liable to pay the claim of the creditor, the value of the property being over one thousand rupees, but the amount of the debt being less than that sum. In such suits the amount which is to settle the jurisdiction of the Court is the amount which is in dispute, and which the creditor would recover if successful, *viz.*, the amount due to him, and not the value of the property attached, unless the two amounts happen to be identical. *Janki Das v. Bardi Nath* (I. L. R., 2 Al. 698), *Gulzari Lal v. Jadaun Rai* (I. L. R., 2 Al. 799), *Krishnama Chariar v. Srinvasa Ayyangar* (I. L. R., 4 Madr. 339), and *Dayachand Nemchand v. Hemchand Dharamchand* (I. L. R., 4 Bom. 515), followed.—I. L. R., 15 Cal. 104.

An order passed under sec. 246 of the Code 1859, rejecting a claim after investigation, will, if not contested by suit by the claimant, estop him afterwards from pleading adverse possession at the date of the order in a suit brought to eject him by the decree-holder.—8 Madr. 506.

A suit brought by a defeated claimant, under Act X of 1877, sec. 283, to establish his right to, and to recover possession of, certain moveable property attached in execution of a decree of a Small Cause Court, is within the jurisdiction of, and must therefore, under Act XI of 1865, sec. 12, be instituted in, a Small Cause Court.—3 Bom. 179.

When a party prefers a claim or makes any objection to the attachment of any property in execution of a decree, but fails to establish it, and bring a suit under sec. 283 of the Civil Procedure (Act XIV of 1882) to establish his right to the property attached, is to be treated as falling under art. 17, cl. 1, of sch. 2 of the Court Fees Act VII of 1870, and is chargeable with only a ten-rupee stamp, notwithstanding that the plaintiff may pray in such a suit to be awarded possession.—9 Bom. 20.

In a partition suit all persons interested in the property to be divided must be brought before the Court. A purchaser or mortgagee of a co-parcener's share in the joint property is a proper, and even necessary, party to a suit for partition. There is nothing in the words of section 283 of the Code of Civil Procedure (Act XIV of 1882) to limit the party unsuccessful in the attachment proceedings to a suit for a mere declaration of his alleged right. He is at liberty to pray, in the same suit, for any consequential relief to which he may be entitled. A., B. and C. were members of a joint Hindu family. In execution of a decree against B., a portion of the family property was attached. Thereupon A. intervened, and objected to the attachment so far as his own share was concerned. The objection was disallowed, and the property was brought to sale and purchased by D. A. then filed a suit (1) to set aside the order in the miscellaneous proceedings disallowing his objection to the attachment, and (2) for a partition of the whole family property. In this suit he impleaded not only his co-sharers B. and C., but also D., the auction-purchaser, and E., a mortgagee of B.'s share in the joint property. The Subordinate Judge, holding that the suit was bad for misjoinder of parties as well as of causes of action, returned the plaint for amendment by striking out the prayers for partition. On appeal, this order was confirmed by the District Judge. On A.'s application to the High Court, under section 622 of the Code of Civil Procedure. *Held*, that the suit was not bad either for misjoinder of parties or for misjoinder of causes of action. Treating the suit as one for partition, the auction-purchaser D. and the mortgagee E. were proper, and even necessary, parties. If A. established his right to partition, he would be entitled to have the order in the miscellaneous proceedings set aside in the same suit. *Held*, also, that section 283 of the Code of Civil Procedure (Act XIV of 1882) did not prevent A. from claiming partition in the present suit. *Held*, further, that even if the Subordinate Judge's view were right that the two prayers could not be joined in one suit, his proper course was to have left it to the plaintiff to elect which of the two prayers he wished should be adjudicated upon by the Court.—16 Bom. 608.

In certain execution-proceedings land was attached, but before the sale the judgment-debtors, with the permission of the Court, sold the land to the plaintiffs. Previous to this sale, certain persons had come forward in the execution-proceedings, and had claimed the land as having been sold to them by the father of the judgment-debtors; this claim was disallowed in November 1876. In 1881 the plaintiffs, alleging that they had been dispossessed by certain persons, amongst whom were the claimants in the execution-proceedings, brought a suit to recover possession of this land against these persons. This suit was decided against the plaintiffs in the lower Appellate Court, on the ground that they had failed to prove that they had



been in possession of the land 12 years before suit. On appeal to the High Court the plaintiffs, appellants, contended that the claim of the defendants in the execution proceedings having been rejected, and they not having brought a regular suit within one year from the order of rejection to establish their right to possession, the defendants were prevented by that order from contending that the plaintiffs had not been in possession at the time of that order:—*Held* that the order did not operate as an estoppel against the defendants; and even if it could so operate, it would not do so until the time had run out, within which they could have brought a suit to establish their right to possession, and that such time had not expired —11 Cal. 673.

A person who had claimed moveable property attached in execution of a decree as his own, and whose claim had been investigated and disallowed, under secs. 271 to 281, sued, the property being under attachment the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value:—*Held* that the suit could not properly be regarded as a suit "for personal property or for the value of such property," within the meaning of sec. 6 of Act XI of 1865, but must be regarded as a suit to establish the plaintiff's right, in the sense of sec. 283, inasmuch as the plaintiff could not recover the property without clearing out of his way the order of attachment, which he could only do by establishing his right in the sense of sec. 283, and therefore the suit was not one cognizable in a Court of Small Causes. *Janakiammal v. Vithenadien*, (5 M. H. C. R., 191), *Kundeme Naine Booche Naidoo v. Ravoo Lutchmeepaty Naidoo* (8 M. H. C. R., 36), *Gordhan Pema v. Kasandas Balmukundas* (I. L. R., 3 Bom. 179), *Chaganlal Negardas v. Jeshan Rav Dalsukhram* (I. L. R., 4 Bom. 503), *Bal-krishna v. Kisansing* (I. L. R., 4 Bom. 505), *Radha Kishen v. Chotey Lal* (N.-W. P. H. C. R., 1817, p. 155), dissented from.—7 Al. 152.

The decree-holders in execution of a simple money-decree passed against the legal representatives of their debtor, and which provided that it was to be enforced against the debtor's property, attached and sought to bring to sale a house as coming within the scope of the decree. The judgment-debtors objected to the attachment and proposed sale, on the ground that the house was their own private property, and not the property of the debtor within the meaning of the decree, having been validly transferred to them during the debtor's life-time. The objection was disallowed by the Court of first instance. *Held* that sec. 283 of the Civil Procedure Code had no application, that the case fell within sec. 244, and that an appeal would lie from the first Court's order. *Ram Ghulam v. Hazaru Kuar*, (I. L. R., 7 Al. 547) and *Sita Ram v. Bhagwan Das* (I. L. R., 7 Al. 733) followed. *Shankar Dial v. Amir Haidar* (I. L. R., 2 Al. 752), *Abdul Rahmun v. Muhammad Yar*, (I. L. R., 4 Al. 190), *Awadh Kuari v. Raktu Tiwari* (I. L. R., 6 Al. 109), *Chowdhry Wahed Ali v. Musammat Jumae* (11 B. L. R., 149), *Ameeroonnissa Khatoon v. Meer Mahomad*, (20 W. R., 280), and *Kuriyali v. Mayan* (I. L. L., 7 Madr. 255), referred to.—9 Al. 605.

In a suit under Act X of 1877, sec. 283, for a declaration of the proprietary right to certain immoveable property attached in the execution of a decree, the plaintiff asked that the property might be "protected from sale." *Held* that consequential relief was claimed in the suit, and court-fees were therefore leviable under Act VII of 1870, sec. 7, cl. 4 (c), and not under sch. 2, art. 17 (iii).—2 Al. (F. B.) 720.

The L Bank advanced money to C, a Hindu governed by the Mitakshara school of law, upon mortgage of ancestral property. S, who was stated

to be C's only son, joined in the mortgage. Subsequently the Bank obtained a decree against C and S for the amount due on the mortgage. On attempting to sell the mortgaged property, other sons of C objected. This objection was allowed, and the mortgagees referred to a regular suit. They then sued all the sons of C to establish their lien on the mortgaged property. *Held* that the suit was maintainable under sec. 283 of the Civil Procedure Code. *Muthoo Lall Chowdhry v. Shoukee Lall* (10 B. L. R., 200), and *Mussamut Dhasee v. Hurry Prosad* (unreported) distinguished.—9 Cal. 888.

In order to enforce a decree which establishes a mortgage, and directs a sale of the mortgaged premises in satisfaction of the mortgage, it is not necessary to issue an attachment. If the decree contains, as it ought to contain, a direction for sale of the mortgaged premises, the proceeding under such a decree by attachment is unnecessary as well as expensive and dilatory. The direction for sale in the decree is in itself sufficient authority for the sale. That direction is founded on the specific lien or charge on the mortgaged premises created by the contract of mortgage, and not on the execution-clauses in the Code of Civil Procedure.—4 Bom. 515.

See I. L. R., 14 Bom. 206 and 15 Madr. 477, noted under sec. 13; 17 Cal. 711, 6 Al. 21, 10 Al. 479 and 11 Al. 74, noted under sec. 244; 13 Al. 339, noted under sec. 258; 19 Cal. 286, noted under sec. 272; 11 Bom. 114, 2 Al. 752, 7 Cal. 403, 17 Cal. 436, and 18 Cal. 296, noted under sec. 278; 3 Al. 504, noted under sec. 279; 7 Cal. 608, 6 Madr. 98 and 16 Bom. 1, noted under sec. 280; 6 Al. 109 and 5 Al. 462, noted under sec. 281.

**284.** Any Court may order that any property which has been attached, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Power to order property attached to be sold, and proceeds to be paid to person entitled.

#### Notes.

This section applies to Provincial Small Cause Courts (so far as relates to moveable property).

A sale having duly taken place in execution of a decree in force at the time cannot afterwards be set aside as against a *bona fide* purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an Appellate Court. A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bona fide* purchasers at other sales, under the same decree, who were no parties to it. *Held* that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed.—10 Al. 166.

When a property is sold in execution of a decree, it cannot be sold again at the instance of another decree-holder, who may have attached it before the attachment effected by the decree-holder under whose decree it

is actually sold ; and when a judicial sale takes place, all previous attachments effected upon the property sold fall to the ground.—12 Cal. 317.

In execution of a decree, property situate in three Munsiffs, *viz.* Serajgunge, Pubna, and Nattore, all three being at that time portions of the District and subordinate to the Court of the Rajshaye, was attached and sold by order of the Court of the Munsiff of Serajgunge :—*Held*, by analogy to the principle on which the case of Kally Prosunno Bose *v.* Dinonath Mullick, 11 B. L. R., 56 ; 19 W. R., 434, was decided, that the sale was not necessarily limited only to the portion of the property situate in the Munsiff of Serajgunge, but that that Court might have jurisdiction to make a valid sale of the whole estate, although it might be more convenient in such a case that the sale should be held by superior Court having jurisdiction over the entire District.—12 Cal. 307.

**285.** Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property, and shall determine any claim thereto and any objection to the attachment thereof, shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

#### Notes.

This section applies to Provincial Small Cause Courts.

At an execution-sale held by an inferior Court at the instance of the decree-holder (the Court itself, the decree-holder, and the auction purchaser being unaware of any objection to the exercise of a jurisdiction which the Court would ordinarily be competent to exercise), A purchased certain property, and his sale was confirmed. It appeared subsequently that this same property had, two years previous to the sale, been attached by a superior Court. On a sale of this property being advertized by the superior Court, A objected on the ground that he had already purchased it. This objection was overruled, and a sale was held by the superior Court, at which A again became the purchaser. A then brought a suit against the decree-holder and the judgment-debtor in the inferior Court to recover as damages the sum paid by him at the sale. The suit was dismissed :—*Held* that, although the superior Court had been wrong in insisting on the second sale, and in not requiring the amount received by the inferior Court to have been deposited in the superior Court, and then rateably distributed amongst the creditors of the judgment-debtors, yet the sale by inferior Court was a good and valid sale ; and A's suit was therefore rightly dismissed. *Obhoy Churn Coondoo v. Golam Ali* (I. L. R., 7 Cal. 410) adopted.—I. L. R., 12 Cal. 333.

X on the 3rd November 1884 obtained a decree in the Court of the Second Munsiff of Bagirhat against A, and on the 6th August 1887 sold such decree to the plaintiff, who on the 8th August 1887 applied in that Court for execution, and on the 5th September 1887 attached the share of A in a certain jama. The share was subsequently sold in execution of the plaintiff's decree on the 20th October 1887 and purchased by the plaintiff himself. Y having obtained another decree against A in the Court of the First Munsiff of Bagirhat on the 6th May 1875, sold his decree in the month

of January or February 1887 to the defendant, who on the 10th February 1887 commenced execution proceedings in the First Munsiff's Court against A, and on the 16th July applied for attachment of A's share in the jama. A filed an objection which was disallowed, and the share was attached at the defendant's instance on the 28th July 1887, and the attachment was confirmed on appeal on the 26th November 1887. The plaintiff, on the strength of his purchase of the 20th October 1887, put in a claim in the month of April 1888 in the defendant's execution proceedings in the Court of the First Munsiff, which was, however, disallowed. He then filed a suit to set aside the order disallowing his claim, and for a declaration that the right, title and interest of A passed to him under the sale of the 20th Oct. 1887. *Held*, that though the property had been first attached in the Court of the First Munsiff, that Court was not a Court of a higher grade than that of the Second Munsiff within the meaning of section 285 of the Code of Civil Procedure, and that the sale to the plaintiff was valid, and that he was entitled to the decree he prayed for. *Bykant Nath Shaha v. Rajendro Narain Rai* followed; *Badri Prasad v. Saran Lal*, *Aghore Nath v. Shama Sundari* dissented from, and *Muttukaruppan Chetti v. Mutturamalinga Chetti* referred to.—19 Cal. 651.

Where certain immoveable property which had been attached in execution of two decrees, one made by a Munsif, and the other by the District Court to which such Munsif was subordinate, was sold under the order of the Munsif, *held* (following *In the matter of the petition of Badri Prasad; Bardi Prasad v. Saran Lal*, I. L. R., 4 Al. (359) that the sale was bad by reason of the Munsif's want of jurisdiction to order it.—5 Al. 615.

Where property attached in execution of a decree of a Munsif's Court is, or becomes, subject to an attachment issued from a Subordinate Judge's Court, the holder of the decree in the Munsif's Court in order to share rateably in the assets under sec. 295 of the Code of Civil Procedure, must apply to the District Court to transfer his application to the Subordinate Court *Gopeenath Acharje v. Achcha Bibee* (I. L. R., 7 Cal. 553) and *Jetha Madhavji v. Najeralli Abhramji* (I. L. R., 4 Bom. 472) approved.—6 Madr. 357.

A, who had obtained a decree in the Court of the Second Munsif of B in September 1877, attached certain property within the jurisdiction which had been assigned to the Munsif by the District Judge under sec. 18 of Act VI of 1871. In the previous month C, who had obtained a decree in the Court of the Additional Munsif of B (to whom jurisdiction had similarly been assigned), had attached the same property. The sale in execution of A's decree took place first, and A became the purchaser. A then objected in the Court of the Additional Munsif that the property could not again be sold; but his objection was over-ruled, and two days subsequently the property was again put up for sale in execution of C's decree, and he became the purchaser. A brought various suits against the tenants for arrears of rent, in which C intervened. *Held* that the jurisdictions of the Munsifs were confined to the particular limits assigned to them, and that, as the property was situate within the limits assigned to the Second Munsif, the Additional Munsif had no jurisdiction to attach or sell it, and that the Attachment by C was made improperly and without jurisdiction. *Quære*.—Whether sec. 285 of the Civil Procedure Code applies to immoveable property.—7 Cal. 410.

Certain immoveable property was attached in execution of a decree made by a Subordinate judge, and also in execution of a decree made by a Munsif. These decrees were held by the same person, and the judgment-

debtor was the same person. Such property was sold in execution of both decrees. On the application of the judgment-debtor, who brought into Court the amount due on the decree made by the Subordinate Judge, and with the consent of the decree-holder and the auction purchaser, the Subordinate Judge made an illegal order setting aside such sale. Subsequently, on the application of the decree-holder and the auction-purchaser, the Munsif made an order confirming such sale. *Per SPANKIE, J.*—That the Subordinate Judge had not any jurisdiction under sec. 285 of the Civil Procedure Code to deal with such sale as regards the decree made by the Munsif, and the Munsif was not precluded by that section from confirming such sale as regards the decree made by him by reason that the Subordinate Judge, a Court of a higher grade, had made an order setting it aside. *Per OLDFIELD, J.*—That, having regard to the provisions of that section, it was doubtful whether the Munsif was competent to confirm such sale; but, inasmuch as the Subordinate Judge only intended to set it aside as regards the decree made by him, and his order was illegal, and the Munsif's order had done substantial justice, there was no reason to interfere.—3 Al. 356.

The provisions of sec- 285 of the Code of Civil Procedure, 1882, apply to immoveable property. Where a house, while under an attachment issued by a Subordinate Judge's Court in execution of a decree, was sold in execution of another decree against the same judgment-debtor by the District Munsif's Court, and was then sold by the Subordinate Judge's Court:—*Held*, that the sale by the District Munsif's Court was invalid by reason of the provisions of sec. 285 of the Code of Civil Procedure, 1882.—7 Madr. 47.

See I. L. R., 6 Al. 255, noted under sec. 234.

### *G.—Of Sale and Delivery of Property.*

#### *(a) General Rules.*

**286.** Sales in execution of decrees shall be conducted  
Sales by whom conducted and how made. by an officer of the Court or by any other person whom the Court may appoint, and, except as provided in section 296, shall be made by public auction in manner hereinafter mentioned.

#### **Notes.**

This section applies to Provincial Small Cause Courts.

A Civil Court, having power to issue execution on a decree, is competent, notwithstanding the absence of special provision in the Code, to refuse to confirm a sale in favour of a purchaser, who has, by the exercise of fraud and collusion with the execution-creditor, succeeded in being declared such purchaser at a depreciated value, although such sale may be without any material irregularity within the meaning of the Code. An order confirming a Court-sale is not appealable under the Code.—4 Ind. Jur. N. S., 505.

Where a judgment-debtor died after his land had been attached, and the creditor brought the land to sale without making the representatives of the deceased parties to the proceedings, *held* that the sale was illegal, and must be set aside.—I. L. R., 6 Madr. 180.

**287.** When any property is ordered to be sold by public  
Proclamation of sales by Public auction. auction in execution of a decree, the Court shall cause a proclamation of the

intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify as fairly and accurately as possible—

- (a) the property to be sold ;
- (b) the revenue assessed upon the estate or part of the estate, when the property to be sold is an interest in an estate or a part of an estate paying revenue to Government ;
- (c) any incumbrance to which the property is liable ;
- (d) the amount for the recovery of which the sale is ordered ; and
- (e) every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property.

For the purpose of ascertaining the matters so to be specified, the Court may summon any person whom it thinks necessary, and examine him in respect to any such matters, and require him to produce any document in his possession or power relating thereto.

The High Court shall, as soon as may be after this Code comes into force, make rules for the guidance of the Courts in exercise of their duties under this section. The High Court may, from time to time, alter any rules so made. All such rules shall be published in the local official Gazette, and shall thereupon have the force of law. As regards his own Court and the Court of Small Causes at Rangoon, the Recorder of Rangoon shall be deemed to be a "High Court" within the meaning of this paragraph.

Nothing in this section shall apply to cases in which the execution of the decree has been transferred to the Collector.

#### Notes.

This section applies to Provincial Small Cause Courts.

A Judge cannot order a Subordinate Judge to postpone a sale in a case pending before the Court of the latter officer. An application by a Collector under sec. 249 of the Code of Civil Procedure for the postponement of a sale in the execution of a decree of land paying revenue to Government should not be granted, where it is not alleged that satisfaction of the decree might be made within a reasonable period by a temporary alienation of the land.—5 N.-W. P. H. C. R., 177.

The object of the proclamation under sec. 249 is to give notice to intending purchasers, not to the judgment-debtors.—12 W. R., 488.

Under sec. 287 of the Civil Procedure Code (Act XIV of 1882) and the Rules of the High Court made thereunder a Court cannot refuse to execute its own decree ordering the sale of immoveable property in the possession



of a third party under a valid title. Rule I of the High Court Rules under that section permits inquiry into the title of the judgment-debtor in respect of moveable property only. Nor can a claim set up in an investigation held under sec. 287 be treated as a claim under sec. 278, the latter section having reference to claims to, and objections to attachment of property under attachment.—14 Bom. 369.

Where a sale in execution of a decree is postponed, whether indefinitely or to a fixed date, it is necessary, in the absence of an express arrangement between all the parties, that a fresh proclamation should be made giving notice of the day to which the sale has been postponed. It may be presumed, when the notice is wanting, that there has been an absence of bidders, from which alone substantial injury must probably have arisen to the judgment-debtor. *Shib Prokash Singh v. Sardar Doyal Singh* (I. L. R., 3 Cal. 544) and *Okhoy Chunder Dutt v. Erskine* (3 W. R., Mis. 11) followed.—I. L. R., 3 Cal. 542.

Upon an application to set aside a sale in execution of a decree on the ground of material irregularities in publishing and conducting it, it appeared that the sale-notification had not been fixed up in the Collector's office as required by sec. 289 of Act X of 1877; that no affidavit as to search having been made in the Registry Office with regard to incumbrances as required by sec. 287 of the Act had been filed; and that the sale took place on, and not after, the thirtieth day from the publication of the notice; but it also appeared that the applicant had himself been present at the sale and had purchased the property, and it was not shown that any substantial injury had resulted from the irregularities. *Held* that there was no ground for setting aside the sale.—8 Cal. 932.

Certain immoveable property was put up for sale, under the provisions of Act X. of 1877, in execution of a decree for money, and was purchased by C, with notice that L held a decree enforcing a lien on such property. Subsequently L applied for the sale of such property in execution of his decree, and such property was put up for sale in execution of that decree, and was purchased by S. S sued, by virtue of such purchase, to recover possession of such property from C. *Held* that, inasmuch as under Act X of 1877 what is sold in execution of a decree purports to be the specific property, and as C had purchased the property in suit with notice of the existing lien on it, and subject to its re-sale in execution of the decree in execution of which S had purchased it, what actually was sold in execution of that decree to S was such property, and S was entitled to possession of such property under such sale. Sales under Act VIII. of 1859 and Act X. of 1877 distinguished.—3 Al. 647.

In the execution of a decree ordering the sale of immoveable property it is not competent for the Court to refuse to sell it, because a stranger to the suit in which such decree was obtained, who is in possession of such property, impeaches the decree as having been obtained by fraud; the course open to him, if he wishes the stay of execution, being to file a suit obtain an injunction for the purpose.—8 Bom. 582.

A creditor obtained two decrees against his debtor, one being a mortgage-decree to enforce his lien on certain property, and in other a simple money-decree. In execution of the second decree, the property over which the judgment-creditor had a lien was sold, and was purchased by a third person. Subsequently, in execution of the first decree, at the instance of the judgment-creditor, this same property was advertised for sale, but on the auction-purchaser objecting, the judgment-creditor brought a suit

against him to enforce his lien on the property in the hands of the auction-purchaser. *Held* that it lay on the plaintiff, in order to entitle him to recover in the suit, to show that the defendants purchased with notice of the lien. *Held* further that the fact that for some purpose at some time or other the judgment-creditor informed the Court of the mortgage is not evidence of notice on the auction purchaser.—10 Cal. 609.

See I. L. R., 4 Bom. 323, noted under sec. 268 ; 10 Madr. 194, noted under sec. 268 ; 7 Cal. 34, noted under sec. 274 ; 17 Cal. 769, noted under sec. 244.

**288.** No Judge or other public officer shall be answerable for any error, mis-statement, or omission in any proclamation under section 287, unless the same has been committed or made dishonestly.

Indemnity of Judges, &c.

**Note.**—This section applies to Provincial Small Cause Courts.

**289.** The proclamation shall be made in manner prescribed by section 274, “on the spot where the property is attached,”\* and a copy thereof shall then be fixed up in the court-house and, in the case of land paying revenue to Government, also in the Collector’s office.

Mode of making proclamation.

If the Court so direct, such proclamation shall also be published in the local official Gazette and in some local newspaper, and the costs of such publication shall be deemed to be costs of the sale.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where property intended to be sold in execution of a decree is divided into a number of small lots, as a means of obtaining a better aggregate price, the law does not require that a separate proclamation of sale should be made on each lot into which the property is so divided. A mere breaking up of a property into lots does not necessarily make it several properties for the purposes of a proclamation of attachment or sale. Where estates, though embraced in the same process, are really at such a distance that there is no moral certainty of communication to persons on, or interested in, the one of what is publicly done on the other, there should, no doubt, be a separate proclamation on each, in order that full intimation may be given of what is to be done.—I. L. R., 12 Bom. 368.

The words “on the spot where the property is attached” in sec. 289 refer to each property attached, and not to a group of separate properties attached under one proceeding or order in one execution case, and therefore, when distinct properties are proclaimed for sale in one execution, the omission to affix a copy of the proclamation in each of such properties amounts to an irregularity in the publication of the sale :—*Held* also that, where there is no evidence to connect the two elements of irregularity and injury under sec. 311, it must appear, before a Court can set aside an execution-sale, that the injury complained of is the reasonable and natural consequence of the irregularity, and attributable to it alone.—11 Cal. 74.

\* See Act No. XII of 1891. (Repealing and Amending Act.)

A certificate of title under Act XI of 1859, sec. 28 and Bengal Act VII of 1868, sec. 11, issued before the expiry of the period of sixty days required by sec. 27 of Act XI of 1859 from the date of sale, is not a certificate duly issued under the provisions of these Acts, and cannot cure defects in the service of notice or in the proclamation of sale. The certificate in execution of which the plaintiff's estate was sold was not made or signed by the Collector of the district, but by a Deputy Collector: *Held*, that under sec. 7 of the Public Demands Recovery Act (VII of 1880) a certificate under the Act must be made and filed by the Collector of the district, and not by any officer gazetted to perform the functions of a Collector under Act VII of 1880.—18 Cal. 125.

A sale of revenue-paying land is not *ipso facto* void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office as required by sec. 289 of the Code of Civil Procedure. An omission so to fix up such notice is an irregularity the remedy for which can only be by an application under sec. 311.—18 Cal. 422.

See I. L. R., 4 Al. 300 and 7 Cal. 34, noted under sec. 274; 7 Cal. 466, noted under sec. 278; 8 Cal. 932, noted under sec. 287; 17 Cal. 769, noted under sec. 244.

**290.** Except in the case of property mentioned in the proviso to section 269, no sale under this chapter shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been fixed up in the Court-house of the Judge ordering the sale.

Time of sale.

#### Notes.

This section applies to Provincial Small Cause Courts (so far as relates to moveable property).

It is competent to a bidder at a Court auction-sale to withdraw his bid.—I. L. R., 14 Madr. 235.

An infringement of the rule contained in sec. 290 is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which sec. 311 refers.—7 Al. 289.

Neither the provisions of sec. 33 of Act XI of 1859, nor those of sec. 2, Bengal Act VII of 1868, affect the jurisdiction of the Civil Court to entertain a suit to set aside a sale under a certificate on any of the following grounds, namely, that no arrears were due at all, that no notice was served in accordance with the provisions of Bengal Act VII of 1880, or that the provisions of sec. 290 of the Civil Procedure Code were infringed. The words "in respect of sales in execution of decrees" in sec. 19 of Bengal Act VII of 1880 do not include any proceedings instituted *after the sale* for setting it aside. Secs. 311 and 312 of the Civil Procedure Code therefore do not apply to sales under a certificate. The infringement of the provisions of sec. 290 of the Civil Procedure Code is not a mere irregularity, but it vitiates the sale—Bakshi Nand Kishore v. Malak Chand, I. L. R., 7 Al. 289. The provision in sec. 8 of Bengal Act VII of 1880, as to the certificate

becoming absolute and acquiring the force and effect of a final decree, does not come into operation unless the notice required by sec. 10 is actually served. The only remedy of a judgment where property has been sold in execution of a certificate issued under Bengal Act VII of 1880, and who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale, is by way of an appeal under sec. 2 of Bengal Act VII of 1868. The effect of sec. 2 of Bengal Act VII of 1880 is that Act of XI of 1859, and Bengal Acts VII of 1868, VII of 1880 are to be considered as if the provisions contained in them were contained in one Act so far as such construction is consistent with the tenor of the last mentioned Act. By the force therefore of sec. 2 of the Act of 1880, the provisions of sec. 2 of the Act of 1868 became applicable to a sale under an execution issued upon a certificate made under the Act of 1880, Bengal Act VII of 1880 is an Act for the recovery of all kinds of public demands, and therefore applies to cases of road or other public cesses.—14 Cal. 1.

Where a sale in execution of decree was adjourned on the application of one of two judgment-debtors, who waived the issue of a fresh proclamation of sale, and the interests of both were sold, *held*, on the application of the other judgment-debtor to set aside the sale, that the omission to issue a fresh proclamation of sale under sec. 291 of the Civil Procedure Code amounted only to an irregularity, and did not vitiate the sale. *Held* further, that the District Judge had jurisdiction to hear the appeal from an order passed after the 1st of July 1888, under the Civil Procedure Code Amendment Act of 1888, although the execution proceedings were commenced before that date. *Rameshur Singh v. Sheodin Singh*, I. L. R., 12 Al. 510: *Sotish Chunder Rai Chowdhuri v. Thomas*, I. L. R., 11 Cal. 658. followed in principle.—18 Cal. 496.

An application made on the day of sale by the judgment-debtor, that a part only of his property may be sold instead of the entirety, cannot be considered such a "consent" as, by virtue of sec. 290 of Act X of 1877, would do away with the necessity of a proclamation for sale being issued thirty days before the day fixed for sale. Where successive postponements of the day of sale have been made, but the last of these is made by the Court on its own motion, without any application for postponement of sale being made on the part of the judgment-debtor (although such postponement might be for his benefit), a strict compliance with the rule that thirty days must elapse between the proclamation and the actual day of sale is requisite. *Ray Ganri Nath Sahay v. Shah Fukeer Chand* (18 W. R., 347) distinguished. Where a decree for sale of certain property was obtained under Act VIII of 1859, and the property was sold, but an order was passed after the new Code of Procedure (Act X of 1887), had come into force setting aside such sale, *held*, that an appeal would lie from such an order under Act X of 1877. *Runjit Singh v. Meherban Koer* (I. L. R., 3 Cal. 662) followed.—5 Cal. 259.

Certain immoveable property was, on the 15th February 1879, notified for sale under a decree of a Civil Court on 15th March following, so that only 29, instead of 30, days elapsed between the day of the sale and the notification. The sale having taken place, the execution-debtor applied to the Deputy Commissioner to set it aside upon the ground that the sale was illegal, the requirements of Act X of 1877, sec. 290, being essential to its validity. Upon that ground the sale was set aside as illegal by the Deputy Commissioner. On appeal, the Judicial Commissioner reversed this decision, on the ground that the fact of the sale having taken place 29 instead of 30 days after the notification was merely an irregularity, and that, as

the execution-debtor had not shown that he had suffered any damage from the irregularity, the sale ought to be confirmed. An application was then made to a Division Bench of the High Court to set aside the order of the Judicial Commissioner confirming the sale, upon the ground that it was manifestly erroneous; and the Division Bench referred the question to a Full Bench. Whether, assuming the requirements of sec. 290 to be essential to the validity of a sale, the High Court had any power, either under 24 and 25 Vic., cl., 105, sec. 15, or Act X of 1877, sec. 622, as amended, to set aside the Judicial Commissioner's order? *Held* by the Full Bench, without answering the question referred, that, assuming the requirements of sec. 290 to be essential, the High Court had a right, under its summary powers, to set aside the sale itself, notwithstanding (and apart from the question whether it would set aside) the order of the Judicial Commissioner.—5 Cal. 878.

See I. L. R., 4 Al. 300, noted under sec. 274.

**291.** The Court may, in its discretion, adjourn any sale under this chapter (other than a sale by the Collector) to a specified day and hour, and the officer conducting any such sale may, in his discretion, adjourn the sale, recording his reasons for such adjournment: Provided that, when the sale is made in, or within the precincts of, the Court-house, no such adjournment shall be made without the leave of the Court. Whenever a sale is adjourned under this section for a longer period than seven days, a fresh proclamation under section 289 shall be made, unless the judgment debtor consents to waive it. Every such sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to such officer, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale.

Power to adjourn sale.

Stoppage of sale on tender of debt and costs, or on proof of payment.

**Note.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 7 Cal. 34, noted under sec. 274; 17 Cal. 152, noted under sec. 311; 18 Cal. 496, noted under sec. 290; 10 Al. 1, noted under sec. 244.

**292.** No officer having any duty to perform in connection with any sale under this chapter shall, either directly or indirectly, bid for, acquire, or attempt to acquire, any interest in any property sold at such sale.

Officers concerned in execution-sales not to bid for or buy property sold.

**Notes.**

This section applies to Provincial Small Cause Courts.

Pleaders of parties to a suit are not debarred by sec. 292 of the Code of Civil Procedure from purchasing property sold in execution of the decree.—I. L. R., 10 Madr. 111.

See I. L. R., 15 Madr. 389, noted under sec. 311.

**293.** The deficiency of price (if any) which may happen on a re-sale under this Code by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court by the officer holding the sale, and shall, at the instance of either the judgment-creditor or the judgment-debtor, be recoverable from the defaulter under the rules contained in this chapter for the execution of a decree for money.

**Notes.**

This section applies to Provincial Small Cause Courts (so far as relates to re sales under sec. 297.)

In execution of a decree, certain property of the judgment-debtor was attached and put up for sale, and a portion thereof was knocked down to a purchaser for a sum sufficient to satisfy the decree. The purchaser, however, having made default in payment of the purchase-money, the property was again put up for sale, and the portion previously sold was purchased by the decree-holder at a price less than the amount bid for it at the former sale. *Held* that the decree-holder was not debarred by what took place at the former sale from proceeding to satisfy his decree by sale of other portions of the attached property than that originally sold.—13 B. L. R., 114; 21 W. R., 149.

The provisions of sec. 251 of the Civil Procedure Code give the officer conducting a sale of moveable property a discretion to allow the purchase-money to be paid at a reasonable time after the sale has been made.—4 N.-W. P. H. C. R., 37.

In computing the fifteen days allowed for payment of the balance of the purchase-money under sec. 254, Act VIII. of 1859, the day of sale was excluded.—3 Agra H. C. R., 204.

The provisions of sec. 293, Act X of 1877 (Civil Procedure Code), for making a defaulting purchaser at a sale liable for any deficiency on a re-sale, extend to all sales, whether of moveable or immoveable property, and also to re-sales held under secs. 297, 306, & 308.—I. L. R., 7 Cal. 337.

At a sale in execution of a decree the property was knocked down to a bidder at Rs. 260. The bidder was unable to make a deposit, and the property was immediately put up for sale and re-sold for Rs. 50. *Held* that the judgment-debtor had sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might, under sec. 293 of the Civil Procedure Code, have issued to recover the difference between the original bid and the price at which the property was sold.—9 Cal. 98.

No appeal lies from an order under sec. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. *Ram Dayal v. Ram Das*, and *Baijnath Sahai v. Maheep Narain Singh* dissented from. *Soudagar Mal v. Abdul Rahman Khan*, *Bahim Baksh v. Dhuri* followed. So *held* by *EDGE, C. J.*, *MAHMOOD* and *KNOX, JJ.*, *STRAIGHT, J.*, dissenting.—14 Al. 201.

Where property has been sold under a decree, and the purchaser at the execution-sale has made default in paying the purchase-money, the remedy



of the judgment-creditor is not limited by sec. 254 of Act VIII of 1859 to a suit against the defaulting purchaser. He is entitled to recover the balance of his debt from his judgment-debtor, who may, perhaps, have his remedy against the defaulting purchaser. *Joobraji Singh v. Gaur Buksh Lal* (7 Cal. W. R., Civ. Rul., 110) dissented from.—2 Bom. 562.

A purchaser of property at a Court-sale who fails to pay the deposit (25 per cent. on the purchase-money) directed to be paid by sec. 306 of the Civil Procedure Code is a defaulting purchaser within the meaning of sec. 293 of that Code, and liable, as such, to make good any deficiency of price which may happen on a re-sale, and all expenses attending the same. A sale in which a decree-holder himself, or some other person for him, without the permission of the Court first obtained, becomes the purchaser, is not, *ipso facto*, void; it is a good sale unless and until set aside by the Court under the provisions of sec. 294 of the Civil Procedure Code.—5 Bom. 575.

No appeal lies from an order under sec. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. *Sou-dagar Mal v. Abdul Rahman Khan and Tapesri Lal v. Deokinandan Rai* followed.—13 Al. 569.

See I. L. R., 12 Madr. 454, noted under sec. 244.

**294.** No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Decree-holder not to bid for or buy property without permission.

When a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, if he so desires, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

If decree-holder purchase, amount of decree may be taken as payment.

When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale, and all expenses attending it, shall be paid by the decree-holder.

#### Notes.

This section applies to Provincial Small Cause Courts.

A mortgagee who has obtained a mortgage-decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor. *Hart v. Tara Prasanna Mukerji* (I. L. R., 11 Cal. 718) distinguished. A mortgagee in such position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascer-

ained by the Court. The permission to a mortgagee to bid, should be very cautiously granted, and only when it is found, after proceeding with a sale, that no purchaser at an adequate price can be found, and even then, only after some enquiry as to whether the sale-proclamation has been duly published.—I. L. R., 16 Cal. 132.

A decree-holder (a mortgagee) who has, after obtaining leave to bid at a sale, purchased the mortgaged premises, is in the same position as an independent purchaser, and is only bound to give credit to the mortgagor for the actual amount of his bid.—19 Cal. 4.

No appeal lies from an order passed under sec. 294 refusing permission to a decree-holder to bid at a sale in execution of his decree.—13 Cal. 174.

Under the terms of sec. 294, it is discretionary with the Court to set aside an execution-sale at which the decree-holder has bid and purchased without first obtaining permission from the Court so to do; and in dealing with such a case, the Courts, although considering the matter as an irregularity in the conduct of the sale, will not interfere with the sale, unless it can be shown that the judgment-debtor has suffered some substantial injury arising from such irregularity.—11 Cal. 731.

In 1884 the plaintiff brought the present suit against the defendant to recover possession of a certain house which he had purchased at a sale held on the 15th March 1880, in execution of a money-decree obtained against one Chintaman Damodar. He obtained a certificate of sale on the 3rd January 1880, which was registered on the 13th of the same month. The defendant had previously purchased the same property at a sale held on the 22nd November 1875, in execution of a decree obtained by him as mortgagee against the said Chintaman. The defendant had obtained a certificate of sale, and was put into possession, but had not then registered the certificate. He subsequently obtained another certificate, which was registered in June 1882. In a suit by the plaintiff for possession. *Held* that the plaintiff could not recover. The defendant had acquired, under the Civil Procedure Code (Act VIII of 1859), by the sale and the confirmation of it, a beneficial interest, and the plaintiff by his subsequent purchase in execution of a money-decree against Chintaman took subject to that interest. The grant to the defendant of the second certificate, which was registered, sufficiently proved that the sale to him had been confirmed. It was contended that, under sec. 294 of the Civil Procedure Code (Act XIV of 1882), the defendant took nothing by his purchase, as he was the holder of the decree in execution of which the property was sold. *Held*, that this objection could not now be made, as the right of the judgment-debtor (Chintaman) and of the plaintiff, as purchaser of his rights, to have the defendant's purchase set aside on this ground, had been barred by limitation long before this suit was brought. The purchase by the defendant was not void *ab initio*, but only voidable "on the application of the judgment-debtor or other person interested in the sale." Further, such an application was a matter in execution falling under sec. 244 of the Civil Procedure Code (Act XIV of 1882), and therefore, even if not barred before the passing of the Limitation Act, XV of 1877, would be barred by article 178 of that Act not later than the 1st October 1880.—11 Bom. 588.

A obtained a money-decree against B and others jointly for Rs. 112, and, in consideration of a payment of Rs. 25 made by B, agreed to release B from all liability under the decree. This payment was not certified to

the Court, and A afterwards, in execution of the decree, had certain immoveable property belonging to B put up for sale, and this property he purchased himself. *Held* that a suit would lie by B to set aside the sale and to recover the property from A.—9 Cal. 788.

A purchase by the son of a decree-holder, undivided in interest from his father, is a purchase by the decree-holder within the meaning of sec. 294 of Act X of 1877 as it stood previously to its amendment by Act XII of 1879, and is absolutely void, if the purchase were made with funds which were the joint property of the father and son. In the absence of evidence to the contrary, the legal presumption would be that the funds were joint property.—5 Bom. 130.

Where there are competing decree holders, who have applied for execution of their decrees, sec. 294 of the Civil Procedure Code (Act X of 1877) must be taken as subject to the provisions of sec. 295, so that the decree-holder, who has been permitted under the former section to purchase the property in execution of his own decree, must share the proceeds of the sale rateably with such competing decree-holders, and will not be allowed to set off the purchase-money against the amount due to him on his decree.—6 Bom. 570.

The holder of a decree, in execution of which property is sold, is absolutely bound under Act X of 1877, sec. 294, to have express permission from the Court before he can purchase the property ; and whether this objection is taken and pressed or otherwise, a sale to him is invalid, unless he has got explicit permission. The use, at a sale, of language by an intending bidder in disparagement of the property for the purpose of influencing by standers, and deterring them from bidding for the property, is a " material irregularity," sufficient to render the sale invalid, under sec. 311 of the same Act.—5 Cal. 308.

The holder of a decree for unascertained mesne-profits, who has applied to the Court to ascertain the amount thereof, and to attach immoveable property under sec. 255 of the Code of Civil Procedure, comes within the purview of sec. 295, and is entitled to share rateably with the attaching creditor in the assets realized. Sec. 294 must be read with sec. 295, and to give effect to both sections the receipt to be given by the decree-holder, who has obtained leave to bid from the Court, and has purchased the property sold, can only be accepted for so much of the judgment-debt as the assets applicable to its discharge may suffice to satisfy.—5 Madr. 123.

There is no appeal to the High Court from an order refusing to set aside a sale unless such order is made under secs. 294, 312, or 313 of the Civil Procedure Code.—10 Cal. 368.

A mortgagee having obtained a decree, declaring his lien on certain property, put up for sale, in execution of this decree, the mortgaged property. The decree-holder asked for, but was refused, leave to bid at the sale, but, notwithstanding such refusal, purchased the property in the name of a third person. Possession under the sale was opposed, and the decree-holder as purchaser brought a suit for possession of the property. The defendants contended that, inasmuch as the plaintiff (decree-holder) had been refused leave to bid at the sale, his purchase could not be enforced. *Held* that the plaintiff had been guilty of an abuse of the process of the Court in bidding at the sale and buying the property *benami*, and that the sale, therefore, ought not to be enforced.—10 Cal. 757.

**295.** Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons :

Provided as follows :—

(a) when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale :

*Proviso where property is sold subject to mortgage.*

(b) when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold :

(c) when immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

*first*, in defraying the expenses of the sale ;

*secondly*, in discharging the interest and principal-money due on the incumbrance ;

*thirdly*, in discharging the interest and principal-money due on subsequent incumbrances (if any) ; and

*fourthly*, rateably among the holders of decrees for money against the judgment-debtor, who have, prior to the sale of the said property, applied to the Court which made the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

Nothing in this section affects any right of the Government.

#### Notes.

This section applies to Provincial Small Cause Courts.

In order to obtain relief under sec. 28 of Act X of 1859, the plaintiff must prove that the tenant holds under a grant made since 1st December 1790. By the word "decision" in sec. 372 of Act VIII. of 1859 is meant the

decree and judgment taken together, and not simply the decree unexplained by the judgment.—B. L. R., Sup. Vol., 1.

Sec. 270 of the Civil Procedure Code did not apply to a case in which property has not been sold in execution of a decree.—8 W. R., 501; 11 Bom. H. C. R., 159.

Sec. 270, Act VIII. of 1859, applied only to rival decree-holders claiming under different decrees, and not to persons claiming under the same decree.—2 Agra H. C. R., 183.

An order by a Principal Sadr Amin made on the application of a third party, that certain sale-proceeds which he had already directed to be rateably distributed among certain decree-holders should be withheld from one of them, was held to have been made without jurisdiction.—11 W. R., 54. S. C., 2 B. L. R., (A. C.) 217.

The Court having jurisdiction to adjudicate the conflicting claims of attaching creditors is the Court in which the attached money is deposited.—16 W. R., 11.

A mortgaged certain property to B in July 1874, to C in March 1877, and again to B in November 1877. B obtained a decree directing the sale of the property in satisfaction of his two mortgages, and it was sold accordingly. Subsequent to the sale, C obtained a similar decree upon his mortgage, and having unsuccessfully applied in his own suit to have his decree satisfied out of the sale proceeds after payment of B's first mortgage of July 1874, brought a suit under the last paragraph but one of sec. 295 of the Civil Procedure Code to recover the amount received by B in respect of B's mortgage of November 1877. *Held* that to read the words "an incumbrance" in sec. 295, proviso (c) of the Civil Procedure Code as "an incumbrance or incumbrances," so as to give priority to B's mortgage of November 1877, over C's earlier mortgage of March 1877, would be to defeat the intention of the Legislature as expressed in that section and also in sec. 80 of the Transfer of Property Act (IV of 1882); and that C was entitled to maintain the suit.—I. L. R., 12 Al. 546.

In distributing the proceeds of execution under sec. 295 of the Civil Procedure Code (Act XIV. of 1882), the Court has power to inquire into the *bona fides* of the several decree-holders that apply for rateable distribution, if the same has been called in question, and to decide it in the same manner as all other questions that arise in execution. The party aggrieved by such a decision is entitled, under the last clause of the section, to bring a regular suit to compel the successful judgment-debtor in execution to refund.—13 Bom. 154.

An order under section 295 of the Code of Civil Procedure (Act XIV of 1882) refusing a decree-holder's application for a rateable distribution of the assets realized by a sale or otherwise in execution of a decree, is not an order "in a proceeding other than a suit" within the meaning of article 13 of the Limitation Act (XV of 1877). On the 21st August, 1885, the defendant attached, in execution of a money decree, certain immoveable property belonging to his judgment-debtor. On the 18th January, 1886, plaintiff, who held another decree against the same judgment-debtor, applied, under section 295 of the Code of Civil Procedure (Act XIV of 1882), for a rateable distribution of the assets to be realized by the sale of the property attached. On the 19th March, 1886, the attached property was put up for sale in execution of the defendants decree. The defendant was allowed to buy the property at the sale and set off the purchase-money against the amount due to him under the decree under section 294, and no money was, therefore,

paid into Court. On the 14th June, 1886, the Court held that as no money had been paid into Court on account of the sale, no further proceedings could be taken on the plaintiff's application for a rateable share of the assets, and his application was accordingly rejected. Thereupon the plaintiff sued the defendant to compel him to refund the assets wrongly paid to him. The Court of first instance decided in plaintiff's favour. The lower appellate Court rejected the plaintiff's claim as barred by article 13, Schedule II of the Limitation Act (XV of 1877), on the ground that the suit was not brought within one year from the date of the Court's order refusing the plaintiff's application under sec. 295 of the Code of Civil Procedure (Act XIV of 1882). *Held*, that the suit was not governed by article 13 of the Limitation Act (XV of 1877). The order made under sec. 295 of the Civil Procedure Code was no bar to the suit, and a suit to set it aside was unnecessary. *Gowri Prasad Kundu v. Ram Ratan Sircar* (I. L. R., 13 Cal., 159) dissented from.—15 Bom. 438.

Hurgovandas Kuber was the holder of a decree in Suit No. 657 of 1869 for Rs. 69,467 against the firm of Hirji, Bhimji & Co., and in execution thereof he attached a certain house belonging to the estate of one Hirji Dossa, deceased, who had been a partner in that firm. Vizbai (the respondent) was the legal representative of Hirji Dossa. On the 9th November 1886, Vizbai purchased the decree from Hurgovandas Kuber for Rs. 18,000, which sum she obtained for the purpose as a loan from Canji Parbut & Co. As a security for this loan she gave Canji Parbut & Co. a letter, dated the 9th November 1886, whereby she agreed to repay the loan out of the proceeds of the sale of the house which had been attached in execution of the decree which she had purchased. In the meantime another decree, viz., in Suit No. 8 of 1870, had been obtained against the firm of Hirji, Bhimji & Co., and had been, prior to the 9th November 1886, purchased by the appellant Munmohandas, who had also, prior to the 9th November 1886, applied for execution. On the 6th April 1887, the attached house was sold by the Sheriff, and realized Rs. 45,000. On the 5th September 1887, an order was made in chambers that the Sheriff should divide rateably the moneys in his hands in Suit No. 657 of 1869 between Munmohandas and Vizbai. Munmohandas appealed, and contended that by the transaction between Vizbai and Hurgovandas Kuber the decree in Suit No. 657 of 1869 had been extinguished as against the estate of Hirji Dossa, and that the said transaction amounted, in law and fact, to a purchase, on behalf of the estate of Hirji Dossa, of the properties attached in the said suit, or the proceeds thereof. *Held*, confirming the order appealed from, that Vizbai was entitled to a rateable proportion of the moneys in question. She was only liable under the decree held by the appellant Munmohandas as the representative of Hirji Dossa. So far as she might have had property of her own, not derived from Hirji Dossa's estate, available for the purchase of Hurgovandas's decree, she stood in the same position as a third party who might have purchased Hurgovandas's share of the proceeds before they were realized. The purchase of Hurgovandas's share with her own money could not prejudice Munmohandas any more than if an entire stranger had purchased. The fact that she borrowed the money and gave the share as a security to the lender did not affect the question. If the money did not come from Hirji Dossa's estate, it could not matter whether it came directly from Vizbai's pocket or from another person at her request. If the money was derived from a source having no connexion, directly or indirectly, with the estate indebted, there is no distinction, in principle, between the representative of the indebted estate and a stranger.—13 Bom. 171.



The plaintiffs in this suit obtained a decree against all three defendants A, B and C. In execution of such decree they attached two sets of securities, (i) municipal bonds, the joint property of B and C; and (ii) Government loan notes, the property of C alone. These were sold by the Sheriff, but before they were so sold, the holders of decree in two other High Court suits came in and applied to the High Court for execution of their decrees, which decrees were against C alone. These last-mentioned decree-holders now claimed to participate rateably with the plaintiffs in this suit in the realized proceeds of both the above-mentioned securities. The plaintiffs in this suit contended that such decree-holders, having decrees only against C, were not claiming against "the same judgment-debtors" as themselves within the meaning of section 295 of the Civil Procedure Code (XIV of 1882). *Held*, that as regards the proceeds of the Government loan notes, the sole property of C, the plaintiffs' decree and the other two decrees were all decrees "against the same judgment-debtor," and that, therefore, as regards that fund, all three sets of decree-holders were equally entitled and must share therein rateably. *Held*, further, that as regards the other fund, the proceeds of the property of B and C, only the plaintiffs in this suit were entitled thereto, since the other decree-holders had no decrees against B and C, and, therefore, not "against the same judgment-debtors" as was the decree of the plaintiffs. *Held*, further, that the plaintiffs having two funds to proceed against, whilst the other decree-holders had but one of these two, the equitable principle of marshalling should be applied and the plaintiffs required to satisfy themselves as far as possible out of the fund not available to the other decree-holders, before they had recourse to the other fund common to all, and as regards the latter fund the plaintiffs should claim against the same only as creditors for the then unsatisfied balance of their debt rateably with such other decree-holders. *Shumbhu Nath Poddar v. Luckynath Dey* (I. L. R., 9 Cal. 920) and *Deboki Nundun Sen v. Hart* (I. L. R., 12 Cal. 294) considered and followed. Another holder of a decree—a Small Cause Court decree passed against all three debtors A, B and C—had previously to the said attachments by the Sheriff in this suit himself attached the same securities through the Small Cause Court. He did not, however, at any time get his decree transferred to the High Court. He now came in in these execution proceedings and claimed to share rateably in both funds on the same footing as the plaintiffs in this suit. *Held*, that, not having had his Small Cause Court decree transferred to the High Court before the realization of the said securities, or indeed at any time, he was not entitled to share in either fund.—*Mattalgiri v. Muttayyar* (I. L. R., 6 Madr. 357) followed.—16 Bom. 683.

U held a money-decree against B. P. and R., in execution whereof he caused to be attached and sold certain property belonging to B. D held a decree against B. P. R. and S. which, so far as P. R. and S. were concerned, was a decree for enforcement of hypothecation by sale of the judgment-debtor's property, but which did not direct the sale of specific property belonging to B. An application by D, under sec. 295 of the Civil Procedure Code, for an order enabling him to share rateably in the proceeds of U's execution, was rejected. *Held* that, there being no question of fraud in the case, D was entitled to enforce his decree in the first instance against the property of B; that his decree against B did not lose the character of a decree for money under sec. 295 of the Code, because it directed a sale of the property of the other judgment-debtors; and that the fact that there were four judgment-debtors in D's decree and only three in U's would not deprive D of the right to share rateably. *Shumbhu Nath Poddar v. Lucky*

Nath Dey (I. L. R., 9 Cal. 920) referred to. Deboki Nundun Sen v. Hart (I. L. R., 12 Cal. 298), Gagat Narain Pal v. Dhundhey Rai (I. L. R., 5 Al. 566), and Hart v. Tara Prasanna Mukerji (I. L. R., 11 Cal. 718), distinguished.—10 Al. 35.

No appeal will lie from an order under sec. 295 of the Code of Civil Procedure dismissing, on the ground that the decree was barred by limitation, a decree-holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order cannot be regarded as a decree under sec. 244 read with sec. 2 of the said Code.—14 Al. 210.

Certain land was mortgaged to A with possession to secure the repayment of a loan of Rs. 2,000 and interest. It was stipulated in the deed that the interest on the debt should be paid out of the profits, and the balance paid to the mortgagors. By an agreement subsequently made, it was arranged that the mortgagors should remain in possession and pay rent to A. A obtained a decree for Rs. 2,000 and arrears of rent and costs, and for the sale of the land in satisfaction of the amount decreed. The land was sold for Rs. 2,855 in March 1881. In May 1881 B, a puisne mortgagee, applied to the Court for payment to him of Rs. 500 of this sum, alleging that A was entitled only to Rs. 2,000 and Rs. 280 costs, but not to arrears of rent, in preference to his claim as second mortgagee. The claim of B was rejected on the 27th May 1881, and the whole amount paid out to A. In February 1882 B (who had filed a suit on the 23rd March 1881) obtained a decree upon his mortgage. On the 23rd May 1884, B sued to recover Rs. 510 paid to A on account of rent on the 27th May 1881. The lower Courts dismissed the suit on the grounds (1) that A was entitled to treat the arrears of rent as interest; (2) that the suit was barred by limitation:—*Held*, on second appeal, that B was entitled to recover the sum claimed.—9 Madr. 57.

A debtor against whom several decrees had been passed, filed his petition in the Insolvent Court at Madras, and the usual vesting order was made. One of the decree-holders had already attached property of the insolvent and had obtained an order for sale in a District Court, and now another decree-holder applied to the same Court in execution of his decrees for the attachment of the property, and for rateable distribution of the proceeds of the sale to be held in execution of the attachment already made. The District Judge held that the vesting order was a bar to both of these applications:—*Held*, (1) that the order rejecting the application for fresh attachments was right; (2) that the order rejecting the application for rateable distribution was wrong, and that the High Court had power to set it aside on revision under Civil Procedure Code, sec. 622.—15 Madr. 372.

G and C held decrees against B, and took out execution of them; and the judgment-debtor's property was attached, but no sale took place. The judgment-debtor paid into Court the sum of Rs. 1,200 on account of G's decree:—*Held* that G was entitled to the sum of Rs. 1,200 paid into Court by the judgment-debtor, and it could not be regarded as assets realized by sale or otherwise in execution of a decree, so as to be rateably divisible between the decree-holders under sec. 295 of the Civil Procedure Code, inasmuch as it could not be said that there was a realization from the property of the judgment-debtor.—8 Al. 67.

Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment-debtor had no saleable interest therein, it is com-

petent to him to proceed by way of a regular suit against the person into whose hands such price has come as such person's rateable share of the assets of the judgment-debtor under section 295 of the Code of Civil Procedure. He is not limited to the procedure in the execution department mentioned in sec. 315 of the said Code. *Munna Singh v. Gajadhar Singh* followed.—13 Al. 383.

Where a judgment-creditor has obtained a decree against two judgment-debtors A and B, and in execution of that decree has attached and caused to be sold joint property belonging to such judgment-debtors, another judgment creditor holding a decree against A alone, who was also applied for execution, is not entitled to claim, under the provisions of sec. 295 to share rateably in the sale-proceeds, the decree not being against the same judgment-debtor, and a Court having no power in execution proceedings to ascertain the respective shares of joint judgment-debtors. In *Shumbhoo Nath Poddar v. Luckynath Dey*, (I. L. R., 9 Cal. 920), it was not intended to lay down that a person who has obtained a decree for money against a single judgment-debtor is entitled to come in and share rateably with a person who has obtained a decree against the same judgment-debtor and other persons.—12 Cal. 294.

The words "decree-holders" or "persons holding decrees for money against the same judgment-debtor," in sec. 295 signify *bona fide* decree-holders. A Court is bound, in cases falling within this section, to satisfy itself whether the claimants are *bona fide* decree-holders within the meaning of the section, and where it is unable to satisfy itself as to the *bona fides* of the claim, the Court should exclude such claimant from the distribution of assets.—11 Cal. 42.

The cause of action given by the last para. but one of sec. 295 does not arise until the money has been actually paid over to the person who is alleged not to be entitled to receive the same, and a suit brought by a person claiming to be entitled to be paid a share of sale-proceeds under that section, and to recover the same from another to whom such sale-proceeds have been ordered to be paid, if brought before they have been actually paid to such other person, is premature, and should be dismissed. Every decree, by virtue of which money is payable, is, to that extent, a "decree for money" within the meaning of that term as used in sec. 295, even though other relief may be granted by the decree; and the holder of such decree is entitled to claim rateable distribution of sale-proceeds with holders of decrees for money only under that section. There is nothing in sec. 295 which takes away the right from a mortgagee who has obtained a decree upon his mortgage to proceed against the property of his mortgagor other than that subject to his mortgage. Thus, the holder of a mortgage-decree, which directs that the amount be realized from the mortgaged property, and from the mortgagor personally, is entitled to claim rateable distribution under that section, and is not, in the first instance bound to proceed against his mortgage-security and exhaust that. A mortgagee who has obtained a decree on his mortgage is not restricted to proceedings in the first instance against his mortgage-security before proceeding against other property of his mortgagor, but when he sells any portion of the property, the subject of his mortgage, and purchases it himself, he is bound, before he can proceed further against the mortgagor, or claim rateable distribution under sec. 295 to prove that there is still a balance due to him, and that the property sold and purchased by him realized a fair amount, the mere fact of the property having been sold at auction not being alone sufficient to prove its value,

and this ought to be enquired into most carefully by the Court to which an application is made to further execute the decree, or to share rateably under sec. 295.—11 Cal. 718.

Certain moveable property was at first attached in execution of a money decree passed by a Subordinate Judge in his Small Cause jurisdiction, of which a part was afterwards sold. In execution of a money-decree passed by the same Subordinate Judge in his ordinary jurisdiction the remaining property was attached and sold. Prior to the date of this sale the applicant applied for execution of a money-decree passed in his favour by the same Subordinate Judge in his Small Cause jurisdiction, and prayed for rateable distribution of the proceeds along with other decree-holders :—*Held* that the application must be allowed. Although a Subordinate Judge, invested under Act XIV of 1869, sec. 28, with small Cause powers, acquires the jurisdiction of two Courts, he does not become the Judge of two Courts, but remains the Judge of a Subordinate Court.—9 Bom. 174.

S and L held mortgage-bonds executed in their favour by the same person. S's bond was dated the 16th June 1882, and was registered, the registration being compulsory. L's bond was of prior date, the 30th December 1880, and was not registered, the registration being optional. Both instituted suits on their bonds against the obligor, and obtained decrees for sale of the property, the decrees being passed on the same day. The property was attached in execution of both decrees on the 14th August 1882. The sale-proceeds were divided by the Court executing the decrees equally between the parties by an order dated the 1st May 1883, notwithstanding that S claimed the whole on the ground that he was an incumbrancer under a decree passed on a registered instrument, and therefore entitled to priority. S, being dissatisfied with this order, brought a suit to recover from L the moiety of the sale-proceeds paid to him :—*Held* that the suit being one to compel the defendant to refund assets of an execution-sale which he was not entitled to receive, and to set aside the order of the Court executing the decree, which directed the payment of the assets to him, was expressly allowed to be brought under the provisions of the penultimate paragraph of sec. 295 and could not be regarded as a suit of the nature cognizable in a Court of Small Causes. *Held* also that the registered bond of the plaintiff took effect as regards the property comprised in it against the defendant's unregistered bond under sec. 50 of the Registration Act (III of 1877), which gave priority to the incumbrance created by the former bond over the incumbrance created by the latter, and this priority was not affected by the subsequent decrees obtained on the bonds, which only gave effect to the respective rights under the bond. The meaning of sec. 295 is that, when immoveable property is sold in execution of decrees ordering its sale for the discharge of incumbrances, the sale-proceeds are to be applied in satisfaction of incumbrances according to their priority.—7 Al. 378.

In execution of a decree against M the plaintiff attached and advertised for sale certain property in mouza A. At that time there were pending proceedings in execution of two other decrees obtained against M by the first and second defendants respectively. These two decrees were obtained on a bond executed by M, by which an eight-anna share of mouza A was hypothecated as collateral security; and in execution of those decrees the defendants brought to sale, and themselves purchased, not an eight-anna share only, but the whole of mouza A, and were allowed by the Court to set off the purchase-money against the amounts due to them under their decrees. At the same time the plaintiff's execution-case was struck off on 30th June

1880. In a suit brought by the plaintiff under sec. 295 of the Civil Procedure Code for his share of the sale-proceeds of mouza A, in which the plaintiff alleged fraud on the part of the defendant in selling the whole mouza under their decrees, of which he only became aware in July 1882, from which time he dated his cause of action, the defendants denied the fraud, and contended that the suit should have been brought within a year of the order of the 30th June 1880; that a set-off having been allowed to the defendants, the plaintiff was not entitled to any rateable distribution; and that, if any rateable distribution were allowed, they were entitled to have an allowance made in respect of a Mortgage which the plaintiff held in a two-anna share of mouza A, which they had paid off subsequently to the transactions now in question:—*Held* that the existence of the order of the 30th June 1880 was not inconsistent with the plaintiff's right, and the suit was therefore not barred as not having been brought within one year of that order:—*Held* also that the fact of the set-off being allowed in exercise of the power given in sec. 294 of the Code, instead of actual payment into Court, did not alter the substantial nature of the transaction, so as to render the purchase-money less applicable to the satisfaction of the debts of other attaching creditors:—*Held*, further, that the defendants were not entitled to deduct the sum paid by them to clear off the plaintiff's mortgage, from the amount of the purchase-money, before the Court could determine the amount rateably distributable among the parties concerned. *Quære*.—Whether they were even entitled to reckon the amount so paid as one of the claims in respect of which, with others, a rateable distribution should be made?—12 Cal. 499.

The words of sec. 295 of the Code of Civil Procedure, "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors. The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code.—13 Cal. 225.

Where property belonging to A has been attached under a decree, and other decree-holders than the attaching creditor have applied before realization of assets to participate in the sale-proceeds, and amongst them a creditor who has obtained a decree against A and B, such latter creditor is entitled, under sec. 295, to share in the proceeds of the sale of A's property.—9 Cal. 920.

Moneys paid into Court by sale or otherwise in execution of a decree are assets from the moment of their payment into Court, and are available, under sec. 295 of the Code of Civil Procedure (Act X of 1877), for rateable distribution only amongst decree-holders who have applied for execution prior to that time.—6 Bom. 16.

Money paid by a judgment-debtor under arrest, in satisfaction of the decree against him, are not assets realized by sale or otherwise, under sec. 295 of the Civil Procedure Code (Act X of 1877). Sec. 295 of the Civil Procedure Code (Act X of 1877) must be read as if the words "from the property of the judgment-debtor" were inserted after the word "realized".—6 Bom. 588.

Application was made for execution of a decree for money against R, and also for execution of a decree against R and another person jointly and severally. Certain immoveable property belonging to R was sold in execution of the first decree, the assets which were realized by such sale being



sufficient to satisfy the amounts of both decrees. Such property was then sold a second time in execution of the second decree. *Held*, under these circumstances, that the second sale should be set aside, not being allowed with reference to the provisions of sec. 295 of Act X 1877.—3 Al. 579.

An application for execution must not only have been made before the assets came into the hands of the Court, but must also be on the file, and undisposed of, to entitle a decree-holder under sec. 295 of the Code of Civil Procedure to share rateably in the assets realized by another decree-holder in execution of his decree against the same judgment-debtor. Where a rateable distribution was ordered among decree-holders whose applications had been struck off the file prior to realization of assets: *Held* that it was open to the party injured to apply to the High Court under sec. 622 to reverse the order.—4 Madr. 383.

The judge of a Court of Small Causes sitting in the exercise of his powers as such, and in the exercise of his powers as a Subordinate Judge, is not one and the same Court, but two different Courts. *Held*, therefore, that the holder of a decree made by the Judge of a Small Cause Court in the capacity of Subordinate Judge, who had applied to such Judge acting in that capacity for execution of his decree, was not thereby entitled to share rateably, under sec. 225 of Act X of 1877, in assets subsequently realized by sale in execution of a decree made by such Judge in the capacity of Judge of such Small Cause Court.—3 Al. 710.

A judgment-creditor in execution of his decree attached certain property belonging to his judgment-debtor while Act VIII of 1859 was in force. This property was ultimately sold on the 9th January 1879, i.e., after Act X of 1877 came into operation. Two days before the sale, another judgment-creditor applied to have his decree satisfied out of the same property by a rateable distribution of the proceeds which might be realized. *Held* that the prior attaching creditor, by his attachment under Act VIII of 1859, acquired, under sec. 270 of that Act, a right to have his decree first satisfied in full, and that he was not deprived of this right by the change in the law introduced by Act X of 1877, sec. 295.—3 Bom. 217.

On the 8th July, 1890, the plaintiff Warden sued (Suit No. 382 of 1890) Govind Ramji for Rs. 2,237, and on the 18th idem obtained an attachment before judgment of certain money belonging to Govind Ramji in the hands of the B. B. and C. I. Railway Company. On the 5th August, 1890, Warden got a decree in the suit for Rs. 2,008, with interest and costs, and on the 13th August, 1890, applied for execution. On the 24th September, 1890, Govind Ramji made an assignment in favour of his attorneys, Messrs. Wadia and Ghandy, of the fund belonging to him (expressed to be Rs. 7,818) in the hands of the Railway Company, subject to the attachment levied on the same by Warden. This assignment was intended to secure costs incurred by Messrs. Wadia and Ghandy as attorneys for the defendant. Notice of this assignment was at once given to the Railway Company. In February, 1891, the Bank of Bengal attached the sum of Rs. 7,818 in the hands of the Railway Company, in execution of a decree, obtained by the Bank against Govind Ramji in Suit No. 190 of 1890, and subsequently other creditors of Govind Ramji, who had obtained judgment against him, applied for execution and obtained attachments on the sum in question. On the 26th May, 1891, under a consent order in Suit No. 382 of 1890, the Railway Company paid over, to the Sheriff of Bombay, the sum of Rs. 8,084-1-0, which was the amount admitted by the Company to be due to Govind Ramji after making all just deductions. It was contended by Messrs.



Wadia and Ghandy that, under the above assignment, they were entitled to the fund assigned to them, subject only to the claim of Warden, who had, at the date of assignment, already attached the said fund, and that subsequent attaching creditors had no claim to the said fund. *Held*, that the fund in question must be regarded as "assets realized by sale, or otherwise, in execution of a decree," within the meaning of sec. 295 of the Civil Procedure Code (XIV of 1882). *Held*, also, that under the provision of sec. 295 the claims of the subsequent execution creditors were "claims enforceable under the attachment of S. E. Warden, within the meaning of sec. 276 of Civil Procedure Code," and that the assignment to Messrs. Wadia and Ghandy was void, as well against the claims of the creditors of Govind Ramaji, who applied for execution, before the 26th May, 1891, as against those of Warden, to the funds in the hands of the Sheriff of Bombay. *Held, further*, that the attachment was not limited merely to such portion of the fund as covered the amount of the decree, but was a valid attachment in the form in which it was made, namely, on the whole fund in the hands of the Railway Company. It was argued that the attachment was actually made only on Rs. 6,000, and that it did not therefore include the whole fund, which was of larger amount. *Held*, that the misdescription in the order of attachment was a mere *falsa demonstratio* and that the entire sum in the hands of the Railway Company was attached. The description of the property must be reasonably accurate, under the circumstances, and such, as with reasonable certainty, identifies the property. If it is such it ought be held sufficient.—16 Bom. 91.

The fact that a money-decree has been obtained on a bond by which property has been mortgaged does not destroy the lien on that property. It is open to a plaintiff to establish his right on the bond, as well as on the decree. The purport of secs. 270 and 271 of Act VIII of 1859 (with which sec. 295 of Act X of 1877 corresponds) is not to alter or limit the rights of parties arising out of a contract, but simply to determine questions between rival decree-holders standing on the same footing, and in respect of whom there is no rule for otherwise determining the mode in which proceeds of property sold in execution shall be distributed.—4 Cal. 29; 22 W. R., 98.

Certain moveable property was attached in execution of decrees of the Small Cause Court at Ahmedabad. After the attachment, but before the sale of the attached property, other creditors of the same judgment-debtor obtained decrees against him in the Court of the Subordinate Judge at the same place, and applied to it for the attachment of the same property in execution of their decrees. The Subordinate Judge, accordingly, attached it by prohibitory orders issued to the Judge of the Small Cause Court. After the sale, the holders of the decrees obtained in the Subordinate Judge's Courts claimed a rateable share in the assets realized by the Small Cause Court, under Act X of 1877, sec. 295. *Held* that they were not entitled to any share in the assets until after satisfaction of the decrees of the Small Cause Court.—4 Bom. 472.

On the 22nd March 1878, the first mortgagee of certain property obtained a decree enforcing his mortgage. On the 25th March 1878, the second mortgagee obtained a decree enforcing his mortgage. Both decrees were made by the same Court. On the 20th June 1878, the property was put up for sale in execution of the second mortgagee's decree. The first mortgagee subsequently brought a suit for a re-sale of the property in satisfaction of his decree. *Held* that this was the only course open to him, and he could not have enforced satisfaction of his decree in accordance

with the provisions of sec. 295 of the Civil Procedure Code, inasmuch as the provisions of the first and second provisoes to that section refer only to sales in execution of simple money-decrees, whereas the property in question had been sold in execution of a decree ordering its sale, and the provisions of the third proviso relate to subsequent and not prior incumbrances.—5 Al. 566.

One Maniklal obtained a decree against L and M for rent due from them, and, in execution thereof, applied for the attachment and sale of two houses, with their compounds and the grounds underneath them (in respect of which property the said rent had fallen due), belonging respectively, one to each of his judgment-debtors. The properties were, accordingly, sold on 23rd July 1879, and the sale-proceeds handed over to Maniklal. In the meantime, on the 18th February 1879, D, a judgment creditor of M under a money-decree, applied for the attachment and sale of the same immoveable property (excepting the houses) of his judgment-debtor, which had been previously attached under Maniklal's decree for rent. On the realization of the sale-proceeds, D applied, under Act X of 1877, sec. 295, for a rateable proportion of the assets realized by the sale of M's property in execution of Maniklal's decree. *Held* that D was not entitled to such rateable proportion of the assets.—4 Bom. 429.

The salary of a karkun, who was employed in the Second-class Subordinate Judge's Court of Anklesvar, was attached, in execution of a decree of the First-class Subordinate Judge's Court of Surat, by an order issued by the Surat Court, directing the Anklesvar Court to stop and remit, every month, a moiety of the said karkun's salary to itself (the Surat Court) until satisfaction of the decree. While the decree of the Surat Court was thus in course of execution, another judgment-creditor of the karkun, who had obtained a decree in the Anklesvar Court, applied to it for a rateable distribution of the moiety between himself and the Surat decree-holder, under sec. 295 of the Civil Procedure Code, Act X of 1877. *Held* that the application was not sustainable, inasmuch as the decree of the Surat Court was being executed by itself, and not by the Anklesvar Court, to which the order of the attachment was sent as the head of a department, or as "the officer whose duty it was to disburse the salary," and not as the Court executing the decree of another Court. *Jetha Madhavji v. Najeralli Abhrahmji* (I. L. R., 4 Bom. 472) followed.—5 Bom. 198.

Where two mortgagees, in execution of their several decrees, attached the same property, of which a moiety, without further specification, was respectively mortgaged to each of them, and subsequent to the attachments the property was sold in execution of one of the decrees: *Held*, that notwithstanding the whole interest of the mortgagor was intended to be sold, the purchaser took one of the moieties subject to the lien of the unsatisfied mortgagee, and that omission or neglect on the part of the Court executing the decree to give specific direction as provided by clause (b) of sec. 295 of the Civil Procedure Code did not prejudice the rights of the unsatisfied mortgagee or discharge his encumbrance.—10 Cal. 567.

See I. L. R., 6 Cal. 663, noted under sec. 276; 4 Bom. 429, noted under sec. 266; 7 Cal. 553, noted under sec. 272; 7 Cal. 34, noted under sec. 274; 6 Al. 255, noted under sec. 234; 6 Bom. 570, noted under sec. 294; 5 Madr. 123, noted under sec. 294; 15 Cal. 202, noted under sec. 213; 10 Madr. 57, noted under sec. 311; 15 Madr. 345, noted under sec. 223.

*(b) Rules as to Moveable Property.*

**296.** If the property to be sold a negotiable instrument or a share in any public Company or Corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker at the market-rate of the day.

Rules as to negotiable instruments and shares in public Companies.

**Note.**—This section applies to Provincial Small Cause Courts.

**297.** In the case of other moveable property, the price of each lot shall be paid for at the time of sale, or as soon after as the officer holding the sale directs, and, in default of payment, the property shall forthwith be again put up and sold.

Payment for other moveable property sold.

On payment of the purchase money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute.

**Notes.**

This section applies to Provincial Small Cause Courts.

Under the Code of Civil Procedure (Act XIV of 1882) it is intended that a sale of moveable property attached in execution of a decree should ordinarily be held in some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons must be shown for directing otherwise. Where the only ground urged for directing a sale outside the Court's jurisdiction was that the property would probably fetch a better price, and it was found by the Court that a fair sale could be had on the spot, *held* that no sufficient reason was shown for departing from the usual practice. A judgment-debtor died. His widow was thereupon placed on the record as his legal representative. In the execution-proceedings which followed, the widow made an appeal to the High Court against a certain order passed by the Court executing the decree. To this appeal, a person alleging himself to be the adopted son of the deceased judgment-debtor applied to be made a party. The widow opposed the application, denying the fact of the adoption. *Held* that, whether the applicant was or was not the adopted son of the deceased judgment-debtor, there was no objection to entering his name on the record if the decree-holder consented, as it tended to his security that this should be done. The applicant was accordingly made a co-appellant with the widow.—I. L. R., 13 Bom. 22.

See I. L. R., 7 Cal. 337, noted under sec. 293.

**298.** No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person be the purchaser) for the recovery of the specific property, and for compensation in default of such recovery.

Irregularity not to vitiate sale of moveable property, but any person injured may sue.

**Notes.**

This section applies to Provincial Small Cause Courts.

A sale in execution of decree transfers to the purchaser nothing more than the rights and interests of the judgment-debtor at the time of attachment and sale; and sec. 252 of Act VIII. of 1859 does not prohibit an enquiry into the extent of those rights, or declare the owner of property, attached in execution of a decree passed against a third party, incompetent to assert his claim by suit. The sale of moveable property, belonging to a third party, in execution of a decree, is not a mere irregularity within the meaning of sec. 252, and the owner of the property so sold is entitled to sue for its restoration or for damages.—6 N.-W. P. H. C. R., 252.

**299.** When the property sold is a negotiable instrument or other moveable property of which actual seizure has been made, the property shall be delivered to the purchaser.

**Note.**—This section applies to Provincial Small Cause Courts.

**300.** When the property sold is any moveable property to which the judgment-debtor is entitled subject to the possession of some other person, the delivery thereof to the purchaser shall be made by giving notice to the person in possession, prohibiting him from delivering possession of the property to any person except the purchaser.

**Note.**—This section applies to Provincial Small Cause Courts.

**301.** When the property sold is a debt not secured by a negotiable instrument, or is a share in any public Company, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary, or other proper officer of the Company from permitting any such transfer or making any such payment to any person except the purchaser.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 10 Madr. 194, noted under sec. 268.

**302.** If the endorsement or conveyance of the party in whose name a negotiable instrument or a share in any public Company is standing is required to transfer such instrument or share, the Judge

may endorse the instrument or the certificate of the share, or may execute such other document as may be necessary.

The endorsement or execution shall be in the following form or to the like effect:—“*A. B., by C. D., Judge of the Court of (or as the case may be); in a suit by E F against A. B.*”

Until the transfer of such instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon, and to sign a receipt for the same; and any endorsement made, or document executed, or receipt signed, as aforesaid, shall be as valid and effectual for all purposes as if the same had been made or executed or signed by the party himself.

**Note.**—This section applies to Provincial Small Cause Courts.

**303.** In the case of any moveable property not herein-  
Vesting order in case of other property. before provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

**Note.**—This section applies to Provincial Small Cause Courts.

*(c) Rules as to Immoveable Property.*

**304.** Sales of immoveable property in execution of a  
What Courts may order of land. decree may be ordered by any Court other than a Court of Small Causes.

**Note.**

A shikmi ghatwali tenure, held under the superior ghatwal, is not liable to be sold in execution, nor are its proceeds liable to attachment for satisfaction of the debt due from its holder.—I. L. R., 9 Cal. 388.

**305.** When an order for the sale of immoveable pro-  
Postponement of sale of land to enable defendant to raise amount of decree. perty has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by mortgage or lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of property comprised in the order for sale, for such period as it thinks proper, to enable him to raise the amount.

In such case the Court shall grant a certificate to the  
Certificate to judgment-debtor. judgment-debtor authorizing him, within a period to be mentioned therein, and notwithstanding anything contained in section 276, to make the proposed mortgage, lease, or sale: provided that all moneys

le under such mortgage, lease, or sale, shall be paid into Court, and not to the judgment-debtor :

Provided also that no mortgage, lease, to sale under this section, shall become absolute until it has been confirmed by the Court.

**Note.**

The sale of immoveable property to the highest bidder for a price which subsequently appears to be too low is not a material irregularity in publishing or conducting the sale. A decree-holder or a judgment-debtor cannot apply to set aside a sale on the ground of the price realized being too low. Under sec. 314 of the Code of Civil Procedure (XIV of 1882) the Civil Court cannot, upon or without application, refuse to confirm a sale on the ground that the price bid is too low.—I. L. R., 8 Bom. 424.

**306.** On every sale of immoveable property under this chapter, the person declared to be the purchaser shall pay, immediately after such declaration, a deposit of twenty-five per centum on the amount of his purchase-money to the officer conducting the sale, and, in default of such deposit, the property shall forthwith be put up again and sold.

**Notes.**

We do not consider that the commencement of a Court-sale, prior to the expiry of the thirtieth day or any delay in making the deposit required by sec. 306 or the adjournment of the sale from time to time without sufficient ground, is more than a mere irregularity.—I. L. R., 14 Madr. 227.

The person declared to be the purchaser of property put up for sale in execution of a decree did not, as required by sec. 306 of the Civil Procedure Code, pay a deposit of twenty-five per centum on the amount of his purchase immediately after such declaration, but on a date subsequent to the date on which the property was put up for sale. *Held* that there was no sale at all of the property.—5 Al. 316.

A co-sharer in undivided immoveable property, of which a share is sold in execution of a decree, does not, under Act X of 1877, sec. 310, acquire the right of pre-emption as against a stranger to whom such share has been knocked down, by merely asserting such right at the time of sale, and fulfilling the conditions of sale required by secs. 306 and 307 of that Act. He must bid at the sale, and as high as the stranger, before he can acquire a right of pre-emption under that section.—2 Al. 850.

See I. L. R., 7 Cal. 337, noted under sec. 293 ; 12 Madr. 454, noted under sec. 244.

**307.** The full amount of purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office-day after the day.

—See I. L. R., 2 Al. 850, noted under sec. 306.



**308.** In default of payment within the period mentioned in the last preceding section, the deposit, after defraying the expenses of the sale, shall be forfeited to Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property, or to any part of the sum for which it may subsequently be sold.

**Notes.**

Under the rules of the High Court, dated 21st June 1882, a payment into the Government treasury is equivalent to a payment into Court for the purposes of sec. 308 of the Code of Civil Procedure, 1882.—I. L. R., 7 Madr. 211.

See I. L. R., 7 Cal. 337, noted under sec. 293.

**309.** Every re-sale of immoveable property, in default of payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh notification in the manner and for the period hereinbefore prescribed for the sale.

**Note.**—See I. L. R., 12 Madr. 454, noted under sec. 244.

**310.** When the property sold in execution of a decree is a share of undivided immoveable property, and two or more persons, of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer.

Co-sharer of share of undivided estate sold in execution to have preference in bidding.

**Notes.**

Sec. 14 of Act XXIII. of 1861 is not applicable to permanently settled estates in Sylhet, nor to estates in any district of Bengal, unless extended thereto. When property is sold by public auction at a sale in execution of a decree, and the neighbour or partner has the same opportunity to bid for the property as other parties present in Court, the law of pre-emption does not apply.—I. B. L. R., (A. C.) 105; 11 W. R., 165.

A pre-emption suit is not barred by the fact that the property in suit had been the subject of confiscation.—1 N.-W. P. H. C. R., Pt. II., p. 35; Ed. 1873, 93.

Where the rights of a judgment-debtor in a *putteedaree* estate were sold at auction in execution of decree, and bid for by the son of the judgment-debtor who gave the name of his father-in-law, to whom the property was knocked down (and who was not a co-parcener in the estate), as the actual purchaser, such father-in-law subsequently waiving his claim as auction-purchaser in favour of the judgment-debtor, *held* under sec. 14 of Act XXIII. of 1861 that the property had been knocked down to a stranger, and that the right of pre-emption attached in favour of the person entitled thereto on such sale, he having done all that was necessary to assert his claim.—2 N.-W. P. H. C. R., 200.

It is the practice of the Courts to allow claims to pre-emption to be asserted on the grounds both of contract and custom in one and the same suit. N.-W. P.

Where two co-sharers entitled to pre-emption in certain villages associated strangers with them in the purchase of such villages and other landed property, *held* that they must be regarded in the light of total strangers in respect of the whole of the property included in the sale-deed, and that a note at the foot of the sale-deed, mentioning the interest severally purchased by each of the vendees, will not entitle them to retain the shares respectively purchased by them.—2 N.-W. P. H. C. R., 343.

Where a Hindu father made a partition of his property among his sons, reserving to himself an interest in one village, which, upon his death, was to be divided among his sons, *held* that during the father's lifetime no son could claim a right of pre-emption in respect of the village so reserved by the father.—2 N.-W. P. H. C. R., 434.

Where the terms of the *wajib-ul-urz* are that the property before sale to a stranger must be offered to the co-sharers, such offer must be made to each and every one of such co-sharers.—3 N.-W. P. H. C. R., 42.

A claim for pre-emption under sec. 2 of Act I of 1841 is sustainable in respect of an imperfect *putteedaree* tenure.—3 N.-W. P. H. C. R., 125.

When, by the express terms of a *wajib-ul-urz*, its operation is limited to the period of the settlement, a right of pre-emption created by it cannot be enforced after the expiry of that period, unless a provision has been made for that purpose, or the operation of the *wajib-ul-urz* has been extended by the agreement of the parties.—4 N.-W. P. H. C. R., 13.

It appeared from the settlement *wajib-ul-urz* that the lands in a certain mouzah were held in the following manner: that is to say, the co-sharers had divided them into *puttees*, and each *putteedar* realized the rent of proceeds of his own separate holding, and his share of the rent of the common lands, and paid his own quota of revenue separately. *Held* that the tenure came within the definition of a *putteedaree* estate contained in sec. 2 of Act I of 1841. A share in the mouzah having been put up for sale in the execution of a decree, and knocked down to the defendant, a stranger, the plaintiff, a co-sharer of a share, was held to be entitled, under the provisions of sec. 14 of Act XXIII. of 1861, to take the share.—6 N.-W. P. H. C. R., 243.

It is incumbent on an officer conducting a sale, in execution of decree, of land, which is a share of a *putteedaree* estate paying revenue to Government, as defined in sec. 2 of Act I. of 1841, to take notice of a claim made by a person under the provisions of sec. 14 of Act XXIII. of 1861, and to receive the purchase-money as a fulfilment of the conditions of the sale, subject to any question which may be raised by any party interested in the sale as to the claimant's title to advance the claim. When the whole of the purchase-money has been paid by the claimant within due time, the Court executing the decree, unless it is satisfied that he has no right to advance the claim, cannot treat the payment by him as a nullity, but must accept it as a fulfilment of the conditions of the sale respecting the purchase-money, and the sale is not defeasible by the failure of the bidder to complete the deposit of the purchase-money. The sale to the claimant cannot become absolute until it has been confirmed, and until it has become absolute he cannot maintain a suit for possession. If the claimant has fulfilled the conditions of sale, and his right is clear, the Court executing the decree is bound to give effect to that right.—6 N.-W. P. H. C. R., 272.

If a person claiming pre-emption under the provisions of sec. 14 of Act XXIII. of 1861 fulfils the conditions of sale respecting the deposit of the purchase-money, the sale cannot be held void merely by the failure of the

person to whose bid the property was knocked down also to complete the deposit. All that the claimant is bound to do is to establish that he is a *putteedar* within the meaning of the section in the estate of which the property sold forms part, and that he has fulfilled the conditions of sale. If he establishes this, the sale must be confirmed in his favour, unless some irregularity in publishing or conducting the sale is shown which would justify the setting aside of the sale. The conditions of pre-emption under the Mahomedan Law do not apply to a claim brought under the section.—6 N.-W. P. H. C. R., 289.

The *wajib-ul-urz* of a village contained this clause regarding the transfer of shares by sale or mortgage, *viz.*: “Whenever a shareholder intends to transfer his rights, his nearest co sharer shall be first entitled to purchase the same, and on his refusal the other sharers in the *thoke*, and on their refusal, sharers in other *thokes* will be entitled.” S, the proprietor of a 4-pies share in one *thoke*, and of a 9-pies share in another *thoke*, sold both shares, together with a bungalow, garden, and factory, situated on the land comprised in the 4-pies share, for Rs. 10,000 to T and others, shareholders in the *thoke* containing the 9-pies share. D and others, shareholders in the *thoke* containing the 4-pies share, sued to obtain possession of that share and the bungalow, garden, and factory, claiming the right of pre-emption under the *wajib-ul-urz*, on payment of a proportionate part of the purchase-money, which they estimated at 4-13ths of that sum, calculating the numbers of pies sold. It was held (in accordance with the opinion of the Full Bench) that the plaintiffs were entitled to claim the right of pre-emption in respect of the 4-pies share to the exclusion of the 9-pies. It was also held that the right of pre-emption did not extend to the bungalow, garden, and factory. The fact that S, the vendor, acquired the bungalow, garden, and factory under a claim of pre-emption, did not estop him from pleading that the right of pre-emption did not extend to such property. Instead of adopting the plaintiff's mode of calculating the price payable for the property claimed, the lower Courts should have ascertained separately the value of the several properties sold.—7 N.-W. P. H. C. R., 38.

A suit by a person claiming possession by right of pre-emption, under the provisions of sec. 14 of Act XXIII of 1861, of a share sold in the execution of a decree, was held to be premature and unmaintainable. The claimant should have sued to set aside the order of the Court confirming the sale in favour of the auction-purchaser, and to have himself declared entitled to the pre-emption of the property, and to be substituted for the auction-purchaser as its purchaser.—7 N.-W. P. H. C. R., 97.

A person holding a share in a *putteedaree* estate as mortgagee is not in a position which gives him a right of pre-emption, under the provisions of sec. 14 of Act XXIII. of 1861, in respect of a share in the estate sold in execution of a decree; nor does he obtain such a position because a share in the estate has been put up for sale and knocked down to him.—7 N.-W. P. H. C. R., 281.

*Held* by a Full Bench, in concurrence with the lower Court, that the proper construction of the words “Shikmi Showkayan” used in a clause of the administration-paper was that they gave a preference to shares in the *thoke* over those who were merely sharers in the village.—Agra H. C. R., (F. B.) 171; Ed. 1874, 128.

Where Government confiscates the share of a convict, and sells it for valuable consideration, the co-sharers have a right to claim such share by right of pre-emption on such sale, and the condition in the *wajib-ul-urz* is

binding on Government as much as it was on the original owner, Government acquiring the share subject to the same condition as the former held it.—1 Agra H. C. R., 88.

Where the wajib-ul-urz provided that, in cases of transfer by "sale, &c.," the co-sharers would have a preferential right to the same, *held* that the co-sharers were entitled to claim by right of pre-emption to take over an usufructuary lease which was made for the term of eight years.—1 Agra H. C. R., 101.

A share in a-mouzah together with the dwelling-house of the proprietor, was exchanged for a share and dwelling-house in another mouzah. *Held* that the transaction being an exchange of property for property was a sale, and that the right to purchase the land, but not the house, was claimable by a co-sharer by right of pre-emption. The consideration payable by the pre-emptor is the estimated value of the property given in exchange, and not that of the property claimed.—1 Agra H. C. R., 144.

*Held* that the plaintiff, having refused to purchase at the sum actually given, could not come into Court and ask for a conditional decree, which is given in cases where a higher price than was actually paid has been allged to have been paid to the prejudice of the pre-emptor.—1 Agra H. C. R., 265.

*Held* that the plaintiff, who had a preferential right to purchase, and had no opportunity offered him, had a right to enforce those conditions, a compliance with which was essential before alienation to others.—1 Agra H. C. R., 274.

*Held* that the person in whose favour a preferential right of purchase is stipulated for by the terms of the wajib-ul-urz is entitled to a decree if he comes forward and claims his right, without unreasonable delay, after he hears that a sale has been made without any tender to him, although he may not have proved especially that he has fulfilled all the conditions required in the case of a claim of pre-emption under the Mahomedan Law of Shuffa.—1 Agra H. C. R., 278.

Where the decree-holder purchased the rights of his judgment debtors sold at auction in satisfaction of his own decree, but, having received the amount of the decree, re-sold the property to the judgment-debtors before the confirmation of the sale, *held* that the transaction did not amount to an alienation such as would give a right to the co-sharers of the debtors to exercise the right of pre-emption under the terms of the wajib-ul-urz.—2 Agra H. C. R., 1.

Where the wajib-ul-urz provided that alienation should be first made to brethren of common ancestor, and then to the other sharers of the putti, *held* that the brethren in whose favour the first right of pre-emption was secured must be construed to be brethren who were sharers in the putti.—2 Agra H. C. R., 31.

Where a resumed maafee "chuck" was alienated by the holder thereof, and a preferential right to take it was claimed by a sharer in the zemindari under the terms of the wajib-ul-urz agreed to by the co-sharers at the time of settlement, and to which the holder of the "chuck" was no party, *held* that such alienation was not an alienation of a share within the meaning of the wajib-ul-urz; that the holder of the "chuck" could neither confer on its possessor a right of pre-emption, nor subject his estate to such right in the event of alienation.—2 Agra H. C. R., 35.

*Held*, on the construction of the wajib-ul-urz, that the stipulating that

alienations should be made with the consent of all the sharers did not stipulate for the existence of pre-emption, and that the claim based on that was untenable.—2 Agra H. C. R., 37 and 74.

*Held* that the conditions of the wajib-ul-urz do in no way confer on any person under disability a right of alienation which he does not otherwise enjoy.—2 Agra H. C. R., 85.

*Held* that a provision in the wajib-ul-urz securing a right of pre-emption to the sharers in cases of sale or mortgage was not applicable to transfer by lease, which was not such an alienation as was contemplated by the terms of the wajib-ul-urz, viz., alienation or transfer of proprietary right.—2 Agra H. C. R., 99.

Where there is imperfect partition, viz., where the land is divided, but the joint liability to the Government remains, and the property is not made into separate mehals, the right of pre-emption is not lost.—2 Agra H. C. R., 252.

Where a plot of land formerly held rent-free situate in a pure zemindari estate is sold, at auction, *held* that the claim of preferential purchase under sec. 14, Act XXIII of 1861 would not lie, as the estate was not a puttidari estate within the meaning of sec. 2, Act I of 1841.—2 Agra H. C. R., 280.

Where shares in a mouzah were by arrangement between the parties made over to a manager upon trust to pay part of the profits to the debtors of the transferors, and the residue of the profits to the transferors, who bound themselves not to alienate until the debts were paid, *held* that it was not such alienation as would confer on the plaintiff a right of pre-emption under the wajib-ul-urz.—2 Agra H. C. R., 328.

*Held* that a pre-emptor is not precluded from claiming the property by right of pre-emption because he opposed the mutation of names only on the ground that the vendor was not in possession.—2 Agra H. C. R., 348.

Where the terms of the wajib-ul-urz recognize the right of each sharer to sell without the consent of the others, but limit that right so far as to give preference or right of refusal to the co-sharers, the sale to a stranger can only be good and valid on proof of offer being made and refused by the co-sharers.—3 Agra H. C. R., 3.

*Held* that a preferential right to purchase is not lost merely by the inclusion of the names of the sons of the purchaser in the sale-deed, if it be proved that the actual purchaser was the father, and the names of the sons were included in accordance with the prevailing usage, without any intention to defraud the other co-sharers.—3 Agra H. C. R., 25.

*Held* that a claim for pre-emption would not lie against the purchaser of a confiscated property sold by the revenue authorities.—3 Agra H. C. R., 70.

Exercise of right of pre-emption allowed in respect of a kotee and golah, as it was proved that according to local usage and custom such properties were subject to pre-emption.—3 Agra H. C. R., 179.

*Held* on the construction of a wajib-ul-urz that the word "intiquah," not only signifies an absolute transfer, but also applies to conditional sales and usufructuary mortgages.—3 Agra H. C. R., 396.

In a puttidari village the sharers in each putti have a preferential claim to the right of pre-emption in that putti.—1 W. R., 233.

A party alleging a right of pre-emption in respect of property which is the subject of a conditional sale is bound to make his claim immediate—

ly on the expiry of the year of grace mentioned in the notice of foreclosure.—6 W. R., 116.

A claim to mesne-profits due before the date on which a right to pre-emption arose cannot form the subject of pre-emption.—7 W. R., 117.

A re-sale cannot destroy the right of pre-emption in a property, the sale of which is admitted by the vendor.—7 W. R., 206.

A person claiming to exercise his right of pre-emption must take the bargain as it was made. Any apportionment of the purchase-money is altogether illegal.—7 W. R., 210.

Pre-emption applies only to sales. A lease in perpetuity, with a rent (however small) reserved, is not a sale, and cannot therefore be the subject of pre-emption.—8 W. R., 106.

Properties bearing separate numbers in the Collector's rent-roll are separate estates in the legal sense of the word "estate" implying such a separation as bars a claim to pre-emption on the ground of coparcenary.—14 W. R., 476.

The provisions of sec. 310 of Act X of 1877 are not applicable in a case where the property sold, is not a share of undivided immoveable property, but the rights and interests of a mortgagee in such a share.—I. L. R., 3 Al. 15.

A share of undivided immoveable property was put up for sale in execution of a decree, and was knocked down to M. Before it was knocked down to him, A, the decree-holder, who had obtained permission to bid for and purchase such share, and who was a co-sharer of such share, bid the same sum as that for which it was knocked down to M, claiming the right of pre-emption. The Court executing such decree subsequently made an order confirming the sale of such share in favour of A. M appealed, impugning the propriety of the confirmation of the sale in favour of A. *Held* that such appeal would not lie.—3 Al. 674.

A person claiming to be a co-sharer in certain undivided immoveable property, a share of which had been sold in execution of a decree, objected to the confirmation of the sale in favour of the person recorded as the auction-purchaser, and prayed that it might be confirmed in his favour, with reference to the provisions of sec. 310 of the Civil Procedure Code. The Court disallowed the objection, and confirmed the sale in favour of the auction-purchaser. The objector thereupon applied to the High Court for revision of the order of the lower Court under sec. 622 of the Civil Procedure Code. *Held* that, having been allowed to object to the confirmation of the sale, and treated as a party to the proceeding held therein, it was competent for him to make such application, notwithstanding that he was not one of the persons mentioned in sec. 311 of the Code; that there being no appeal in the case, so far as he was concerned, the High Court was competent to entertain the application under sec. 622 of the Code; but that, as he was not one of the persons who was competent to avail himself of the provisions of sec. 311, he had no *locus standi* to justify his application to the lower Court, and the application for revision must therefore be dismissed.—5 Al. 42.

See I. L. R., 2 Al. 850, noted under sec. 306.

Application to set aside sale of land on ground of irregularity.

**311.** The decree-holder, or any person whose immoveable property has been sold under this chapter, may apply



to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it;

but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity.

#### Notes.

In execution of a decree, the defendant caused a decree of the plaintiff awarding him Rs. 925 to be attached, and under sec. 236, Act VIII. of 1859, caused the prohibitory order to be fixed in a conspicuous part of the Court-house, and copies thereof to be delivered to the judgment-debtors. The decree was subsequently sold by auction, and the defendant purchased it for Rs. 20. On special appeal by the plaintiff, upon the ground that the sale was irregular, as the prohibitory order had not been served upon him, *held* that the prohibitory order having been, in accordance with the provisions of sec. 236, Act VIII. of 1859, was legal and regular. *Held* that the Court executing the defendant's decree ought not to have sold the plaintiff's decree, but should have, under sec. 243, appointed a manager to enforce the plaintiff's decree. That a decree-holder ought not to be allowed to bid and purchase at a sale in execution of his decree without an order of Court previously obtained upon notice to the judgment debtor. Practice of English Courts regarding sale in execution of decrees discussed.—3 B. L. R., (A. C.) 320 ; 14 W. R., 406 note.

The plaintiff, as manager of the estate of her husband, a lunatic, obtained a decree, and attached and became the purchaser of the lands of the defendants in execution of the decree. The Judge required her to give security for the proceeds of the sale before he would allow actual possession to be given to her. The sale was confirmed, but several months elapsed before she found security, and meanwhile the same lands, were attached and purchased by other creditors under another decree against the said debtor, and possession was given to them. *Held* (reversing the decision of the High Court) the title of the plaintiff must prevail. The security was ordered for the protection of the lunatic against misappropriation by his manager; it was not a proceeding affecting the judgment-debtor. The second sale ought not to have been ordered or confirmed. Under the Code of Civil Procedure, property may be attached without view to immediate sale. A Court has power to send its decree for concurrent execution into several places, although in its discretion it may refuse to exercise such power.—10 B. L. R., 214; 17 W. R., 289 ; 14 Moore's I. A. 529.

It cannot be laid down as a general proposition of law that under no circumstances can a sale in execution of a decree be set aside as against a *bona fide* purchaser for valuable consideration and without notice. In a suit brought to set aside such a sale, it is for the Court to determine whether it will be in accordance with the principles of justice, equity, and good conscience, that the sale ought to be set aside or not.—B. L. R., Sup. Vol., 911 ; S. C. 9 W. R., 196.

On application by the judgment-debtor to the Principal Sadr Amin to set aside the sale by auction of a house, in execution of a decree, on the grounds of material irregularities in publishing and conducting the sale, from which the applicant sustained substantial injury, the objections were disallowed as untenable, and the sale confirmed. But the District Judge, on appeal, set aside the sale for a ground on which he had no authority to

interfere. On petition to the High Court by the purchaser of the house, *held* that the order of the Judge must be set aside as illegal, and the original order confirming the sale allowed to stand.—3 Bom. H. C. R., (A. C.) 110.

The inam village of Chandanpuri was sold by auction under a decree. The notice of sale stated that the sale would begin either at Maligam or at Chandanpuri, and be completed at Maligam. *Held* that the notice of sale was sufficiently certain. An auctioneer who sells under a decree has power to adjourn the sale from time to time (upon giving proper notice), but whether he does so or not is a matter in his own discretion. The practice of karkuns reading aloud notices of liens on property about to be sold by auction is objectionable, but, in the absence of proof that the value of the property has been thereby deteriorated, it is not such an irregularity as will vitiate the sale.—4 Bom. H. C. R., (A. C.) 164.

A sale in execution of a decree is not invalidated by the fact that the balance really due is overstated, there being no other irregularity in the publication and conduct of the sale.—1 N.-W. P. H. C. R., Pt. II., p. 1; Ed. 1873, 61.

Where objections to sale-proceedings are presented by judgment-debtors, the Court ought to make a careful investigation into the circumstances attending such sale, and not rely on the mere report of a nazir. Each objection should be taken up separately and determined specifically, and the reasons for the finding duly recorded.—2 N.-W. P. H. C. R., 142.

An auction-sale under a decree can only be set aside for some material irregularity by which substantial injury has been sustained. Where a sale was fixed for the 20th November, but delayed until the 22nd without any order of postponement, or any fresh proclamation of the day of sale, there is a *prima facie* case of injury to the party whose property was sold. Such a postponement is in contravention of the provisions of sec. 249 of Act VIII of 1859, as, when a sale is postponed, there must be fresh proclamation of the sale and date when it is to take place.—2 N.-W. P. H. C. R., 143.

The High Court passed an order postponing a sale in execution of a decree, which order arrived at the Collector's office the day after the sale. *Held* that the publication of the sale was irregular, as the order of postponement invalidated the notification of sale.—4 N.-W. P. H. C. R., 135.

The circumstance that property was sold in execution of a decree below its proper value, and that few persons attended the sale, is not sufficient to vitiate the sale.—5 N.-W. P. H. C. R., 19.

The High Court has no power to entertain a special appeal from an order passed in regular appeal by a Judge setting aside a sale in execution and reversing the order of a Munsif confirming such a sale.—5 N.-W. P. H. C. R., 19.

A Judge cannot order a Subordinate Judge to postpone a sale in a case pending before the Court of the latter officer. An application by a Collector under sec. 249 of the Code of Civil Procedure for the postponement of a sale in the execution of a decree of land paying revenue to Government should not be granted, where it is not alleged that satisfaction of the decree might be made within a reasonable period by a temporary alienation of the land.—5 N.-W. P. H. C. R., 177.

A sale in execution of decree transfers to the purchaser nothing more than the rights and interests of the judgment-debtor at the time of attachment and sale; and sec. 252 of Act VIII. of 1859 does not prohibit an enquiry into the extent of those rights, or declare the owner of property,

attached in execution of a decree passed against a third party, incompetent to assert his claim by suit. The sale of moveable property, belonging to a third party, in execution of a decree, is not a mere irregularity within the meaning of sec. 252, and the owner of the property so sold is entitled to sue for its restoration or for damages.—6 N.-W. P. H. C. R., 252 ; 9 W. R., 118.

When a Court executing a decree passes an order postponing a sale, and the sale takes place notwithstanding, in consequence of the order arriving too late, the Court is justified in setting aside the sale on the ground of irregularity, and its order doing so is not appealable.—6 N.-W. P. H. C. R., 354.

Where portion of the property of a judgment-debtor has been sold in execution for a sum sufficient to satisfy the decree, the Court is not justified, on default being made by the purchaser, in directing the sale of any further portion of the debtor's property, it being open either to the judgment-creditor or the judgment-debtor to apply that the balance due upon the decree after re-sale of the portion already sold, should be realised from the defaulter.—8 C. L. R., 41.

When property has been put up for sale at auction in execution of a decree, and bids have been *bona fide* made for it, the Court is not competent to postpone the sale, or to decline to conclude it, and order another auction, merely on the representation of the judgment-debtor that he can obtain a higher price by private transfer, there being shown no ground to believe that the amount of the judgment-debt would have been thus realized.—1 Agra H. C. R., Mis., 11.

Three attempts to sell land taken in execution under a decree had been rendered abortive by the acts of the judgment-debtor, and a delay of seven years occasioned, during which, by his conduct, he defeated the execution of the decree. When the property was put up for sale for the fourth time, the Collector rejected the two highest bids, on the ground that neither of the bidders could produce a mooktearnamah from the persons for whom respectively they professed to act as agents, nor produce the required deposit, and he declared the third highest bidder the purchaser of the land. *Held* that under the circumstances the conduct of the Collector *was justifiable*, and the sale valid.—Marshall's Rep., 592 ; 2 Ind. Jur., O. S., 1 ; 5 W. R., P. C., 7 ; 9 Moore's. I. A. 324.

A suit was brought in 1852 to set aside an execution-sale made in 1841 on the ground of irregularity in not complying with the provisions of Beng. Reg. XLV., sec. 12, of 1793, for the due publication of the sale. A summary suit under Beng. Reg. VII. of 1825, sec. 5, had been brought shortly after the date of the sale by the judgment-debtor to set it aside on the ground of inadequacy of the purchase-money, which suit was dismissed. There was no allegation in that suit of any irregularity in the publication of sale. It appeared from the evidence in the suit of 1852 that the notice of sale was affixed at the dwelling house of the judgment-debtor, the place where his rents were paid, but which was not part of the estate sold. It was not pleaded in the suit of 1852 that there was a town or village where the notification could be fixed as required by sec. 12 Beng. Reg. XLV. of 1793. The Sadr Court held that there had been an irregularity in the publication of the notice of sale, as it was not made within the ambit of the estate sold, and set the sale aside on that ground. On appeal, *held* by the Judicial Committee reversing such decree, *first*, that as it did not appear that there was any town or village within the Pergunnah at which the notifi-

ation required by the provisions of Beng. Reg. XLV. of 1793, sec. 12, could be affixed, there had been no irregularity in posting the notice at the house of the judgment-debtor, so as to vitiate the sale ; and, *secondly*, that even if there had been an informality in that respect, it ought to have been objected to in the summary suit brought in 1841, and could not be opened eleven years afterwards.—8 Moore's L. A. 427.

At a sale in execution of a decree, when the sale of any lot is completed, the purchaser should then and there be required to make the deposit prescribed by the Civil Procedure Code, failing which the lot should at once be put up to sale at the risk of the first purchaser. The decree-holder, if the lot is knocked down to him, is as much bound to make the prescribed deposit as any other auction-purchaser.—W. R., 1864, Mis., 30.

After the striking off of an execution-case, the omission to re-issue the processes required by law on the admission of a third party as decree-holder, is not a material irregularity in the case.—W. R., 1864, 359.

In a re-sale for default under sec. 253, Act [VIII. of 1859, the officer conducting the sale was not bound to commence from the next highest bid below that made by the defaulter, instead of commencing the sale *de novo*.—1 W. R., Mis. 11.

A sale in execution of a decree is illegal if made on a holiday, whether it is a fixed holiday or only a day on which the Courts are closed by order of the High Court.—3 W. R., Mis., 24.

In the case of moveable property process of attachment and sale may be issued successively or simultaneously ; but in regard to immoveable property, process of attachment and sale should be issued successively ; but if issued simultaneously, and the attachment has been made *bona fide*, and the sale-proclamation issued as required by law, with an interval of thirty days between it and the sale, such irregularity is not a sufficient ground for setting aside the sale, as no material injury would accrue to the debtor thereby.—4 W. R., Mis., 12.

The affixing, in the Principal Sadr. Amin's Court, of a notification of sale in execution of a decree of the Small Cause Court, was held to be no irregularity in the sale by reason of which damages could be recovered under sec. 252, Code of Civil Procedure, 1859 ; the law making no provision for the service of the notification of sale on the judgment-debtor in person, or in the village in which he lives.—6 W. R., Civ. Ref., 14.

Directions as to the payment of the purchase-money at sales in execution of decree, arising under sec. 254, Act VIII. of 1859, were to be dealt with as provided by that section, and did not fall under secs. 256 and 257. A default under sec. 254 was not an "irregularity in conducting the sale," under sec. 256.—6 W. R., Mis., 82.

Where a sale is postponed, a fresh notice and proclamation ought to issue.—6 W. R., Mis., 84.

On an application to set aside a sale of immoveable property in execution of a decree under sec. 256, Act VIII. of 1859, before ascertaining whether any substantial injury has accrued to the debtor, it was held that the Court must come to a distinct finding that there has been an irregularity in publishing or conducting the sale.—6 W. R., Mis., 125.

A sale in execution of a decree was set aside by a subsequent decree of 9th March 1861, but was afterwards allowed to stand by an order of 7th May 1862. As no suit was brought to set aside the latter order, it was

held to be a final judicial proceeding, and the sale declared to be good and valid.—7 W. R., 116.

It was doubted at one time whether a sale could be set aside by reason of an omission to attach the property.—11 W. R., 226.

Where property is advertised to be sold in execution, a change in the specified order of sale or other sudden alteration of programme, without notice to intending bidders, or the express consent of the judgment-debtor, was an irregularity under sec. 256, Code of Civil Procedure, 1859, vitiating the sale.—12 W. R., 281.

Where the Sadr cutchery of the zemindar was beyond the jurisdiction of the District Court, the publication of the notice of sale at one of the inferior cutcheries was held to be legal and sufficient.—14 W. R., 44.

Where an irregularity in an execution sale (*e. g.*, a misstatement in the notification), produces a mistake, and the property is consequently sold at an inadequate price, the judgment-debtor is entitled to have the sale reversed.—14 W. R., 320.

*Held* that the judgment-debtor could not complain of the order of the Subordinate Judge postponing a sale in execution of decree from the 25th to the 26th, unless he could show that he had suffered substantially by the postponement. But the attention of the Court was called to the importance of abiding by the date fixed in the proclamations of sale as far as possible, and not postponing sales without good reason.—17 W. R., 278.

The market value of a property is not the value which ought to be taken as the standard at an auction-sale in execution of a decree where the purchaser ordinarily gets neither a title nor the title deeds as in a private sale, but only the right, title, and interest of the judgment-debtor at the time of sale.—18 W. R., 197.

Where a sale was notified to take place on the 8th, and on that day the order for the postponement of the sale to the 9th was made in open Court, *held* that that was a sufficient notification of the sale being held on the 9th, and that a fresh notice was not necessary.—18 W. R., 347.

The issue of a notice of sale after the death of the original decree-holder, and before any person had applied to be registered as the substituted decree-holder, is not an irregularity which would warrant the setting aside of a sale under Act VIII. of 1859, sec. 256.—22 W. R., 481.

An execution-sale properly notified may be adjourned with the consent of the parties.—22 W. R., 481.

Where a judgment-debtor objects to the sale of attached property, it, is the duty of the Court executing the decree to try the validity of the objections.—24 W. R., 85.

Where, in an execution-sale, there had been some irregularity which left it doubtful whether the judgment-debtor had been duly appraised of the sale of his dwelling-house, *held* that the irregularity had caused material injury to the judgment-debtor, and that the sale must be set-aside.—25 W. R., 183.

The affixing of a notice of sale in a not very conspicuous part of the land, when the judgment-debtor resides in a different district, is not sufficient to satisfy the requirements of justice.—25 W. R., 364.

The plaintiff instituted a suit against defendant for recovery of money, and previous to judgment, that is, on the 8th of January 1885, applied for, and on the 11th obtained, order for attachment of several houses and premises belonging to defendant, and such attachment was made. The suit was

dismissed, but eventually on appeal it was decreed : but the attachment was never withdrawn. Plaintiff then applied for execution of his decree, and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February 1887, and accordingly, on the 21st December 1880, a sale-notification was issued. Judgment-debtor twice applied for postponement of sale, but his applications were refused, and the sale took place on the date fixed. Judgment-debtor then objected to the confirmation of the sale, urging that the property sold was never attached in execution of the decree, and the attachment previous to judgment was infructuous, because afterwards the claim was dismissed by the Court of first instance ; that there had been several other irregularities in publishing and conducting the sale ; and that, owing to the irregularities, property had been sold at a grossly inadequate price, causing substantial injury. The Subordinate Judge, overruling the objections, confirmed the sale. On appeal by the judgment-debtor, *held*, following *Mahadeo Dubey v. Bhola Nath Dichit* (I. L. R., 5 Al. 86), that a regularly perfected attachment is an essential preliminary to sales in execution of decrees for money ; and where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void, and may be set aside without any inquiry as to substantial injury being sustained by the judgment-debtor for want of a valid attachment, and that an attachment before judgment, like a temporary injunction, becomes *functus officio* as soon as the suit terminates. Further, that the phrase “ a material irregularity in publishing or conducting ” in the first paragraph of sec. 311 of the Code of Civil Procedure should be liberally construed, and that absence of attachment of property at the time of sale thereof is “ a material irregularity,” attachment being the first step which a Court in executing a simple money-decree has to take to assert its authority to bring property to compulsory sale. The following cases were referred to in the course of argument : *Mahadeo Dubey v. Bhola Nath Dichit* (I. L. R., 5 Al. 86) ; *Chunni Kuar v. Dwarka Prasad* (Weekly Notes, 1877, p. 297) ; *Mohee-ooddeen v. Ahmed Hossain* (14 W. R. 384) ; *Gangathara Pandita v. Rathaboi Ammal* (I. L. R. 6 Madr. 237) ; *Imamunissa Bibi v. Leakat Hossain* (I. L. R., 3 Al. 424) ; *Rameshwari Dasse v. Doorgadas Chatterjee* (I. L. R., 6 Cal. 103) ; *Bakhshi Nand Kishore v. Malak Chand* (I. L. R., 7 Al. 289) ; *Jasoda v. Mathura Das* (I. L. R., 9 Al. 511) ; *Girdhari Sing v. Hardeo Narain Sing* (L. R., 3 I. A. 230) ; *Macnaghten v. Mahabir Purshad Sing* (I. L. R., 9 Cal. 656).—I. L. R., 10 Al. 506.

*Held* by the Full Bench that an application to set aside, on the ground of material irregularity within the meaning of sec. 311 of the Civil Procedure Code, a sale held by the Collector in execution of a decree transferred to him for execution under sec. 320, cannot be entertained by a Civil Court. *Madho Prashad v. Hansa Kuar* (I. L. R., 5 Al. 314) followed. *Nathu Mal. v. Lachmi Narain* (I. L. R., 9 Al. 43) distinguished. *Per* EDGE C. J.—The intention of the Legislature as expressed in sec. 320 and the following sections of the Civil Procedure Code was not to allow any delegation to the Collector of power to adjudicate upon questions of title, but, in other matters, to hand over all the proceedings to the Collector, and to withdraw the matters so handed over from the purview of the Civil Courts to that extent, but not questions of title or the other questions, if in dispute, referred to in sec. 322B, 322C, or 322D.—11 Al. 94.

Where a sale of immoveable property in execution of a decree took place before the expiration of the thirty days required by sec. 290 of the Civil



Procedure Code, and without the consent of the judgment-debtor. *Held* by **EDGE, C. J.** (**BRODHURST, J.**, dissenting), that the holding of the sale under these circumstances was not merely an irregularity, within the meaning of sec. 311 of the Code, but was an illegality, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside on the ground of such illegality, without proving that he had sustained any substantial injury. *Held* by **BRODHURST, J.**, *contra*, that infringement of the rule contained in sec. 200 of the Code does not of itself vitiate a sale in execution of decree, but is a "material irregularity" within the meaning of sec. 311—that expression being wide enough to include illegalities—and that, before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury by reason of such irregularity. *Olpherts v. Mahabir Pershad Singh* (I. L. R., 10 I. A. 25), *Mohunt Meg Lall Pooree v. Ship Pershad Madi* (I. L. R., 7 Cal. 34), *Kalytara Chowdhrair v. Ramcoomar Goopta* (I. L. R. 7 Cal. 466), *Tripura Sundari v. Durga Churn Pal* (I. L. R., 11 Cal. 74), *Bonomali Mozumdar v. Woomesh Chunder Bundopadhyaya* (I. L. R., 7 Cal. 730), *Bandy Ali v. Madhub Chunder Nag* (I. L. R., 8 Cal. 932), *Nathu v. Harbhuj* (Weekly Notes, 1885, p. 304), *Jasoda v. Mathura Das* (I. L. R., 9 Al. 511), and *Bakshi Nand Kishore v. Malak Chand* (I. L. R., 7 Al. 289), referred to.—11 Al. 333.

A suit will lie in a Civil Court to set aside a sale held under Bengal Act VII of 1880, where the sale proclamation is issued against the whole sixteen annas of the estate, but a sale held only of a portion thereof. The effect of sec. 19 of that Act is, that it relates to the practice and procedure in respect of sales, that is to the practice and procedure of executing Courts in the carrying out of sales.—I. L. R., 14 Cal. 9.

The words "any person whose immoveable property has been sold," in sec. 311, are sufficiently wide to include a person who is neither the decree-holder nor the judgment-debtor nor the auction-purchaser, but who alleges that the property sold in execution is his.—14 Cal. 240.

An application under sec. 311 of the Civil Procedure Code to set aside a sale cannot be made after the expiry of thirty days from the date of such sale and after such sale has been confirmed, even though it be alleged that the sale was fraudulently kept from the knowledge of the applicant until after such confirmation. *Semble*, that if, before such sale had been confirmed, an application had been made, although after thirty days from the date of the sale, the Court would possibly have been justified in granting the application and extending the period of limitation if sufficient cause under sec. 18 of the Limitation Act were made out.—14 Cal. 679.

Where one decree-holder had attached certain land, and another decree-holder against the same debtor had entitled himself to rateable distribution of the assets under sec. 295 of the Code of Civil Procedure, *held* that the latter was entitled to apply, under sec. 311 of the Code, to set aside the sale on the ground of material irregularity.—10 Madr. 57.

A hereditary dharmakarata of a temple, who had assigned his office to a Zemindar and consented to a decree being passed on the footing of such assignment, is competent nevertheless to bring a suit to set aside a Court sale of temple lands, treating such assignment as a nullity. A mortgagee, having obtained a decree on her mortgage, brought the mortgage property to sale; and her vakil bid through an agent at the Court sale and became the purchaser. It appeared that the vakil had not informed his client that he intended to bid nor obtained the sanction of the Court but he had been instructed by his client and had obtained the permission of the Court to bid

on her account, and he was found to have acted in an underhand manner towards her. In a suit to set aside the sale, brought by the mortgagor, who had sought unsuccessfully to obtain the same relief by means of a petition under section 311 in which fraud was not alleged against the purchaser:—*Held*, (on its appearing that the vakil had not discharged the burden which lay on him of proving that the transaction was free from suspicion), that the sale should be set aside.—15 Madr. 389.

Although sec. 312 of the Civil Procedure Code contemplates that objections to a sale under sec. 311 shall be filed before an order for confirmation is passed, if the precipitate action of the Court has led to the confirmation of a sale before the time allowed for filing objections to the sale has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court on appeal is bound to interfere and to see that objections which by law the appellant is empowered to make are heard and determined before a sale of his property is confirmed or becomes absolute. An application under sec. 311 of the Civil Procedure Code, on behalf of a judgment debtor who was a minor, was rejected on the ground that the applicant did not legally represent the minor, and the Court thereupon confirmed the sale. A second application to the same effect was then filed on behalf of the minor by his guardian, and was rejected on the ground that the Court had already confirmed the sale, and was precluded from entertaining objections after such confirmation, prior to which no proper application of objection had been filed. From this order the judgment-debtor appealed. *Held* that the appeal must be considered to be one from an order under the first paragraph of sec. 312 of the Civil Procedure Code, confirming the sale after disallowing the appellant's objection, and that it would, therefore, lie. *Held* that, assuming the first application on the minor's behalf to have been rightly rejected, the second was made by a duly authorized guardian, and, with regard to sec. 7 of the Limitation Act (XV of 1877), was not barred by limitation; and the judgment-debtor had, therefore, a right to make it, and the Court should have entertained and dealt with it before proceeding to confirm the sale or grant a sale-certificate. The order disallowing the application and the order confirming the sale, were set aside, and the case remanded for disposal of the appellant's objections. *Phoolbas Koonwur v. Jogeshur Sahoy* (I. L. R., 1 Cal. 226) referred to.—9 Al. 411.

Where a sale in execution took place under an order obtained, notwithstanding a consent, on the part of the decree-holder's pleader, to a petition by the judgment-debtor for a postponement, the petition, so consented to, having been, by mistake, afterwards presented to, and filed by the judgment-debtor in, the wrong court, *held* that the judgment-debtor was entitled to a decree in a suit brought to have the sale set aside, no title having passed thereby.—11 Cal. 136; L. R., 11 I. A. 234.

An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of sale was not legally saleable, is not a matter which can be entertained by the Court under sec. 311, so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it. *Ram Gopal v. Khi-ali Ram* (I. L. R., 6 Al. 448) and *Janki Singh v. Ablakh Singh* (I. L. R., 6 Al. 393) distinguished. *Per* MAHMOOD, J.—The scope of sec. 244 is limited to matters connected with the execution of the decree between the decree-holder and the judgment-debtor, and covers all the questions which may arise between the decree-holder and the judgment-debtor relating to execution, &c., of the decree. Questions that may arise after the sale

are not, strictly speaking, questions relating to the execution, discharge, or satisfaction of the decree, within the meaning of clause (3), sec. 244; but as soon as there has been a sale, the execution of the decree, so far as the decree-holder is concerned, is over, and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree-holder's decree.—Also *per* MAHMOOD, J.—The expression “conducting the sale,” as used in sec. 311 of the Civil Procedure Code, does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale, and not to anything done antecedent to the order of sale. *Olpherts v. Mahabir Pershad* (L. R., 10 Ind. Ap. 25) referred to.—7 Al. 641.

One Shidapa Bapu died indebted to the second defendant Malkhana. On his death his widow Tayawa became his heir, as he left neither son nor brother surviving. In 1878 Malkhana brought a suit to enforce payment of the debt due by the deceased Shidapa Bapu, and he made Baslingawa, the mother of Shidapa, defendant in the suit, omitting Tayawa altogether. On 30th August, 1878, Malkhana obtained an *ex-parte* decree, and on the 26th July, 1880, the house of Shidapa, then in the possession of Baslingawa, was sold in execution, and the first defendant, Ranu, purchased it. On 6th September, 1880, the sale was confirmed, and on 26th November, 1880, Ranu was put into possession. On the 10th of December 1880, one Shidapa Basapa presented a petition on behalf, as he alleged, of the plaintiff Tayawa, the widow of Shidapa Bapu, to set aside the sale. He did not produce any authority from her, and his application was rejected on the 14th June 1881. On the 31st October 1878, Tayawa adopted the plaintiff Baswantapa under an authority, as she alleged, of her deceased husband Shidapa Bapu. In 1881 Tayawa filed the present suit on behalf of her adopted son Baswantapa to set aside the sale and to recover the house:—*Held*, that the plaintiff was entitled to have the sale set aside, and to recover possession of the house. The estate was vested in Tayawa as legal representative of her deceased husband. Had Tayawa wilfully put forward Baslingawa as the representative of Shidapa Bapu so as to deceive and mislead Malkhana, then, no doubt, she might be held bound by the decree obtained by the latter against Baslingawa. Her mere quiescence while Malkhana wilfully sued the wrong person could not affect her legal rights, or deprive her adopted son, the plaintiff Baswantapa, of his rights. He could not be bound by a suit and sale to which he was not a party either in person or by representation:—*Held*, also, that Tayawa was not bound to come forward to assert her ownership when the property was attached and sold under Malkhana's decree. The rule—that one who, knowing his own title, stands by and encourages a purchase of property of another's will not be allowed to dispute the validity of the sale—implies a wilful misleading of the purchaser by some breach of duty on the owner's part. In this case there was nothing more than mere quiescence on the part of Tayawa.—9 Bom. 86.

A sale by public auction in execution of a decree, which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the Civil Procedure Code.

The time to be notified for a sale by public auction in execution of a decree must be the time of the commencement of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, and that all who are interested in the property sold may see that there is a fair competition and a good sale. Where property which was advertised for sale by public auction in execution of a decree at 11 A. M.,

was sold at 7 A. M., :—*Held*, that the mistake was more than a mere irregularity in conducting the sale, and that the whole of the proceedings were invalid.—7 Al. 676.

The Court executing a decree passed an order postponing a sale in execution, but the order failed to reach the officer conducting the sale, and the sale was consequently held. The judgment-debtor applied to have the sale set aside as void. *Held* that the effect of the Court's order for postponement of the sale was to deprive the officer of all legal authority to hold it on the date previously fixed ; that his not being aware of the order was not material ; that the defect in the sale amounted to an illegality and not merely to an irregularity within the meaning of sec. 311 of the Civil Procedure Code ; that consequently it was not necessary to show that the defect had caused substantial loss to the judgment-debtor ; and that the Court could not confirm the illegal sale, but must hold it to be void. *Sukhdeo Rai v. Sheo Ghulam, Ram Dial v. Mahtab Singh and Ganga Prasad v. Jag Lal Rai*, referred to.—12 Al. 96.

Where an application is made to set aside a sale in execution of a decree on the ground of irregularity, it is not to be presumed from the proved existence of irregularity and injury that the latter occurred by reason of the former, in the absence of evidence to show that the injury is the result of the irregularity. *Macnaghten v. Mahabir Pershad Singh*, (I. L. R., 9 Cal. 656) and *Lala Mobaruk Lal v. Secretary of State for India in Council*, (I. L. R., 11 Cal. 200) discussed.—11 Cal. 658.

The mortgagees of a certain tenure obtained, on 11th September 1884, under sec. 86 of the Transfer of property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885 ; this time was subsequently extended on the application of the mortgagor to 30th April 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under sec. 311 of the Civil Procedure Code to have the sale set aside for material irregularity :—*Held*, that under sec. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of sec. 311, " person whose property has been sold," and entitled them to make the application.—13 Cal. 346.

The word " disallowed " in sec. 312 has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under sec. 311 are taken.—11 Cal. 287.

An order passed under the first clause of sec. 312 of the Civil Procedure Code, after an objection made under the provisions of sec. 311 had been disallowed, is appealable under art. (16) of sec. 588. *Per MAHMOOD J.*—An application made under sec. 311 can be disposed of only under sec. 312, and if the Court rejects the objection to the sale, the order must be regarded as an order " refusing to set aside a sale of immoveable property " under the first paragraph of sec. 312, and therefore appealable as falling under the purview of art. (16) of sec. 588. *Laman v. Rassu Lal and Rajan Kura v. Lalla Prasad* dissented from by MAHMOOD J. *Tota Ram v. Khub Chand*.—12 Cal. 253.

Execution of a decree on a mortgage-bond, for the sale of the mortgaged property and for the costs of the suit, amounting to Rs. 1,000, certain houses were attached on the 30th September 1881, which were not part of the mortgaged property. On an objection raised by the judgment-debtors

that the decree was by its terms executable only against the mortgaged property, the High Court in appeal decided, on the 6th September 1882, that the houses were not liable to attachment and sale under the decree. In the meantime, on the 15th June 1882, the houses had been put up for sale and purchased for Rs. 500, and the sale had been confirmed on the 16th August 1882. The judgment-debtors brought a suit against the purchaser to set aside the sale, on the ground that the houses were not saleable under the decree. *Held* that the decree, in regard to costs, was a decree made personal against the judgment-debtor, and conferred a right upon the decree-holder to take out execution for the recovery of those costs, not only against the property mortgaged in the bond, but also against the person and other property of the judgment-debtor. *Per* OLDFIELD, J. (MAHMOOD, J., doubting).—That the attachment and sale in execution of the decree were valid, inasmuch as they were made in respect of the costs as well of the principal and interest decreed. *Per* MAHMOOD, J.—That the suit was maintainable, and was not barred by any plea *in limine*. *Abdul Haya v. Nawab Raj* (B. L. R., Sup. Vol. 911) referred to. Also *per* MAHMOOD, J.—That inasmuch as the adjudication of the 6th September 1882 was one between the judgment-debtors on the one hand and the decree-holder on the other, and subsequent, not only to the sale, but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide anything in relation to the nature of the decree as to costs, the order then passed could not be used against the purchaser. Also *per* MAHMOOD, J.—That it was doubtful whether, the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself, were valid; but that everything that was said against these proceedings constituted matters falling under sec. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale; and that therefore, even assuming that the sale and confirmation of sale were subject to the objection of “material irregularity in publishing or conducting” the sale, within the meaning of sec. 311, a suit like the present, upon that ground alone, was prohibited by the last part of sec. 312.—7 Al. 450.

In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000. There was, in fact, one charge only, amounting to about Rs. 800. *Held* that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it.—8 Al. 116.

An execution-sale of the right, title, and interest in land was set aside by the Court, on the ground that the warrant for the execution of the decree and order of attachment of the property sold had not been signed by the Judge, but by the Munsarim of the Court; and at a second sale the property was sold to other purchasers, who, as well as the judgment-debtor, were sued by the purchaser at the first sale for a declaration of his right to have the first sale confirmed. The High Court having held that with reference to sec. 222 of Act VIII of 1859, the first sale had been rightly set aside, an appeal to the Judicial Committee was dismissed with costs.—7 Al. 506.

Disparaging remarks made by bystanders or by purchasers at an exe-



uction-sale other than the decree-holder do not constitute such an irregularity as is contemplated by sec. 311 of the Code of Civil Procedure. *Gunga Narain Gupta v. Annunda Moyee Burroanec*, 12 C. L. R., 404, followed; *Woopendro Nath Sircar v. Brojendro Nath Mundle*, I. L. R., 7 Cal. 346, 90 L. R., 263, and *Rukhinee Bullubh v. Brojonath Sircar*, I. L. R., 5 Cal. 308, distinguished. It is the practice of the Courts under the Rules of the High Court, which have the force of law, to place all properties intended for sale in execution of decrees on a list, and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property, which is the consequence of such procedure, is not an adjournment within the meaning of sec. 291 of the Civil Procedure Code.—17. Cal. 152.

The sale of immoveable property by an amin on a close holiday is not illegal, nor is it an irregularity in publishing or conducting the sale.—3 Al. 333.

The provisions of sec. 13 of Act XV of 1877 are not applicable to proceedings in the execution of a decree.—3 Al. 185.

Where, after a judgment-debtor has applied, under Act X of 1877, sec. 311, to have a sale set aside, the auction-purchaser is made a party to the proceedings, and the sale is set aside, the auction-purchaser can appeal against the order setting aside the sale.—2 Al. 352.

Although the auction-purchaser may not apply under Act X of 1877, sec. 311, to have a sale set aside, he may be a party to the proceedings after an application has been made under that section, and then, if an order is made against him, he can appeal from such an order under sec. 588.—2 Al. 396.

Sec. 311 does not apply only to sales made under chap. xix of the Code, and the sale of an under-tenure may be set aside upon any of the grounds mentioned in that section.—7 Cal. 163.

The words "any person whose immoveable property has been sold," in sec. 311 of the Code of Civil Procedure, do not include a person who has purchased the same property at a prior execution-sale, such prior sale not having been confirmed.—8 Cal. 367; S. C. 10 C. L. R., 44.

When a judgment-debtor has died after decree, but before application has been made to execute the decree, the Court, before directing the attachment and sale of any property to proceed, must issue a notice to the party against whom the execution is applied for to show cause why the decree should not be executed against him, and its omission to do so will invalidate the entire subsequent proceedings.—6 Cal. 103; 7 C. L. R., 85; 2 W. R., 74.

A Subordinate Judge made an order for the sale, in execution of a decree of certain immoveable property, which was "ancestral," within the meaning of the notification by the Local Government, No. 671, dated the 30th August 1880, under which execution of such decrees should have been transferred to the Collector; and such property was sold accordingly. *Held* that, the order for the sale of such property having been made without jurisdiction, the sale was void, and should be set aside.—4 Al. 382.

The property of a judgment-debtor was proclaimed and advertized for sale in execution of a decree on a certain day. The proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was released to a third party. Notwithstanding this fact, no fresh proclamation was made, and the sale took place on the day origi-



nally fixed. *Held* that the omission to issue a fresh proclamation was a material irregularity, inasmuch as the judgment-debtor was entitled to have a proclamation issued accurately describing the property to be sold, and that such proclamation should be published thirty days before the sale. See also *Gopeenath Dobey v. Roy Luchmееput Singh Bahadur* (L. L. R., 3 Cal. 542).—3 Cal. 544; 2 C. L. R., 260.

When liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property, and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside. Where a decree-holder was joint in family with the manager of an infant defendant, and the defendant's property was to be sold in execution of the decree:—*Held* that the decree-holder ought not to be granted leave to purchase at the sale, because any purchase made by him would be for the benefit of the family of which the manager of the infant defendant was one of the members; and it would, in fact, be a purchase by an agent of the property of his principal.—7 Cal. 346; 9 C. L. R., 263.

On the day fixed for the sale of certain immoveable property in the execution of a decree the Court made an order postponing the sale, but the sale had been effected before such order reached the officer conducting it. The Court, on application having been made to set aside the sale, passed an order confirming it. Subsequently, an application by the decree holder for a review of this order having been granted, the Court passed an order setting aside the sale as illegal. *Held* that, the sanction to the sale originally given having been withdrawn, the sale could not legally be held, and the sale which was effected, the order of postponement notwithstanding, was unlawful and invalid, and in reviewing its first order, and in setting aside the sale as illegal, the Court executing the decree had not acted *ultra vires*, and its action was not otherwise illegal. (H. C. R., N.-W. P. 1874, p. 354).—2 Al. 686.

An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale in accordance with sec 287 of Act X of 1877, was taken, for the first time, in the Court of appeal; an application to set aside the sale, on the ground that it had taken place without proclamation made, having been rejected by the Court of first instance, which found that proclamation had been made. *Held* that the objection was taken too late, although, if properly taken in the Court of first instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity; substantial damage, resulting from it, remaining to be proved as required by sec. 311 of Act X of 1877. *Held* also that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the non-statement of the revenue, the applicant had not (as required by sec. 311) proved, to the satisfaction of the Court, that he had sustained substantial damage by reason of such irregularity.—9 Cal. 656. S. C. 11 C. L. R., 494; L. R., 10 I. A. 25.

An application under sec. 311 of Act X of 1877 to set aside a sale in execution of a decree having been made by the judgment-debtor, the Court executing the decree (Subordinate Judge) disallowed the objections, and passed an order confirming such sale. The judgment-debtor subsequently applied to the Subordinate Judge for a review of judgment. The Subordinate Judge, without recording his reasons for granting such application, irregularly proceeded at once to pass an order setting aside such sale, with.

out cancelling the previous order confirming it. The auction-purchaser appealed to the District Judge. That officer, treating the appeal as one from an order granting an application for review of judgment, entertained it, and set aside the Subordinate Judge's second order. *Held* that the District Judge was not justified in entertaining such appeal, such order not being one granting an application for review, but one setting aside a sale, and as such not appealable. Before a review of judgment is granted, an order granting the application for review, and the reason for granting the same should be regarded.—3 Al. 316.

On an application under sec. 311 of the Civil Procedure Code, (Act X of 1877) to set aside a sale, it appeared that there had been a material irregularity in publishing the sale; but no witnesses were called to prove that substantial injury had been caused thereby. It also appeared that seventeen days after the applicant had applied for proclamations to be issued to his witnesses, he deposited the requisite fees; and that, subsequently there was a delay of seven days in the office in issuing such proclamations, which were ultimately issued only three days prior to the day fixed for the hearing. On the applicant alleging that, in consequence of such delay, he had not been allowed a fair opportunity to produce his witnesses, *held* that the Court cannot presume that substantial injury has been caused from the mere fact of there having been a material irregularity in publishing a sale; but when both a material irregularity and substantial injury have been proved, the Court may reasonably presume that the substantial injury is due to such irregularity. *Held* also that the applicant, having been guilty of laches himself, could not be allowed to set up the delay in the office as a ground for the non-production of his witnesses.—7 Cal. 730.

The mere fact that the amount of rent payable in respect of a tenure brought to sale in execution of a decree is not stated in the sale-proclamation is not a material irregularity within the meaning of sec. 311 of the Civil Procedure Code (Act X of 1877), though, if the amount of rent payable were stated to be more than it actually was, that might constitute such an irregularity as tending to lessen the price at which purchasers might be willing to buy. Where decrees for arrears of rent had been obtained by fractional share-holders in a tenure, and in execution thereof a moiety of the tenure had been sold, it appeared that the other moiety had been sold, at the same time in execution of a mortgage-decree against some of the judgment-debtors in the rent suits, on an objection being taken to the confirmation of such sale, on the ground that the whole tenure should have been sold in execution of the rent decrees: *Held* that, all that the decree-holders were entitled to have sold was the right, title, and interest of their judgment-debtors, and that they were in position of ordinary creditors having no lien on the tenure; and that, consequently, the mortgagor being entitled to enforce his lien against the moiety covered by his mortgage, the sale of the remaining moiety in satisfaction of the rent-decrees was a good sale, and could not be set aside.—7 Cal. 723.

The plaintiff purchased under a private conveyance from the registered tenant of a permanent transferable interest in land such as is described in sec. 26 of Bengal Act VIII of 1869, but no notice of the transfer was given to the zemindar. The zemindar subsequently brought a suit against the tenant for arrears of rent, and obtained a decree, in execution of which he caused the tenure to be sold, and himself became the purchaser. The plaintiff took proceedings under sec. 311 of the Civil Procedure Code to set aside the sale, but his application was rejected on the ground, an erroneous one, that he was not a proper party to take such proceedings, and he did not appeal against the order rejecting it. *Held*, in a suit brought against the

zemindar and the tenant to set aside the sale, that in the absence of fraud the suit was not maintainable. The plaintiff might have satisfied the rent-decree, and so prevented the sale, or he might have appealed against the order rejecting his application to set it aside; but having done neither, and the zemindar having had no notice of the transfer, the plaintiff was not entitled to treat the proceedings in the rent-suit as a nullity, on the ground that he was not a party to that suit.—10 Cal. 496.

Under Act XII of 1879, Form 149 of Schedule IV of the Code of Civil Procedure provided that sixty days should elapse between a sale in execution of a decree and its confirmation. A sale having been confirmed before the expiry of sixty days :—*Held*, that the sale was not rendered inoperative, and that its effect was not postponed by reason of the provision in Form No. 149. Where a suit was brought to recover money from the defendant, who was the karnavan of a Malabar tarwad, and it was not alleged in the plaint that the defendant was sued as karnavan, or that the debt was binding on the tarwad : *Held*, that a sale of tarwad property in execution of the decree was not binding on the members of the tarwad, and therefore that Article 12 of Schedule II of the Indian Limitation Act, 1877, did not apply to a suit brought by other members of the tarwad to recover the land sold in execution of the decree.—7 Madr. 512.

See I. L. R., 4 Al. 300, noted under sec. 274 ; 5 Cal. 308, noted under sec. 294 ; 7 Cal. 466, noted under sec. 278 ; 3 Al. 424, noted under sec. 248 ; 5 Al. 42, noted under sec. 310 ; 3 Al. 356, noted under sec. 285 ; 8 Bom. 424, noted under sec. 305 ; 10 Cal. 401, noted under sec. 2 ; 14 Cal. 1, noted under sec. 290 ; 17 Cal. 769, noted under sec. 244 ; 12 Al. 440, noted under sec. 234 ; 18 Cal. 422, noted under sec. 289.

**312.** If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser.

If such application be made, and if the objection be allowed, the Court shall pass an order setting aside the sale.  
 of its being allowed.

No suit to set aside, on the ground of such irregularity, an order passed under this section, shall be brought by the party against whom such order has been made.

#### Notes.

It is a general principle of law that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. *Held*, accordingly, that an appeal from an order under the second paragraph of sec. 312 of the Civil Procedure Code, although made before Act VII. of 1838 came into force, would, upon the operation of that Act, lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made. *Hurrosundari Dabi v. Bhojohari Das Manji* (I. L. R., 13 Cal. 86) explained and distinguished.—I. L. R., 16 Cal. 429.

An order of an Appellate Court under section 312 confirming a sale cannot be the subject of a second appeal.—18 Cal. 422.

Where a sale in execution of a decree has taken place pending an appeal, and the decree has subsequently been reversed, the Court executing the decree cannot, after such reversal, grant confirmation of the sale. *Bassappa bin Malappa Aki v. Dundaya bin Shivlingaya* (I. L. R., 2 Bom. 540) referred to.—10 Al. 83.

An appeal does not lie from an order, setting aside a sale, passed under section 312, paragraph 2, of the Civil Procedure Code (Act XIV of 1882).—11 Bom. 603.

A suit lies in a Civil Court for confirmation of a sale held in execution of a decree by the Collector under sec. 320 of the Civil Procedure Code, and to set aside an order passed by the Collector cancelling the sale. *Madho Prasad v. Hansa Kuar* (I. L. R., 5 Al. 314) referred to. *Azim-ud-din v. Baldeo* (I. L. R., 3 Al. 554) followed. In such a suit, where it is pleaded in defence that the property was sold for an inadequate price, it lies on the defendant to show that there has been a material irregularity in publishing or conducting the sale.—9 Al. 602.

A sale was held in execution of a decree when an appeal was pending. Before the sale became absolute and before it was confirmed the decree was reversed by the appellate Court. After the reversal of the decree the purchaser applied for confirmation of sale and the lower Court granted the application. *Held*, on appeal to the High Court, that the lower Court was not competent to confirm the sale, inasmuch as, at the date of the application for confirmation, there was no decree subsisting.—10 Al. 83.

*Held* (OLDFIELD, J., dissenting) that a suit by the purchaser at a sale of immoveable property in execution of a decree, which has been set aside under secs. 311 and 312 of Act X of 1877, to have such sale confirmed, on the ground that there was no irregularity in the publication or conduct thereof, is not barred by the last clause of sec. 312 or by the last clause of sec. 588, but is maintainable.—3 Al. 554.

Proceedings to execute a decree commenced when the former Code of Civil Procedure (Act VIII of 1859) was in force; but property belonging to the judgment-debtor was sold in pursuance of those proceedings on the 14th November 1877, after the new Code (Act X of 1877) came into operation. Subsequently, at the instance of the applicant, the Court made an order, setting aside the sale on ground of irregularity.—*Held* that this order was governed by the former Code, and was consequently not subject to appeal.—3 Bom. 214.

The Court executing a decree having made an order setting aside a sale under Act VIII of 1859 of immoveable property in the execution of the decree, the purchaser at such sale sued the decree-holder and the judgment-debtor to have such order set aside, and to have such sale confirmed in his favour. *Held* (OLDFIELD, J., dissenting) that the suit was maintainable, the provision of sec. 257 precluding an appeal from an order setting aside a sale, and not a suit to contest the validity of such an order, and that, the order setting aside the sale in this case being *ultra vires*, the auction-purchaser was entitled to the relief he claimed.—3 Al. 206.

Certain immoveable property was put up for sale in the execution of B's decree, and was purchased by him. Subsequently, on the same day, such property was put up for sale in the execution of S's decree, and was purchased by him. B objected to the confirmation of the sale to S on the ground that S's decree had been satisfied previously to such sale, and the Court executing the decrees made an order setting aside such sale on that ground. S thereupon sued B to have such order set aside, and to have such

sale confirmed, and to obtain possession of such property. *Held* that, inasmuch as such order had not been made under sec. 257 of Act VIII. of 1859, but had been made at the instance of a purchaser under another decree, and B's decree, as a matter of fact, had not been satisfied, S's suit to have such order set aside was maintainable.—3 Al. 112.

An appellate Court has a discretionary power to substitute or order a new appellant or respondent after the period of limitation prescribed for an appeal. The right, title, and interest of G in certain immoveable property was attached and notified for sale in the execution of a money-decree held by T. It was also attached and notified for sale in the execution of a money-decree held by S and R. The same date was fixed for both sales. The officer conducting sales first sold the property in execution of T's decree, and T purchased the property. He then sold the property in execution of the decree held by S and R, and K purchased the property. The Court executing the decrees confirmed the sale to Y, granting him a sale-certificate, and disallowing K's objection to the confirmation. It also confirmed the sale to K ordering the purchase-money to be paid to S and R, and disallowing K's objection to the confirmation; but it refused to grant K a sale-certificate, on the ground that, as the sale to T had been confirmed, and a sale-certificate granted to him, it could not give K possession of the property. In a suit by K against S and R to recover his purchase-money, *held* (distinguishing the suit from the cases in which it had been held that, when the right, title, and interest of a judgment-debtor in a particular property is sold, there is no warranty that he has any right, title, or interest, and therefore the auction-purchaser cannot recover his purchase-money if it turns out that the judgment-debtor had no interest in the property) that the rule of *caveat emptor* did not apply, and the suit was maintainable. The provisions of sec. 257 of Act VIII of 1859 apply to applications made under sec. 256 of that Act, and to those only. *Held*, therefore, that, inasmuch as K objected to the confirmation of the sale to him on the ground that the Court was not competent to confirm a sale which had by its previous order been nullified, and not on any of the grounds mentioned in sec. 256 of Act VIII of 1859, K was not precluded by the terms of sec. 257 of that Act from maintaining his suit. Where the Court executing two decrees made separate orders directing the sale on the same date of certain immoveable property in execution of such decrees, the officer conducting sales was not bound to sell such property once for all in execution of both decrees, and his selling such property separately was, therefore, not an irregularity in the conduct of the sales.—2 Al. 107.

See I. L. R., 7 Madr. 512, noted under sec. 311; 10 Cal. 368, noted under sec. 294; 3 Al. 356, noted under sec. 285; 9 Al. 411, 14 Cal. 9 & 14 Cal. 679, noted under sec. 311; 14 Cal. 1, noted under sec. 290; 17 Cal. 769, noted under sec. 244; 12 Al. 440, noted under sec. 234.

### 313. The purchaser at any such sale may apply to the

Application to set aside sale on ground of judgment-debtor having no saleable interest.

Court to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest therein, and the Court may make such

order as it thinks fit: Provided that no order to set aside a sale shall be made, unless the judgment-debtor and the decree-holder have had opportunity of being heard against such order.



**Notes.**

In execution of a decree obtained on the 5th August 1876, the property of the judgment-debtor was attached on the 17th August 1877. The sale of the attached property was postponed pending a suit instituted under the direction of the Court by a claimant to the attached property. This suit having been dismissed on the 13th September 1878, the decree-holder, on the 25th September, applied for a sale of the property, and the 16th December was fixed for the sale. Meanwhile, on the 13th December 1877, a decree had been obtained by another party against the judgment-debtor, and in execution of this decree the same property was attached on the 13th September 1878, and under this attachment a sale took place on the 15th November following. On the 16th December, as fixed, the property was again sold under the first attachment. The auction-purchaser at that sale, on the 6th January 1879, applied, under sec. 313 of the Civil Procedure Code, to set aside the sale on the ground that the judgment-debtor had no saleable interest. *Held* (reversing the decision of the lower Court) on the authority of the following cases—*Gogaram v. Kartick Chander Singh* (9 W. R., 514), *Lala Joogul Lall v. Bhuka Chowdhary* (9 W. R., 244), and *Kartick Chander Singh v. Gogaram* (2 W. R., Mis., 48), which the Court felt bound to follow, while it doubted the correctness—that the sale must be set aside.—6 C. L. R., 85.

In execution of a rent-decree, dated 26th May 1869, certain immovable property was sold in execution, and purchased by the appellant on the 21st February 1880, no mention having been made of any incumbrances. On the 9th May 1879, a decree was obtained upon a mortgage executed by the original judgment-debtor, and in execution of that decree the property which had already been sold was attached, and, on the 11th March, again sold in execution of the second decree, it being alleged that the property was covered by the mortgage which was prior in date to the former decree. The appellant thereupon applied that the sale of the 21st March should be set aside under sec. 313 of the Civil Procedure Code, and his purchase-money directed to be returned to him. *Held* that, if, as a fact, the property sold was covered by the mortgage, there was, under the circumstances, no such saleable interest in the judgment-debtor at the time of the sale on the 21st February 1880 as would prevent the operation of sec. 313 of the Civil Procedure Code, inasmuch as under that sale the purchaser would be unable to get the particular property purchased by him; and that the sale must be set aside.—8 C. L. R., 468.

Under sec. 313 a purchaser at a sale in execution of a decree may resist the confirmation of the sale and prevent its conclusion, while under sec. 315 he may apply, after the confirmation of the sale, for a refund of the purchase-money on the ground that nothing passed by the sale. To entitle a purchaser, under para. 2 of sec. 315, to a refund of purchase-money, it is not necessary that a Court should have decided in other proceedings that the judgment-debtor had no saleable interest in the property which purported to be sold, or that the purchaser should have obtained actual possession and have been deprived thereof.—8 Madr. 99.

*Held* that an application under sec. 313 of the Civil Procedure Code by the purchaser at a sale in execution of a decree, which had been transferred for execution to the Collector, in accordance with the rules prescribed by the Local Government, was entertainable by the Civil Courts, and the Collector had no jurisdiction, under the Code or under Notification No. 671



of 1880, to entertain it. *Madho Prasad v. Hansa Kuar* (I. L. R., 5 Al. 314) referred to.—9 Al. 43.

The fact that property sold in execution of a decree is incumbered, even when the incumbrance covers the probable value of the property, is not sufficient to sustain a plea that the person whose property is sold had no saleable interest therein. Sec. 313 of the Civil Procedure Code contemplates that either the judgment-debtor had no interest at all, or that the interest was not one he could sell; and the fact that the property may fetch little or nothing if sold does not affect the question. *Naharmal v. Sadut Ali* (8 C. L. R., 468) distinguished. *Protap Chunder Chuckerbutty v. Panioty* (I. L. R., 9 Cal. 506) referred to.—9 Al. 167.

In the event of the death of the judgment-debtor, notice must issue to his representative before the sale of immoveable property can be set aside under sec. 313 of the Code of Civil Procedure, albeit that the section makes no express provision for the appearance of the representative.—7 Bom. 424.

Sec. 313 of the Civil Procedure Code only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion only of the property.—9 Cal. 626.

A person who purchases immoveable property at a sale in execution of a decree, knowing that the judgment-debtor has no saleable interest therein, is not entitled to the benefit of the provisions of sec. 313 of Act X of 1877, which were designed for the protection of persons who innocently and ignorantly purchase valueless property.—3 Al. 527.

Where in execution of a decree passed against a person who had previously been adjudicated an insolvent, portions of his property (then vested in the Official Assignee) are attached and sold, the purchaser is entitled to have the sale set aside under sec. 313 of the Code of Civil Procedure, notwithstanding that the Official Assignee acquiesces in the sale, and is content to receive the sale-proceeds.—9 Cal. 217.

The fact that property sold in execution of a decree is subject to a mortgage upon which a decree has been obtained—which fact is not disclosed prior to the proclamation of sale—is not sufficient to enable an auction-purchaser to set aside the sale on the ground that the judgment-debtor had “no saleable interest” in the property, within the meaning of sec. 313 of the Civil Procedure Code. *Naharmul Marwari v. Sadut Ali* (8 C. L. R., 468) distinguished.—9 Cal. 506.

A misrepresentation or concealment in the sale-notification, which induces a purchaser to buy a property for much more than it is really worth—although that misrepresentation or concealment may be fraudulent—is no ground for setting aside a sale under sec. 313 of the Civil Procedure Code. The meaning of sec. 313 is that, when a purchaser under an execution-sale buys a property which turns out to have no existence at all, or to be of no saleable value whatever, the Court may then set aside the sale under sec. 313.—10 Cal. 368.

See I. L. R., 7 Madr. 512 & 11 Al. 94, noted sec. 311; 10 Cal. 368, noted under sec. 294. See I. L. R., 11 Madr. 269.

**314.** No sale of immoveable property in execution of a decree shall become absolute until it has been confirmed by the Court.

Confirmation of sale.

**Note.**

See I. L. R., 8 Bom. 424, noted under section 305 ; 17 Cal. 769, noted under sec. 244 ; 18 Cal. 125, noted under sec. 289.

**315.** When a sale of immoveable property is set aside under section 312 or 313,

If sale set aside, price to be returned to purchaser.

or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is, for that reason, deprived of it,

the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase-money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the Court may be enforced against such person under the rules provided by this Code for the execution of a decree for money.

**Notes.**

The plaintiff purchased at an auction-sale, in execution of a decree, the right, title, and interest of a judgment-debtor in certain property. The sale was confirmed on 30th November 1866. On proceeding to take possession, he was opposed by the defendant, who asserted that he was in possession of the property, and that it was his. In a suit under sec. 258, Act VIII of 1859, for a refund of the purchase-money, the sale still remaining uncanceled, *held* that the suit must be dismissed ; that sec. 258 of Act VIII of 1859 only applied to cases where the auction-sale had been cancelled ; that the proper course for the plaintiff to have pursued was to have brought a suit under sec. 269 of Act VIII of 1859 for a declaration of the judgment-debtor's right, title and interest in the property.—3 B. L. R., (A. C.) 301 ; 12 W. R., 176.

When an auction-purchaser at a sale in execution of a decree buys the right, title, and interest of the judgment-debtor in the property sold in execution, and it is subsequently found that the judgment-debtor had no right, title, or interest whatever in the property, no suit will lie against the decree-holder or the judgment-debtor to recover back the money which the auction-purchaser has paid. Although a purchaser may, under sec. 258 of Act VIII of 1859, recover his purchase-money, it is only when the sale is set aside for irregularity under sec. 257.—4 B. L. R., (F. B.) 11 ; 12 W. R., (F. B.) 8.

Under sec. 258, Act VIII. of 1859, when a sale of immoveable property is set aside, the purchaser is entitled to recover back his purchase-money. If the Court, reversing the sale, omit to make such order, the purchaser can sue to recover the money from the person who has received it.—1 W. R., 55 ; 2 Agra H. C. R., 50.

No appeal lies from an order refusing a refund of price to a purchaser the sale to whom has been set aside under sec. 315 of the Civil Procedure Code. *Soudagar Mal v. Abdul Rahman Khan*, *Tapesri Lal v. Deoki Nandan Ria* and *Ram Dial v. Ram Das* referred to. *Baijnath Sahai v. Moheep Narain Singh* dissented from.—I. L. R., 12 Al. 397.

Upon an application for refund of purchase-money under sec. 315 the Munsif, being of opinion that the purchaser had, in collusion with the judgment-debtor, run up the price of the land at auction far beyond its value with a view to prevent other property attached from being sold to satisfy the decree, rejected the application, except as to a sum of Rs. 50, which represented the alleged value of the judgment-debtor's interest in the land brought to sale by the decree-holder. *Held* that, as the judgment-debtor was found to have no interest in the land, the purchaser was entitled to a refund of the money paid to the decree-holder.—8 Madr. 101.

Although there is no express provision in the Code laying down that a decree-holder may take out of Court the proceeds of an execution-sale before the date on which the sale is confirmed, yet sec. 315 of the Code implies that this may be done. The Court, however, under special circumstances, may refuse to pay over to the decree-holder the purchase-money until the sale is confirmed, but in such case it should provide for due payment of interest on the money detained. *Held* that, under the special circumstances of this case, the decree-holder was not entitled to receive interest from his judgment-debtor from the date of the sale to the date on which the sale was confirmed.—12 Cal. 252.

Where an order was passed under sec. 315 directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court, *held* that, under sec. 622 of the Code of Civil Procedure, the High Court could set aside the order, because the judgment-debtor having been found to have a saleable interest, the lower Court had no power to order a refund.—9 Madr 437.

Where immoveable property was sold in the execution of a decree under the provisions of Act VIII of 1859, and the auction-purchaser, having been subsequently deprived of such property on the ground that the Judgment-debtor had no saleable interest in it, applied under Act X of 1877, sec. 315, to the Court executing such decree for the return of the purchase-money. *Held* that the Court could entertain the application.—*In the matter of the petition of Mulo*, I. L. R., 2 Al. 299. This is dissented from in a subsequent case where it was held that Act X of 1877, sec. 315, cannot have retrospective effect so as to apply to a sale which had taken place before the Act came into operation.—2 Al. 780, 2 B. L. R., (A. C.) 83; 10 W. R., 365 followed.

*Per* STRAIGHT, OLDFIELD, and TYRRELL, JJ.—That the words in sec. 315 of the Civil Procedure Code, “no saleable interest,” mean “nothing to sell,” and are not intended to confine the cases in which a purchaser at an execution-sale shall be entitled to receive back his purchase-money to those in which the judgment-debtor, though having an interest, such interest is, by prohibition of law or for some other reason, unsaleable. *Held* by the Full Bench that a purchaser at a sale in execution of a decree can maintain a suit against the decree-holder for recovery of his purchase-money when it is found that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in sec. 315.—5 Al. 577.

A judgment-debtor, whose property had been sold in execution of the decree under Act VIII of 1859, appealed from the order disallowing his application to set aside the sale, after Act X of 1877 (Civil Procedure Code) came into force. The Appellate Court set aside the sale. The purchaser sued the decree-holder for interest on the purchase-money and the expenses of the sale, the purchase-money having been returned to him under the order of the Court executing the decree, without interest and less such ex-

penses. *Held* by the Full Bench that the provisions of Act X of 1877, and not of Act VIII of 1859, were applicable to the determination of the matter in dispute in the suit. *Held* by the Divisional Bench (STRAIGHT and TYRRELL, JJ.) that, with reference to the ruling of the Full Bench, the suit was maintainable. *Held* also by the Divisional Bench that, under the circumstances of the case, the plaintiff ought not to be granted the relief sought.—5 Al. 364.

See I. L. R., 11 Madr. 269, noted under sec. 313; 13 Al. 383, noted under sec. 295.

**316.** When a sale of immovable property has become absolute in manner aforesaid, the Court of immovable property. shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate, and not before: Provided that the decree under which the sale took place was still subsisting at that date.

#### Notes.

The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immovable property, and tendered in evidence a sale-certificate, dated 20th September 1865. The first Court decided against the plaintiff on the ground, among others, that the certificate was not registered, though registration of it was compulsory. On the 9th February 1875, the plaintiff filed an appeal in the High Court against that decree, and, on the 26th July 1875, applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February 1875, regarding the same property as that to which the certificate of the 20th September 1865 related. *Held* by the High Court that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it, or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence, which had no existence when that Court made such decree. (Distinction pointed out between this case and *Mohidin v. Mahadaji*, S. A. 437 of 1872.) *Quære*.—Whether, under the circumstances of this case, the Subordinate Judge, who issued the new certificate of sale on the 1st February 1875, ought to have so issued it, in order that the plaintiff might register it, the plaintiff having already lost, by his own laches, the right to register the original certificate? *Quære*.—Whether the Court of first instance ought to have received the second certificate if it had been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing?—12 Bom. H. C. R., (A. C.) 247.

K brought a suit against P to recover possession of certain land. Whilst that suit was pending in the Court of first instance, the right, title, and interest of P in the land were sold in execution of a decree against him at the instance of a judgment-creditor, and purchased by G. Subsequent to G's purchase K's suit was dismissed by the Court of first instance; but K appealed, and the Appellate Court reversed the decree of the Court

below, and gave judgment in K's favour. G, who was not made a party to the appeal, thereupon instituted a suit against K to eject him and obtain possession of the land. *Held* that the doctrine of *lis pendens* applied, and that G was not entitled to maintain the suit. *Held*, further, that it made no difference to the application of the doctrine that the decree of the Court of first instance was in favour of G's predecessor in title, for that decree was open to appeal, and the decree in the suit was that passed by the Appellate Court, the proceedings in the Appeal Court being merely a continuation of those in the suit ; and as G's purchase was made whilst that suit was pending, G was still bound by the decree of the Appellate Court. *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (14 Moore's L. A. 101 ; 8 B. L. R. , 122 ; 16 W. R., (P. C. ) 19) distinguished.—I. L. R., 15 Cal. 94.

An application by an auction-purchaser for a certificate of sale needs bear no stamp, since by sec. 316 of the Civil Procedure Code (Act XIV of 1882) it is not even required to be in writing.—13 Bom. 670. -

In execution of a decree for sale passed on a hypothecation bond, all the land comprised in the security was attached. The judgment-debtor was a member of an undivided family ; his son put in no claim in execution, but on a claim put in by his nephew it was ordered that the right, title and interest of the judgment-debtor be sold. The decree-holder became the purchaser, and having obtained a sale certificate which recited that " all the interest of the judgment-debtor " was sold, he was put in possession of all the land, part of which he leased to the son. Subsequently the nephew obtained a decree for his share against the decree-holder and then purchased the rest of the land from him. In a suit by the son against the nephew to recover his share, the plaintiff having failed to prove that the judgment debt had been incurred for purposes not binding on him :—*Held*, that the entire estate less the interest of the nephew was sold to the decree-holder and consequently the son's interest had passed to him. The question what is actually bargained and paid for at an execution sale is a mixed question of law and fact, and the High Court on second appeal is not bound by the finding of the Court of first appeal with regard to it.—13 Madr. 47.

The words " subsisting decree ", in the proviso to sec. 316 refer to a decree which is unreversed and in full force, and not to a decree the execution of which is not barred by limitation. Where a decree under which a sale takes place remains, unreversed, and the sale under it has been confirmed, a sale certificate will operate as a valid transfer of the property sold, notwithstanding that the sale has actually taken place at a time when execution of the decree is barred by limitation.—11 Cal. 376.

A Court having once granted a certificate of sale to an auction-purchaser is under no obligation to give him another, in order that he may escape the penalty which he has incurred by reason of the certificate being insufficiently stamped.—9 Bom. 526.

The title of a purchaser at a Court sale becomes complete upon his payment of the purchase-money and confirmation of the sale by the Court. When the sale is admitted, production of a certificate is not necessary to prove that fact.—10 Bom. 444.

Claims on property admitted by the parties or established by a decree of a Court should be entered in the certificate of sale and be computed as part of the purchase money in ascertaining the amount of the stamp duty leviable on the certificate of sale. Other claims should neither be entered in the certificate of sale nor computed as part of the purchase money. It is the duty of the purchaser to provide the stamp.—9 Bom. 47.

*Held* that a sale-certificate granted under sec. 316 of the Civil Procedure Code is not a document, the registration of which is compulsory under the Registration Act, 1877, sec. 17 (b).—5 Al. 568.

Under Act VIII. of 1859, sec. 259, and Act XX of 1866, secs. 17 and 42, it was necessary to register the certificate of sale itself, and not merely the memorandum of the certificate of sale.—3 Madr. 41.

A purchaser of immoveable property at a Court-sale under the Civil Procedure Code, Act VIII of 1859, who has been put into possession by the Court, has thereupon a complete title against all persons bound by the decree, notwithstanding that he has no certificate of sale, or one only which has not been registered. *Rajkishan Mookerjee v. Radha Madhab* (21 W. R., 349) followed. *Quære*.—How far the above ruling will be affected by the language of sec. 316 of Act XIV of 1882?—7 Bom. 254.

Clause 178, sch. ii. of the Limitation Act (XV of 1877), is not applicable to applications for certificates of sale. *Re Khaja Pattahnjee* (I. L. R., 5 Bom 202) dissented from. The provisions of the Indian Limitation Act (No. XV of 1877) do not apply to applications to a Court to do what it has no direction to refuse, nor to applications for the exercise of functions of a ministerial character. *Kylasa Goundan v. Ramasami Ayyan* (I. L. R., 4 Madr. 172) followed.—6 Bom. 586.

The applicant purchased certain land at a Court-sale on the 17th February, 1876. The sale was confirmed on the 20th March of the same year. The purchaser did not apply for a certificate of sale until the 10th March 1880. *Held* that the application was barred by the Limitation Act (XV of 1877) sch. i., art. 178. *Held* also that the purchaser's right to a certificate of sale accrued to him under secs. 256, 257, and 259 of the Civil Procedure Code (Act VIII of 1859) on the 20th March, 1875, when the sale was confirmed.—5 Bom. 202.

A person purchased certain property at a sale in execution of a decree in November 1878; his purchase was confirmed, and he obtained a certificate of sale on the 23rd May, 1879, from which date he remained in possession. The judgment-debtor applied to have the sale set aside for irregularity, but his application was dismissed both at the hearing and on the appeal. He had applied, before the sale took place, to stay the sale, on the ground that the right to apply for execution was barred. This application was dismissed, but was allowed on appeal. It did not appear that the auction-purchaser was a party to the proceeding, or that he was cognizant of the application. Two years from the date of the sale, and one and a-half year from its confirmation, the judgment-debtor, on a summary application, obtained an order setting aside the sale, and putting the auction-purchaser out of possession. *Held* that the order was erroneous, the Subordinate Judge having no power, after the sale had been confirmed, to set aside the sale by a summary order; and that, under art. 165, sch. ii. of Act XV of 1877, the application for such an order was barred. The words, "subsisting decree," in sec. 316 of Act X of 1877, as amended by Act XII of 1879, mean a decree unreversed and in full force, and not merely one upon which execution cannot be issued.—7 Cal. 91.

Where land subject to an unregistered mortgage, the registration of which was optional, was attached and sold in execution of a money-decree obtained against the mortgagor, and the purchaser registered his certificate of sale and obtained possession of the land, *held* that no question of priority under sec. 60 of the Registration Act could arise, inasmuch as the purchaser



acquired only the right, title, and interest of the mortgagor subject to the mortgage.—7 Madr. 248.

See I. L. R., 3 Al. 647, noted under sec. 287 ; 17 Cal. 769, noted under sec. 244.

**317.** No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims.

Bar to suit against purchaser buying benami.

Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser.

#### Notes.

Sec. 260, Act VIII of 1859, is no bar to a suit for a declaration that the name of the certified purchaser was inserted in the certificate of sale fraudulently and without the consent of the real purchaser.—4 B. L. R., Ap. 32.

In a suit by a member of a joint Hindu family to recover possession of certain property alleged to belong to the joint estate, but which had been purchased by the defendant at a sale in execution of a decree passed against the estate of R, one member of the family, for his separate debt, the defendants sought to rebut the presumption that the property in dispute was part of the joint estate by showing that, though the members of the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house, they also had separate dealings and funds of their own ; and that, while the family had some ancestral estate, several members of the family had acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family. They also relied on the following facts as showing that the property in dispute was the separate property of R, viz., that during R's lifetime the other members of the family allowed him to appear to the world as the sole owner thereof, and on one occasion when R, B the kurta, and a third member of the family, entered into a security-bond with the Collector, whereby R pledged this property, and the two others pledged other properties, each of them described the property pledged by him as being in his possession "without the right of any co-sharers" On the other hand, the plaintiff, in addition to oral evidence to show that the property in dispute had been purchased out of the joint family funds, although the purchase was made in the name of R alone, filed the family account-books and the private account-books of R for the same purpose, as well as certain letters which passed between B and R relative to the purchase of the property. *Held*, 1st, that the evidence as to the separate trading, funds, and property of the several members of joint-family, and their independent dealing with such property, disclosed such a state of things as might be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint-family and to throw upon the plaintiff the *onus* of establishing the joint nature of the property claimed by clear and cogent evidence, 2ndly, that the provisions of sec. 260, Act VIII 1859, apply to ordinary benami purchases at execution-sales, but do not affect purchases of property by one member of a joint Hindu family

in his own name, but with the joint funds ; 3rdly, that the mere fact that R, while trading on his separate account, was permitted by the other members of the joint family to appear to the world as the sole owner of family estates, did not disentitle those members to recover from the defendant, the purchaser at a sale in execution of a decree against R, their own share of such estates ; 4thly, that the misrepresentation as to his separate ownership made by R in the security-bond given to the Collector could not be regarded in the present suit as more than an admission inconsistent with the title now asserted by the plaintiff, the defendant not having purchased on the faith of such misrepresentation ; 5thly, that the letters between B and R relative to the purchase by the latter of the estate in dispute were admissible as against the defendant.—12 B. L. R., 317 ; 19 W. R., 356.

The provisions of sec. 260, Act VIII of 1859, apply to ordinary benami purchases at execution-sales, but do not affect purchases of property by one member of a joint Hindu family in his own name, but with the joint funds.—12 B. L. R., (P. C.) 317 ; 19 W. R., 356.

The immoveable property of A at a Court's sale was purchased by B with the money, and on behalf of A. B subsequently conveyed the property to C for the benefit of A. *Held* that the property could be taken in execution by the creditors of A. *Quoere*.—Whether, but for the subsequent conveyance, B, under the operation of secs. 259 and 260 of the Civil Procedure Code, would not have had a good title against the creditors of A ?—7 Bom. H. C. R., (A. C.) 21.

A's property is sold under a decree to B, a *bona fide* purchaser, who offers to A to reconvey to him on being repaid the purchase-money. *Held* that, if A accepts the proposal, sec. 260 of the Civil Procedure Code does not preclude a contract from arising.—10 Bom. H. C. R., (A. C.) 344.

The certified purchaser of property which had been a second time attached and sold in the execution of a decree, as the property of the judgment-debtors, sued to be confirmed in possession of the property by virtue of his certificate of sale, and to obtain the cancelment of the second sale, and the order disallowing his objections to that sale. *Held* that the provisions of sec. 260 of Act VIII. of 1859 did not prohibit the consideration of the circumstances of the first sale, when the question for determination was whether, at the time of the second attachment, the judgment-debtors were in possession as owners of the property, or merely as lessees of the certified purchaser.—6 N.-W. P. H. C. R., 197.

Sec. 260 of Act VIII of 1859 does not preclude the Courts from entertaining a suit brought by a decree-holder against the certified purchaser of property to bring the property to sale in execution of his decree as the property of his judgment-debtor, on the allegation that the certified purchaser had purchased the property *benami* for the judgment-debtor, who had remained in possession as owner from the date of the purchase, and was in possession as such at the time of the attachment.—6 N.-W. P. H. C. R., 265.

In a suit to obtain possession of certain property purchased at an execution-sale, the plaintiff, who alleged that the purchase had been made for his benefit, and that the certified purchaser was his benamidar, made the certified purchaser, who admitted his allegation, a defendant along with the person in possession. *Held* that the case came within the rule laid down in *Buhuns Koowar v. Lalla Buhooree Lall*, 14 Moore's I. A. 496 ; 10 B. L. R., 159 ; and that the suit was not barred by sec. 317 of the Civil Procedure Code.—9 C. L. R., 295.

Sec. 260 of Act VIII. of 1859 does not preclude a person purchasing benami from setting up his title against a person not being the certified purchaser, or claiming through him.—Marshall's Rep., 423 ; 2 Hay's Rep., 512.

The correct interpretation of sec. 260, Act VIII. of 1859, is to the effect that a suit by a party claiming to be the real purchaser of immoveable property sold in execution of a decree cannot be brought against the certified auction-purchaser, even though the claimant has had previous possession.—9 W. R., 360.

Sec. 260, Act VIII. of 1859, does not apply when the name of the certified purchaser has been inserted by fraud and contrary to the wishes of the purchaser.—13 W. R., 85.

In a suit for possession of a tank, on the allegation that plaintiff purchased it in execution of a decree against one S D, and that, after being put in possession, she was subsequently ousted, defendant's plea being possession after prior purchase at an execution-sale under a decree against the same S D; the lower Court found that the defendant's purchase was a fictitious transaction, being in reality for the benefit of S D, who was in actual possession and enjoyment of the property at the time of the plaintiff's purchase. *Held* that the case did not come under the purview of sec. 260, Act VIII. of 1859.—14 W. R., 111.

Sec. 260 of Act VIII. of 1859 must be construed strictly and literally, and is applicable only to a suit brought against a certified purchaser to assert a benami title against him. Where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, may show in defence that the holder of the certificate is a mere trustee.—L. R., 2 I. A. 154 ; 23 W. R., 358.

If, after obtaining a certificate of sale in execution of a decree, the purchaser acknowledges that his purchase is benami and gives up possession, or does some act which clearly indicates an intention to waive his right, or restores the property to the real owner, such act may, by reason of the antecedent relation of the parties, operate as a valid transfer of property. Defendant acted benami in buying certain land at a Court-sale for plaintiff, paid part of the purchase-money for plaintiff, and allowed plaintiff to remain in possession, on the understanding that defendant was to transfer the property on repayment of the balance of the purchase-money. Defendant having ejected plaintiff, plaintiff sued to recover the land. *Held* that sec. 317 of the Code of Civil Procedure was no bar to plaintiff's suit.—I. L. R., 11 Madr. 234.

In a suit by A against B and C to recover land, A alleged that B brought the land at a Court-sale on his behalf. B did not contest the suit. C, who did not claim under B, pleaded that A could not recover by reason of the provisions of sec. 317 of the Civil Procedure. *Held* that sec. 317 only enabled the certified purchaser and those claiming under him to avoid arrangements made with him in the nature of a trust, and was no bar to the suit.—8 Madr. 511.

Certain property belonging to a judgment-debtor was brought to sale and purchased by a person in the benami name of her daughter, then an infant; and the sale certificate was made out in the name of the latter. Subsequently the mother mortgaged the property, and the mortgagee brought a suit, obtained a decree, and had the property sold, and purchased it himself. Upon his being resisted by the daughter in attempts to get his name registered as proprietor, he instituted a suit against both

mother and daughter to establish his rights to the property. The daughter thereupon objected that the suit would not lie by reason of the provisions of sec. 317 of the Civil Procedure Code. *Held* that the provisions of that section, which were intended to prevent fraud, were inapplicable to the facts of the case, and that suit was maintainable.—12 Cal. 204.

At a sale in execution of a decree, in February 1875, the plaintiff purchased certain property in the name of M, who was recorded as the purchaser. In 1886, eleven years after the execution sale, M sold the property to H, whose name was subsequently registered as owner, notwithstanding the plaintiff's objections. The plaintiff thereupon, in 1888, brought a suit against H for a declaration of his title to the property, on the grounds that it had originally been purchased on his behalf at the execution sale, and that he had been in possession for more than 12 years. *Held*, that the suit did not fall within sec. 317 of the Civil Procedure Code. *Buhuns Kowur v. Lalla Buhoree Lall* relied on.—19 Cal. 198.

A, the certified purchaser of a taluk at a sale held under the provisions of Act XI of 1859 for arrears of revenue, and who had obtained symbolical possession, has at the time of the sale agreed with B, the former owner of the taluk, to reconvey to him (B) after the sale had been completed. In a suit by B to compel specific performance of the contract, alleging that he had never quitted actual possession of the taluk, objection was taken that the suit was not maintainable under sec. 36 of Act XI of 1859 and sec. 317 of Act XIV of 1882. *Held* that the suit, not being one to oust the certified purchaser from possession, was not barred by sec. 36; and that neither was it barred by sec. 317 of the Civil Procedure Code, that section applying only to sales in execution of decrees of Civil Courts held under the Procedure Code.—14 Cal. 583.

The provisions of sec. 317 of the Code of Civil Procedure are no bar to a suit for partition brought by a Hindu son against his father, and a certified purchaser of family property, who has bought benami for the father with the family-funds at a sale in execution of a decree against the father.—6 Madr. 135.

A sued K, the purchaser of certain immoveable property sold in execution of a decree under Act VIII of 1859, for a declaration that K had purchased such property on her behalf. The suit was instituted after Act VIII of 1859 was repealed, and Act X of 1877 came into force. When the suit was instituted, K did not hold a sale-certificate. After it was instituted, he applied for and obtained a sale certificate under sec. 317 of Act X of 1877. *Held* that, when the suit was instituted, it was maintainable, as the defendant not being a certified purchaser under sec. 260 of Act VIII of 1859, that section did not apply; and that, when the defendant obtained a certificate under sec. 317 of Act X of 1877, he became a certified purchaser, and the suit would only be maintainable if the plaintiff made out a case falling within the provisions of the last part of sec. 317.—5 Al. 478.

**318.** When the property sold is in the occupancy of the judgment-debtor or of some person on his behalf, or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property, and a certificate in respect thereof has been granted under sec. 316, the Court shall, on application by the purchaser, order

Delivery of immoveable property in occupancy of judgment-debtor.

delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

**Notes.**

A suit by an auction-purchaser to obtain possession of land, the subject-matter of his purchase, will lie when it is shown that an attempt has been made to obtain possession in execution proceedings, and that such attempt has been unsuccessful. In the case of *Lolit Coomar Bose v. Ishan Chunder Chuckerbutty* (10 C. L. R., 258) it was not intended to hold that under no circumstances would such a suit lie, but that, so long as the means provided by sec. 318 are open to a purchaser, he is bound to have recourse to that section rather than to bring a fresh suit.—I. L. R., 12 Cal 169.

On the 18th January 1877, the father of the plaintiffs purchased the interest of M in two houses at a sale in execution of a money decree against M. The purchaser however, never obtained possession and he did not obtain the certificate of sale until the 31st July 1878. Subsequently to the sale of the 18th January 1877, two suits were filed against M on mortgages executed prior to that date and decrees in both were obtained against M. In execution of these decrees both the houses were sold and respective purchasers were represented by two of the defendants. The purchasers got possession and both obtained sale-certificates, one prior to the father of the plaintiffs, viz., on the 5th February 1878, and the other subsequently, viz, 1st November, 1878. The plaintiffs now sued to recover the houses:—*Held* that the plaintiffs were not entitled to recover as against the defendants. The plaintiffs not having either got possession or obtained a certificate of sale at the date of the sale in execution of the decrees on the mortgages had only an inchoate title. The purchasers in execution had no notice of the plaintiff's incipient right and having been left to buy what, so far as they knew, was a complete title, they ought not to be disturbed at the instance of the plaintiff's who failed to assert their dominant right. Had the plaintiffs got into possession or obtained a certificate and registered, there would have been notice sufficient to put all persons interested in inquiry as to their rights; but while they chose to keep their rights wholly in the dark they invited others to act as if those rights were not in existence, and they could not look to the Courts to extend and complete such rights in a way which would render the defendants victims not of their own negligence but of the negligence of those who would gain by it.—9 Bom. 16.

On the 9th December 1876, the plaintiff purchased a house at an auction sale in execution of a decree against the owner, one Sultan Saheb. The sale was confirmed on the 9th January 1877, but the certificate of sale was not issued until the 16th June 1880. On the 20th January 1880, the defendant purchased the same house at a sale in execution of a money decree against Sultan Saheb. The sale was confirmed on the 28th February 1880, and a certificate was issued on the 20th March 1880. The defendant got possession from the judgment-debtor in April 1880. The plaintiff now sued for possession. It was contended for the defendant that, having completed his title under the auction sale and obtained possession before the plaintiff had taken out his certificate he had acquired a better title than the plaintiff:—*Held*, that the plaintiff was entitled to recover. By his prior purchase he had obtained an equitable interest in the property, although he had not obtained a sale certificate. The defendant, therefore, purchased subject to the plaintiff's equitable interest; and that title having subsequently been

perfected by the issue of the certificate, the plaintiff's were in a position to sue for possession.—10 Bom. 453.

S attached certain land and a house in execution of a decree against R. M put in a claim, under sec. 278 of the Code of Civil Procedure, alleging that he was in possession as purchaser from R. The claim was rejected. No suit was brought by M to contest this order. S purchased the said land and house in execution, and obtained a sale-certificate. In 1884 S sued M to recover possession of the land and house, alleging that in execution proceedings in 1882 he had been put into possession of the land, but not of the house, which was found locked up by the Court amin, and that M prevented him from enjoying both the land and house. M pleaded that S had never been put into possession and again set up his title as purchaser from R, and possession under such title. The Munsif found that S had been put into formal or constructive possession of the land, but not of the house, and decreed the claim. On appeal the district Judge held that S was bound to proceed according to the provisions of sec. 335 of the Code of Civil Procedure to recover possession, and could not bring a separate suit. *Held* that, whether there had been legal delivery or not, the suit was not barred.—10 Madr. 53.

An application by a purchaser at a Court sale to be put into possession is barred under article 178, schedule 2 of the Limitation Act (XV of 1877), if made more than three years after the grant of the certificate of sale.—8 Bom. 257.

See I. L. R., 6 Bom. 586, noted under sec. 316; 3 Bom. 433, noted under sec. 319; 15 Madr. 203, noted under sec. 211.

**319.** When the property sold is in the occupancy of a tenant or other person entitled to occupy the same, and a certificate in respect thereof has been granted under section 316, the Court shall order delivery thereof to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant, by beat of drum, or in such other mode as may be customary, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Delivery of immoveable property in occupancy of tenant.

#### Notes.

*Quære.*—Whether the one year's limitation (of suits to set aside sales in execution of decrees) under cl. 3, sec. 1, applied to a suit brought against a person who had obtained possession of property by delivery under sec. 264, Act VIII. of 1859.—2 W. R., 55.

No appeal lay from an order of a Court giving possession under sec. 264, Act VIII. of 1859, to a purchaser at a sale in execution of a decree.—17 W. R., 395.

Act VIII. of 1859, sec. 230, did not limit the applicant to any particular manner of obtaining possession; and sec. 264 contained nothing to prevent the purchaser at an execution sale from obtaining possession if he could without the assistance of the Court.—22 W. R., 406.

A obtained a money-decree against B on the 25th January 1872, in execution of which property belonging to B was sold on the 9th September 1874, A himself becoming the purchaser. The sale was confirmed on the



9th October 1874, but the certificate of sale was not issued till the 23rd January 1878. A applied for possession on the 2nd April 1879. *Held* that the right to apply for possession contemplated in Act VIII. of 1859, secs. 263 and 264 (corresponding with Act X of 1877, secs. 318 and 319), accrued on the date the certificate of sale was issued, and not on that on which the sale was confirmed, and that, therefore, the period of limitation under Act XV of 1877, sch. 2, art. 178, against the purchaser, counted from the former date.—3 Bom. 433.

See I. L. R., 6 Bom. 586, noted under sec. 316.

**320.** The Local Government may, with the sanction of the Governor-General in Council, declare, by notification in the official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector, and rescind or modify any such declaration.

The Local Government may also, notwithstanding anything hereinbefore contained, from time to time prescribe rules for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court.

Rules under this section may confer upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector, including the powers of the Court under sections 294 and 312, and may provide for orders passed by the Collector or any gazetted subordinate of the Collector, or orders passed on appeal with respect to such orders, being subject to appeal to, and revision by, superior Revenue-authorities as nearly as may be as the orders passed by the Court, or orders passed on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.\*

\* These three paragraphs have been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 30.

A power conferred by the rules upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exerciseable by the Court or by any Court in exercise of any appellate or revisional Jurisdiction which it has with respect to decrees or orders of the Court.\*

In executing a decree transferred to the Collector under this section, the Collector and his subordinates shall be deemed to be acting judicially within the meaning of Act No. XVIII of 1850 (*an Act for the protection of Judicial Officers*).\*

#### Notes.

A decree was transferred to the Collector for execution. The Mamlatdar, under the orders of the Collector, put up for sale certain immoveable property belonging to the Judgment-debtors. The sale was confirmed by the Mamlatdar with the sanction of the Collector. Sometime afterwards the auction-purchaser applied to the Collector for a certificate of sale, but the Collector refused the certificate, and set aside the sale, on the ground that the purchaser was a relative of the decree-holder, and had really purchased the property on his behalf without the permission of the Court. Against this proceeding of the Collector, the purchaser made an application, first to the Subordinate Judge, who had transferred the decree to the Collector for execution, and then to the District Court. But both Courts declined to entertain his application, on the ground of want of jurisdiction. *Held*, on an application to the High Court, that the Subordinate Judge had jurisdiction to deal with the application, and to revise the Collector's proceedings in execution. *Held*, also, that the Collector having through his subordinate put up for sale the judgment-debtor's property, and confirmed the sale, had in that way completely executed the decree so far as he could, and was so far *functus officio*. His duty was to make a return to the Court of what he had done. After confirmation of the sale he could not set it aside. *Per* WEST, J.—The Collector, like the Nazir in India, is a ministerial officer when he executes a decree. He, like the Nazir, must carry out the decree of a Civil Court in general subjection to the judicial direction of the Court, on whose authority the coercive power exercised by him rests, and which alone can deal judicially with the questions that arise in execution. His proceedings and orders are subject, accordingly, to revision and correction on the application of a party aggrieved, whenever he misconceives the decree or acts illegally in giving effect to it. He is limited strictly to the precise line of activity laid down for him in the Code and the orders under it; and in cases of error or doubt it is the Court that must determine whether, he, as its ministerial officer, has or has not transgressed his powers. *Per* BIRDWOOD, J.—A sale made by a Collector under Chapter 19 of the Civil Procedure Code is subject to confirmation by the Civil Court under sec. 312. As soon as the Collector has exercised or performed the powers or duties conferred or imposed upon him by secs. 321 to 325 of the Code, he is *functus officio*. If he has sold the property or re-sold it under the power given by clause (c) of sec. 325, he has completed the execution of the decree so far as he can legally complete it and it is then his duty to

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\* These three paragraphs have been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 80.

re-transmit the decree to the Court, under rules prescribed in that behalf by Government under the second paragraph of sec. 320. Where the property has been sold or re-sold, the sale or re-sale cannot be set aside by the Collector. Any application for setting it aside must be made to the Civil Court under sec. 311, and dealt with by it under sec. 312 ; and if no application is made to the Court, the sale must be confirmed by it under that section. —I. L. R., 11 Bom. 478.

The rules framed by the Local Government in 1890 in exercise of the powers conferred by section 320 of the Code of Civil Procedure, as amended by section 30 of Act VII of 1888, are not retrospective in their operation so as to give the Collector the power to confirm a sale held before the date of issue of the rules. Nor do the rules authorize the Collector to set aside a sale. On 27th July, 1889, the property in dispute was sold by the Collector in execution of a decree which was referred to him under section 320 of the Code of Civil Procedure (Act XIV of 1882.) On 23rd September, 1889, the Collector set aside the sale, on the ground that the auction-purchaser had purchased the property for and on behalf of the decree-holder. Thereupon the auction-purchaser applied to the Court which had passed the decree, complaining of the Collector's proceeding, and praying for a confirmation of the sale. The Court asked the Collector to return the record of the case, but this he refused to do, on the ground that he had extended the time given by the decree to the judgment-debtor to redeem. In January, 1890, the Local Government framed new rules in exercise of the powers conferred by section 320 of the Code of Civil Procedure as amended by section 30 of Act VII of 1888. One of these rules empowered the Collector to confirm a sale held in execution of a decree transferred to him. In April, 1890, the auction-purchaser again applied to the Court for a confirmation of the sale. This application was rejected, on the ground that under the new rules framed by Government the Collector alone had the power to confirm the sale. *Held*, that the rules in question had no application to the present case, the sale having been held before the rules were promulgated. The Civil Court was, therefore, competent to confirm the sale. *Held*, further that even if the rules did apply, they did not empower the Collector to set aside, the sale, or extend the time given by the decree to the judgment-debtor to redeem. —15 Bom. 322.

A decree passed by a Subordinate Judge upon a bond, in which certain immoveable property was mortgaged, was, in accordance with the rules made by the Local Government under sec. 320 transferred to the Collector for execution. A sale in execution took place, and the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree. *Held* that, with reference to the second paragraph of rule 19 of the Rules framed by the Local Government under sec. 320 of the Civil Procedure Code, regarding the transmission, execution, and retransmission of decrees, and published in the N.-W. P. and Oudh Gazette of the 4th September 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of sec. 320, and notwithstanding the ruling of the Full Bench in *Madho Prasad v. Hansa Kaur* (I. L. R., 5 Al. 314). *Held*

also that, inasmuch as the Subordinate Judge had jurisdiction to decide the question, and inasmuch as, even if his decision was wrong, the purchaser had a remedy by bringing a regular suit, the matter did not fall within sec. 622 so as to call for the interference of the High Court in revision. *Sivanathaji v. Joma Kashinath*. (I. L. R., 7 Bom. 341) and *Amir Hasan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal. 6) referred to.—7 Al. 407.

The authority conferred upon the Local Government by sec. 320 of the Civil Procedure Code prior to the amendment of that section by sec. 30 of the Civil Procedure Code Amendment Act (VII of 1888), to make rules for regulating the procedure of the Collector in executing decree transmitted to him, included power to make a rule providing for an appeal from the Collector's orders. Clause XIX of Rule 17 which was added to the Rules (No. 671 of 30th August 1880) published in the N.-W. P. and Oudh Gazette of the 14th September 1880, by a notification in the Gazette of the 17th November 1883, and which made the order of a Collector confirming a sale appealable to the Commissioner of the Division, was therefore not *ultra vires* of the Local Government. *Madho Prasad v. Hansa Kuar* referred to. Sec. 243 of the N.-W. P. Land Revenue Act (XIX of 1873) does not apply to such orders passed by a Collector.—12 Al. 564.

*Held* that effect cannot be given to the rules prescribed by the Local Government under sec. 320 of Act X of 1877, unless an order for sale has been made on or after the 1st October 1880.—4 Al. 116.

*Held* that a decree for the sale of ancestral land, or of an interest in such land, in enforcement of an hypothecation on such land, is a "decree for money" within the meaning of the rules prescribed by the Local Government under sec. 320 of Act X of 1877.—4 Al. 115.

Orders passed by a Collector in the exercise of the powers conferred on him under sec. 320 and the following secs. of the Civil Procedure Code, relating to the execution of a decree of a Civil Court, after transfer of the decree to him under sec. 320, are not appealable to the High Court, *Held*, therefore, that the order of a Collector, disallowing an application by the judgment-debtor that the amount of the decree might be satisfied by the temporary transfer of his immoveable property, and ordering the sale of such property, and the order of a Collector confirming a sale, were not appealable to the High Court.—5 Al. 314.

See I. L. R., 4 Al. 382 & 11 Al. 94, noted under sec. 311; 7 Bom. 332, noted under sec. 210; 9 Al. 43, noted under sec. 313.

Power of Collector when execution of decree is so transferred.

**321.** When the execution of a decree has been so transferred, the Collector may—

(a) proceed as the Court would proceed under section 305; or

(b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(c) sell the property ordered to be sold, or so much thereof as may be necessary.

**322.** When the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of contract specifically affecting the same, but being a decree for money in satisfaction of which to Court has ordered the sale of immoveable property has been so transferred, the Collector, if, after such enquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafte provided.

Procedure of Collector when execution of decree is so transferred

Notice to be given to decree-holders and to persons having claims on property.

**322A.** In the case mentioned in section 322, the Collector shall publish a notice calling upon—

(a) every person holding a decree for money against the judgment-debtor capable of execution by sale of his immoveable property, and which such decree-holder desires to have so executed, and every holder of a decree for money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;

(b) every person having any claim on the said property, to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

Such notice shall be in the language of the district, and shall allow a period of sixty days from the date of its publication for compliance therewith. It shall be published by being posted in the Court-house of the Court which made the original order under sec. 304, and at such other places (if any) as the Collector thinks fit. Where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

**322B.** Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such enquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, and may, from time to time, adjourn such hearing and enquiry.

Amount of money-decrees to be ascertained and immoveable property available for their satisfaction.

If there be no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied and the immoveable property available for that purpose.

If any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order under sec. 304, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof be within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector. The Collector shall then draw up a statement as above provided in accordance with such decision.

#### Notes.

An appeal from the decision of a dispute under sec. 322B falls directly within the exception of art. 11, sch. ii of the Court Fees Act (VII of 1870), and the memorandum of appeal should therefore be presented as for a decree in a suit, upon an *ad valorem* stamp. *Srinivasa Ayangar v. Peria Tambi Nayakar* dissented from.—I. L. R., 7 Al. 565.

See I. L. R., 11 Al. 94, noted under sec. 311.

**322C.** The Collector may, instead of himself issuing the notices and holding the enquiry required by sections 322A and 322B, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notice, hold the inquiry, and draw up the statement required by sections 322A and 322B and transmit such statement to the Collector.

**Note.**—See I. L. R., 11 Al. 94, noted under sec. 311.

**322D.** The decision by the Court of any dispute arising under section 322B or section 322C shall, as between the parties thereto, have the force of, and be appealable as, a decree.

**Note.**—See I. L. R., 11 Al. 94, noted under sec. 311.



**323.** Whenever the amount to be recovered and the property available have been determined as provided in section 322B or 322C, the Collector may—

Scheme for liquidation of money-decrees.

(1) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property ; or if it appears that the amount with interest (if any) in accordance with the decree and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale ;

(2) raise such amount and interest (notwithstanding any order under section 304)—

(a) by letting in perpetuity or for a term, on payment of premium, the whole or any part of the said property ; or

(b) by mortgaging the whole or any part of such property ; or

(c) by selling part of such property ; or

(d) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or

(e) partly by one of such modes, and partly by another or others of such modes.

(3) For the purpose of managing, under this section, the whole or any part of such property, the Collector may exercise all the powers of its owner.

For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable, or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let, or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this paragraph, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

In proceeding under paragraphs (2), (3), and (4) of this section, the Collector shall be subject to such rules, consistent with this Act, as may, from time to time, be made in this behalf by the Chief Controlling Revenue Authority.

**324.** If, on the expiration of the letting or management under section 323, the amount to be recovered has not been realised, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks of the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and if, on the expiration of the said six weeks, the said balance is not so paid the Collector shall sell such property or part accordingly.

**324A.** The Collector shall, from time to time, render to the Court which made the original order under section 304 an account of all moneys which come to his hands, and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this chapter, and shall hold the balance at the disposal of the Court.

Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and (if the Collector so directs) the expenses of witnesses summoned by him.

Such balance shall be applied by the Court as follows:—

*firstly*, in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

*secondly*, where the Collector has proceeded under section 321, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 295 direct; or

*thirdly*, where the Collector has proceeded under section 322, in keeping down the interest on incumbrances on the property, and (when the judgment-debtor has no other

sufficient means of subsistence) in providing for his subsistence to such amount as the Court thinks fit; and in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered;

and no other holder of a decree for money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied;

and the residue (if any) shall be paid to the judgment-debtor or such other person (if any) as the Court directs.

**325.** When the Collector sells any property under this chapter, he shall put it up to public auction, in one or more lots as he thinks fit, and may—

Sales how to be conducted.

(a) fix a reasonable reserved price for each lot;

(b) adjourn the sale for a reasonable time, whenever he deems the adjournment necessary for the purpose of obtaining a fair price for the property, recording his reasons for such adjournment;

(c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

**Note.**—See I. L. R., 11 Bom. 478, noted under sec. 320.

**325A.** So long as the Collector can exercise or perform in respect of the judgment-debtors' immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by sections 322 to 325 (both inclusive,) the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease, or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for money.

Restrictions as to alienation by judgment-debtor or his representative, and prosecution of remedies by decree-holders.

During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under section 323.

The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree

affected by the provisions of this section in respect of any remedy of which the decree-holder has thereby been temporarily deprived.

**325B.** When the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by sections 321 to 325 (both inclusive) shall, from time to time, be exercised and performed by such one of the Collectors of the said districts as the Local Government may, by general rule or special order, direct.

**325C.** In exercising the powers conferred on him by sections 322 to 325 (both inclusive), the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

**326.** When, in any local area in which no declaration under section 320 is in force, the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree may be made within a reasonable period by a temporary alienation or management of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him, instead of proceeding to a sale of the land or share. In such case the provisions of sections 320, paragraph two, to 325C (both inclusive), shall apply, as far as they are applicable.

#### Notes.

Sec. 244 of Act VIII of 1859 admits only of a temporary alienation of land, and not of an arrangement by which possession is left with the judgment-debtor subject to a payment by yearly instalments.—2 N.-W. P. H. C. R., 347.

Where a Collector recommended that the lands of a judgment-debtor should be exempted from auction-sale, and that the judgment-debt should be satisfied by money-instalments extending over a period of twelve years, and the Judge, on the matter being referred to the Civil Courts for sanction and approval, in sending the proceedings to the Munsif, intimated that the arrangement was a proper one, and the Munsif in his order referred to this opinion of the Judge, *held* that the recommendation of the Collector should have been dealt with by the Court executing the decree in the exercise of its own judgment, and not in deference to the opinion expressed by the Judge, who exceeded his jurisdiction in interfering in the matter. The arrangement proposed by the Collector was not one which could be

proposed or accepted under the terms of sec. 244 of the Civil Procedure Code.—6 N.-W. P. H. C. R., 39.

Act X of 1877, sec. 326, does not apply to a decree which directs the sale of land or of a share in land in pursuance of a contract specifically affecting the same. The Court, therefore, cannot authorize the Collector to stay the sale in such a case under sec. 326.—I. L. R., 2 Al. 856.

Where the Collector has applied to the Court under sec. 326 of the Civil Procedure Code, proposing a scheme for the payment of decretal money in order to avoid a sale of attached property, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner proposed; and the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme, and any evidence that may be offered in support of those objections; and if, after hearing the decree-holder's objections, and the evidence which may be offered in support of them, the Court is not fully satisfied that the proposal is feasible, or that it can, in all reasonable probability, be carried out within the specified period, the Court ought, in the exercise of its discretion, to refuse its sanction.—9 Cal. 290.

**327.** The Local Government may, from time to time,

Local rules as to sales of land in execution of decrees for money.

with the sanction of the Governor-General in Council, make special rules for any local area, imposing conditions

in respect of sale of any class of interests in land in execution of decrees for money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government to make it impossible to fix their value;

and if, when this Code comes into operation in any local area, any special rules as to sale of land in execution of decrees are in force therein, the Local Government may continue such rules in force, or may, from time to time, with the sanction of the Governor-General in Council, modify the same.

All rules so made or continued, and all such modifications of the same, shall be published in the local official Gazette, and shall thereupon have the force of law.

*H.—Of Resistance to Execution.*

**328.** If, in the execution of a decree for the possession

Procedure in case of obstruction to execution of decree.

of property, the officer charged with the execution of the warrant is resisted or obstructed by any person, the decree-holder may complain to the Court at any time within one month from the time of such resistance or obstruction.

The Court shall fix a day for investigating the complaint, and shall summon the party against whom the complaint is made to answer the same.

This section applies to Provincial Small Cause Courts (so far as relates to moveable property).

The word "month" in sec. 230 of the Code of Civil Procedure means a month according to the English calendar. An applicant under that section has a clear calendar month, exclusive of the day of dispossession within which to prefer his application.—5 Bom. H. C. R., (A. C.) 39.

The Court could not be put in motion under sec. 226 of the Code of Civil Procedure without an application from the decree-holder under that section.—19 W. R., 62.

In order to bring a case under secs. 226 and 227 of the Civil Procedure Code, 1859, it was necessary to show that obstruction had been offered arising from the circumstance that lands had been taken which were not included in the decree.—8 W. R., 398.

Where a warrant for possession of land in execution of a decree was not executed owing to the resistance of the judgment-debtors in September 1880, and no complaint was made under sec. 328 of the Code of Civil Procedure, 1877, but a fresh warrant for possession was applied for by and granted to the decree-holders, and resistance was again made in January 1881, held that a complaint by the decree-holders as to the second obstruction made within thirty days of the second obstruction was not barred by reason of art. 167 of sch. ii of the Limitation Act.—I. L. R., 5 Madr. 113.

Section 328 of the Civil Procedure Code (Act XIV of 1882) does not make it obligatory on a decree-holder, who is obstructed in execution of the decree, to pursue his remedies under that section. Accordingly the failure on the part of the plaintiff to avail himself of the remedy under that section did not prevent him from proceeding against the defendant by a regular suit.—8 Bom. 602.

See I. L. R., 8 Bom. 481, noted under sec. 334.

**329.** If the Court is satisfied that the obstruction or resistance was occasioned by the judgment-debtor, or by some person at his instigation, the Court shall inquire into the matter of the complaint, and pass such order as it thinks fit.

Procedure in case of obstruction by judgment-debtor or at his instigation.

#### Notes.

This section applies to Provincial Small Cause Courts (so far as relates to moveable property).

The power given by sec. 329 of the Civil Procedure Code to make such order as the Court shall see fit must be construed with regard to the circumstances in respect of which the power is to be exercised. An order under sec. 329 should be the result of the fact that the defendant in the suit, who is precluded by the decree from disputing plaintiff's right, unjustly instigates a third party who has no real interest in the property, to prevent the plaintiff from getting the benefit of his execution. A Court has no power under this section to determine, as between the judgment-creditor and a third party obstructing the execution of the decree, important questions on the merits which are wholly unconnected with, and cannot be affected by, the fact that the obstruction is made at the instigation of the defendant.—I. L. R., 3 Madr. 81.



**330.** If the Court is satisfied that the resistance or obstruction was without any just cause, and that the complainant is still resisted or obstructed in obtaining possession of the property by the judgment-debtor or some other person at his instigation, the Court may, at the instance of the decree-holder and without prejudice to any penalty to which such judgment-debtor or other person may be liable under the Indian Penal Code or any other law for such resistance or obstruction, commit the judgment-debtor or such other person to jail for a term which may extend to thirty days, and direct that the decree-holder be put into the possession of the property.

Procedure when obstruction continues.

**Note.**

This section applies to Provincial Small Cause Courts (so far as relates to moveable property).

**331.** If the resistance or obstruction has been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the claim shall be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant;

Procedure in case of obstruction by claimant in good faith, other than judgment-debtor.

and the Court shall, without prejudice to any proceedings to which the claimant may be liable under the Indian Penal Code or any other law for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V.,

and shall pass such order as it thinks fit for executing or staying execution of the decree.

Every such order shall have the same force as a decree, and shall be subject to the same conditions as to appeal or otherwise.

**Notes.**

This section applies to Provincial Small Cause Courts (so far as relates to moveable property).

*Held per JACKSON, J.*—That as the decree-holder had not complained that the officer of the Court had been obstructed or resisted by the claimant, the case did not fall within sec. 229 of Act VIII of 1859; and, therefore, the Court had not jurisdiction to take summary cognizance of the case. *Per MITTER, J.*—This objection, taken for the first time on special appeal, did not affect the merits of the case or the jurisdiction of the Court.—1 B. L. R., (A. C.) 206.

The provisions of sec. 229 of the Code of Civil Procedure are not applicable to the case of a person put in possession of land under a decree in the manner prescribed by sec. 224 of the same Code.—1 N.-W. P. H. C. R., 134; Ed. 1873, 218.

In claims arising under sec. 229 of Act VIII of 1859, there was nothing to prevent the "claimants" from questioning the legality of the decree obtained by the decree-holder against the judgment-debtor.—4 N.-W. P. H. C. R., 81.

Possession by receipt and enjoyment of rent is as good in law as actual occupation, and sec. 230, Act VIII. of 1859, was not restricted to cases of personal occupation.—15 W. R., 70.

When an application is made by a party on the ground that he was in possession, and that he has been dispossessed in execution of a decree in a suit in which he was not a party, the proper order to be made under sec. 230, Act VIII. of 1859, is in the first instance to examine the applicant.—16 W. R., 288.

The plaintiff being the holder of a decree of a Subordinate Court for more Rs. 5,000 was obstructed in execution by the present defendants. He applied to the Court for the removal of the obstruction, the property, which was the subject of the application, being valued at less than Rs. 5,000 and the Subordinate Judge directed that the application be registered as a regular suit under Civil Procedure Code, sec. 331, and ultimately passed a decree in favor of the plaintiff:—*Held*, that the appeal against this decree did not lie to the High Court.—I. L. R., 13 Madr. 520.

The investigation of claims under sec. 331 of the Code of Civil Procedure (Act XIV of 1882) is not limited to the fact of possession. Any question of title arising between the contending parties in connection with their right of possession may be finally determined in such investigation as in an ordinary action of ejectment. A obtained a decree in the Court of a First Class Subordinate Judge for possession of property worth more than Rs. 5,000. In executing this decree against a portion of the property awarded, which was worth Rs. 420, A was resisted by B, who claimed to hold the property under a title adverse to the judgment-debtors. B's claim was thereupon numbered and registered as a suit under sec. 331 of the Code of Civil Procedure (Act XIV of 1882). The First Class Subordinate Judge, who investigated the claim, ordered B's obstruction to be removed and the property to be put into A's possession. B appealed against this order. *Held*, that the appeal lay to the District Judge under Act XIV of 1869, the subject-matter of the claim being less than Rs. 5,000.—14 Bom. 627.

A Court executing a decree obtains, by virtue of sec. 331 a special jurisdiction which enables it to try a claim, of which the value of the subject-matter falls below the pecuniary limit of its ordinary jurisdiction. By virtue of sec. 647 a superior Court may, for sufficient cause, transfer a claim registered under sec. 331, to a Subordinate Court for trial.—8 Madr. 548.

An application in furtherance of execution of a decree for possession against a person who resists execution, claiming the property as his own, is an application within sec. 331 of the Civil Procedure Code, and should be treated as a plaint.—14 Cal. 234.

Appeals from orders under sec. 331 of Act X of 1877, as amended by sec. 52 of Act XII of 1879, are chargeable with the same court-fee as is required in the case of appeals from decrees.—8 Cal 720.

An investigation under sec. 331 of the Civil Procedure Code (prior to

the Amendment Act of 1879) is limited to the fact of possession, and is no bar to a subsequent suit brought to try the title to the land in dispute.—3 Madr. 104.

The plaintiff obtained a decree against T, A, and J in a suit, the subject-matter of which exceeded Rs. 5,000, and, in part-execution thereof, attached property worth less than that amount. D having resisted the execution of the decree, the plaintiff's claim was numbered and registered as a suit under sec. 229 of Act VIII of 1859. Upon investigation the First Class Subordinate Judge made an order staying execution of the decree. The plaintiff appealed to the District Judge, who *held* that no appeal lay to him, as the subject-matter of the original suit, out of which the execution-suit arose, exceeded Rs. 5,000. The plaintiff appealed against this decision to the High Court. *Held* that the investigation of a claim under sec. 229 of Act VIII of 1859 is not to be regarded as a fresh suit, but is merely a continuation of the original suit, and that there was, therefore, no appeal against the order in question to the District Judge.—4 Bom. 123.

In a suit under sec. 229 of Act VIII of 1859 (sec. 331 of Acts X of 1877 and XIV of 1882), the *onus* is on the plaintiff to establish a *prima facie* case of possession, and it is then incumbent on the claimant to answer that case and show, if possible, a better title.—10 Cal. 50.

See I. L. R., 3 Madr. 81, noted under sec. 329 ; 8 Bom. 602, noted under sec. 328 ; 10 Al. 411 and 14 Al. 417, noted under sec. 13.

### 332. If any person other than the judgment-debtor

Procedure in case of person dispossessed of property disputing right of decree-holder to be put into possession.

dispossessed of any property in execution of a decree, and such person disputes the right of the decree-holder to dispossess him of such property under the decree, on the ground that the property was *bona fide* in his possession on his own account or on account of some person other than the judgment-debtor, and that it was not comprised in the decree, or that, if it was comprised in the decree, he was not a party to the suit in which the decree was passed, he may apply to the Court.

If, after examining the applicant, it appears to the Court that there is probable cause for making the application, the Court shall proceed to investigate the matter in dispute ; and, if it finds that the ground mentioned in the first paragraph of this section exists, it shall make an order that the applicant recover possession of the property, and, if it does not find as aforesaid, it shall dismiss the application.

In hearing applications under this section, the Court shall confine itself to the grounds of dispute above specified.

The party against whom an order is passed under this section may institute a suit to establish the right which he claims to the present possession of the property ; but, subject to the result of such suit (if any), the order shall be final.

**Notes.**

This section applies to Provincial Small Cause Courts (so far as relates to moveable property).

In a suit by A against B for recovery of ancestral jamma lands, of which he alleged that he had been dispossessed by B, B stated in his written statement that A's ancestor having relinquished the land the zemindar had leased the same to him, B, and he had been in possession since. He also stated how A's ancestor relinquished, and that he, B, had thereupon obtained a patta. He denied that he had dispossessed. *Held* that, B having admitted the possession of A's ancestor, it lay upon B to prove his title. *Per* MACPHERSON, J.—The opinion of the Full Bench in *Pulin Behari Sen v. Watson* (B. L. R., Sup. Vol., 904) was that, if a party makes a qualified statement, that statement cannot be used against him apart from the qualification; not that, if a man makes a series of independent unqualified statements, those statements cannot be used against him. That case goes no further than to lay down that an unfair use is not to be made of a man's written statement by trying to convert into an admission by him that which he never intended to be an admission.—1. B. L. R., (A. C.) 133; 10 W. R., 190.

In a suit to recover possession of certain property, on proof that the plaintiff had been dispossessed by a benamidar, in whose favour a conveyance had been executed by the plaintiff's father, *held* that the presumption arising from the defendant's recent and unexplained possession being rebutted by the plaintiff's prior, continuous, and peaceful possession, the defendant must shew affirmatively that his title was a valid one, and could not raise the defence that the plaintiff was prevented from showing it to be invalid.—2 B. L. R., (A. C.) 274; 11 W. R., 185.

Whether or not an appeal lies from the decision of a lower Court, rejecting an application by a party other than a defendant, under sec. 230 of Act VIII of 1859, disputing the right of the decree-holder to dispossess him, the High Court may, under the 15th section of the Charter, compel the lower Court to exercise its jurisdiction. *Golucknarain Dutt v. Bistooprea Dossee* (1 W. R., 140) referred to and questioned. Planting a bamboo, and making proclamation to the occupants of an estate that it has been adjudged to some other, is sufficient dispossession of a landlord to warrant him in applying to the Court under sec. 230.—2 B. L. R., (A. C.) 301

One share-holder, being dispossessed by the other of a certain jalkar in execution of his decree, brought a suit under sec. 230, Act VIII of 1859, alleging that the jalkar had been a part of their joint mehal, and that, on partition thereof, the jalkar was left ijmal. The decree-holder set up that the jalkar had been formed after the partition, and by diluvion of one of his own villages. *Held* that the *onus* was upon the claimant to prove his case.—3 B. L. R., Ap. 90; S. C., 12 W. R., 16.

In a suit to recover possession of land and wasilat under a gantijamma, which had originally belonged to the defendants, the main question was as to 10 katas, of which possession by receipt of rent only was claimed from the defendants, whose dwelling-house was thereon. The defendants alleged that the 10 katas were not included in the ganti jamma under which plaintiffs claimed. *Held* that the *onus* was on the plaintiffs to prove that the 10 katas were included in the ganti jamma under which they claimed. It was not on the defendants to show the extent of that tenure while it was in their possession and when it was transferred to the plaintiffs, although the fact was one peculiarly within their knowledge.—3 B. L. R., (A. C.) 161; 11 W. R., 501.

A had been dispossessed of certain land in execution of a decree, which B had obtained in a suit against C, under sec. 15, Act XIV. of 1859. A applied under sec. 230, Act VIII. of 1859, to recover the land. *Held* the decree obtained by B was a decree within the meaning of sec. 230 of Act VIII of 1859, and, therefore, A had rightly applied under that section. No stamp was necessary on A's application.—4 B. L. R., (F. B ) 94.

The plaintiffs were in possession of certain immoveable property, when the Joint-Magistrate, under sec 319 of the Criminal Procedure Code, placed the 1st defendant in possession until the rights of the parties should be determined by a competent Civil Court. *Held*, in a suit to recover possession of the property instituted more than six months after the plaintiffs were dispossessed, that the plaintiffs could not recover without showing title.—4 M. H. C. R., 478; 7 W. R., 212; 17 W. R., 181.

Where an application was made to the Civil Court under sec. 230 of the Civil Procedure Code by the petitioner disputing the right of a decreed holder to dispossess him of certain immoveable property, and the Civil Judge rejected the application, *held* that sec 231 of the Civil Procedure Code did not give the petitioner a right of appeal to the High Court.—5 M. H. C. R., 183.

In a suit to prevent the defendants from obstructing the plaintiff in his enjoyment of the fruits of certain trees which he claimed as heir of a person who purchased that right, the defendants denied the existence of the right, and alleged possession and enjoyment in themselves. *Held* that the District Judge in appeal, having found the possession and enjoyment to be in the defendants, was right in throwing upon the plaintiff the burden of proving his title to the trees or their produce. Rule of evidence with reference to ancient documents stated.—4 Bom. H. C. R. (A. C.) 60.

A donee, under a deed of gift, brought a suit to recover a piece of land which he alleged his donors had given for a temporary purpose to the defendant in possession six years before, and the Munsif found that it was so, and allowed the claim. But the District Judge, on appeal, considering that the plaintiff had failed to prove his donors' title to the land, reversed the Munsif's decree. *Held* that the Judge was in error in requiring the plaintiff to establish the title of the donors, without inquiring whether the defendant had obtained possession merely by their permission; and that the suit must be remanded for a finding by the District Judge on that point.—4 Bom. H. C. R., (A. C.) 70.

On the 28th August 1857, the plaintiff passed a kabuliat to Government, and took possession of certain miras land, abandoned by the mirasdar for four or five years previous to that date. The plaintiff continued in possession of his land, and paid the Government assessment from 1864 till 1872. In an action brought by the plaintiff to recover possession of the land, he alleged in the plaint that he had taken the defendants as partners in the cultivation of the land, and had been dispossessed by them. Both the lower Courts rejected the claim. The lower Appellate Court based its decision on the ground that, as the plaintiff failed to prove the fact of his alleged partnership with the defendants, he could not succeed, notwithstanding that Court found in the plaintiff's favour the other facts stated above. *Held* in special appeal that, as the suit was one to establish title and recover possession, the Judge should, on the facts found, and having regard to Reg. XVII of 1827, sec. 7, cls. 1 and 2, and Bom. Act I of 1865, have called upon the defendants to prove their claim to hold possession as against the plaintiff's right of occupation.—12 Bom. H. C. R., (A. C.) 144.

Where a person is alleged to be in possession, not as owner of the full proprietary right, but as mortgagee, the burden of proof of such qualified ownership lies on the party asserting it. Such a case falls within the scope of sec. 110, Act I of 1872.—6 N.-W. P. H. C. R., 26.

A, being in possession of lands, as purchaser under deeds of sale from B, the person last seized, was forcibly ousted from possession by C and D, who set up a title to the lands under an alleged deed of gift from B. A made a complaint to the Criminal Court, and under an order of that Court was again put into possession; C and D being directed to institute a suit in the Civil Court to establish their claim, which they accordingly did, relying upon their title, and impeaching deeds of sale. In such circumstances, *held* by the Judicial Committee, reversing the decree of the Court at Calcutta (without prejudice, however, to any question which might arise between A and any other party claiming under B), that it was incumbent on C and D to prove some title to the lands claimed before they could put A to proof of his title.—4 Moore's I. A. 233.

Suit by A to recover immoveable property in the possession of B and his predecessors, whose title had been unchallenged for forty-four years, on the ground that the estate was mortgaged only by A's ancestors, and that B and those claiming under him were only usufructuary mortgagees in possession. *Held* that the *onus probandi* was on A, who could only succeed by the strength of his own title, and not by reason of the weakness of B's title.—10 Moore's I. A., 151.

A person claiming under Act X of 1877, sec. 332, need not prove his title, but only the fact of possession.—I. L. R., 2 Al. 94.

A mortgagee who is in possession of the mortgaged property under the mortgage is in possession "on his own account" within the meaning of Act VIII of 1859, sec. 230, and Act X of 1877, sec. 332.—2 Al. 94.

Where, in pursuance of an order made in the execution of a decree while Act VIII of 1859 was in force, certain persons were dispossessed of certain property after that Act was repealed and Act X of 1877 came into force, and such persons applied under Act X of 1877, sec. 332, to be restored to the possession of such property on certain of the grounds specified in that section. *Held* that such persons were entitled to the benefit of that section.—2 Al. 94.

When a person making a claim to certain property under sec. 230 of Act VIII of 1859 has been allowed to bring a suit under that section to try his right to the property, it is sufficient, in the first instance, for him to prove his possession, without proof of his title; but if he takes this course, it is open to the defendant to show that, although possession may be in the plaintiff, yet he has no good title to the property, and that he (the defendant) has a better title.—5 Cal. 278.

See I. L. R., 3 Madr. 104, noted under sec. 331; 12 Madr. 211, noted under sec. 234.

**333.** Nothing in section 331 or 332 applies to a person to whom the judgment-debtor has transferred the property after the institution of the suit in

Transfer of property by judgment-debtor after institution of suit.

**Note.**

This section applies to Provincial Small Cause Courts (so far as relates to moveable property).



**334.** If the purchaser of any immoveable property sold in execution of a decree be resisted or obstructed by the judgment-debtor or any one on his behalf in obtaining possession of the property, the provisions of this chapter relating to resistance or obstruction to a decree-holder in obtaining possession of the property adjudged to him shall be applicable.

Resisting or obstructing purchaser in obtaining possession of immoveable property.

#### Notes.

A purchaser of immoveable property at a Court-sale, having been obstructed by the defendant, made an application to the Court, under sec. 268 of Act VIII of 1859, for the removal of the obstruction, but subsequently withdrew his application. The Court thereupon made an endorsement upon the application to the effect that, as the applicant did not wish to proceed further, no investigation was made. *Held* that no such order had been made as was contemplated by sec. 269 of Act VIII of 1859, that section contemplating, at least an order against one party or the other; and that, therefore, the provisions contained in the same section, as to the time within which a suit must be brought, did not apply to the case of the plaintiff.—I. L. R., 5 Bom. 440.

D, the father of the defendants, by a mortgage dated October, 1869, mortgaged a house together with other property to B, the father of the plaintiff. B sued D upon the mortgage, and obtained a decree directing the sale of the mortgaged property. The execution sale took place in July 1877, and the plaintiff (the mortgagee's son) became the purchaser of the house. On attempting to take possession he was resisted by the defendants (sons of the mortgagor), who alleged the house to be ancestral property, and denied the plaintiff's right to more than the third share to which the father had been entitled. *Held* by the High Court, on appeal, upon the authority of *Girdharilal v. Kantoo Lal*, as explained in *Suraj Bunssee Koer v. Sheo Prasad*, that the shares of the defendants were validly bound by their father's mortgage, as it had been found by the lower Court that the debt, in respect of which the mortgage had been executed, had not been contracted by their father for improper or immoral purposes; but that as the purchaser at the execution sale (the plaintiff) was the mortgagee's son, the question arose whether he could be held to be a stranger to his father's suit on the mortgage, and, as such, not bound to go behind the decree and make inquiry as to whether the debt had been improperly incurred. This would depend on the circumstances under which he and his father were living and the relation existing between them. The case was, accordingly remanded for a determination of the question whether the plaintiff was a stranger to his father's suit. *Held* that the defendants, not being joint with their father at the date of the suit, were not represented by him, and would be entitled to redeem, but only on condition, if the plaintiff insisted on it, of their redeeming the whole of the house. Unless the mortgage-deed expressly provided for the redemption of the sons' interests on payment of a proportionate part of the debt, the mortgage should be treated as one and entire; the father's authority, according to *Girdharilal's* case, being to apply or charge the whole property to or with the payment of his debts not improperly incurred. Where a decree passed in a suit upon a mortgage directs the mortgaged property to be sold, the decision

in *Deendyal's* case, which limited the "right, title and interest" which passed under the auction sale to the father's share, does not apply.—8 Bom. 481.

**335.** If the purchaser of any such property is resisted or obstructed by any person other than the judgment-debtor claiming in good faith a right to the present possession thereof, or if, in delivering possession thereof, any such person is dispossessed, the Court, on the complaint of the purchaser or the person so dispossessed, shall inquire into the matter of the resistance, obstruction, or dispossession, as the case may be, and pass such order thereon as it thinks fit.

The party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property ; but, subject to the result of such suit (if any), the order shall be final.

#### Notes.

Where a review of judgment was applied for on the ground of the subsequent publication of the report of a High Court decision on a point of law which governed the case, but which had not been urged at the previous hearing, it was considered that the applicant was not to blame for his omission to bring the decision to the notice of the Court at the first hearing, and the application for review of judgment was granted. A sued for possession of certain shops belonging to a Malabar tarwad, which had been attached in execution of a personal decree passed against a karnavan in a suit on a private debt. In the execution proceedings, an objection petition was put in, stating that the shops were sridhanam and was rejected ; and the order of rejection was not appealed against for one year. Respondents Nos. 1 to 4, the husbands of the persons who put in the objection petition, were in possession, and were now sued for possession. The plaintiff was assignee of the purchaser at the execution sale. *Held*, that upon the facts found the plaintiff acquired nothing under the Court-sale. *Per cur.*—An order rejecting a claim-petition under sec. 335 of the Civil Procedure Code, not being appealed against within one year, acquires the force of a decree. *Velayuthan v. Lakshmana* (I. L. R., 8 Madr. 506,) followed.—I. L. R., 10 Madr. 357.

When the defendant is in possession by virtue of an order under sec. 269 Act VIII of 1859, the plaintiff can only succeed on the strength of his own title. K and R, two out of five undivided Hindu brothers, sued V (a purchaser at an execution-sale of the interest of one of the brothers other than K and R) for the recovery of certain land of which V had obtained possession under sec. 269 of Act VIII of 1859. The lower Courts awarded two-fifths of the land to K and R as being the amount of their share in the land. *Held* by the High Court that the decree could not be maintained, as K and R, being two of several co-parceners in undivided property, could not say that they were entitled to a specific share in any portion of that property. They might have sued for general partition, or for a decree declaring them entitled to joint possession with V. *Babaji v. Vasudeo* (I. L. R., 1 Bom. 95) followed. A purchaser at a Court's sale ought not to be put

in exclusive possession of the whole undivided land by virtue of a decree against one co-parcener only.—2 Bom. 676.

An order under sec. 335 of the Civil Procedure Code is subject to revision by the High Court under sec. 622 of that Code. *Shiva Nathaji v. Joma Kashinath* (I. L. R., 7 Bom. 340) followed.—6 Al. 172.

See I. L. R., 10 Madr. 53, noted under sec. 318.

*I.—Of Arrest and Imprisonment.*

**336.** A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his imprisonment may be in the civil jail of the district in which the Court ordering the imprisonment is situate, or, when such jail does not afford suitable accommodation, in any other place which the Local Government may appoint for the confinement of persons ordered by the Courts of such district to be imprisoned :—

Provided as follows :—

(a) for the purpose of making an arrest under this section, no dwelling house shall be entered after sunset or before sunrise, and no outer door of a dwelling-house shall be broken open. But, when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may unfasten and open the door of any room in which he has reason to believe the judgment-debtor is to be found: Provided that, if, the room be in the actual occupancy of a woman who is not the judgment-debtor, and who, according to the customs of the country, does not appear in public, the officer shall give notice to her that she is at liberty to withdraw; and, after allowing a reasonable time for her to withdraw, and giving her every reasonable facility for withdrawing, he may enter such room for the purpose of making the arrest:

when the decree in execution of which a judgment-debtor is arrested is a decree for money, and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

The Local Government may, by notification published in the official Gazette, direct that, whenever a judgment-debtor is arrested in execution of a decree for money, and brought before the Court under this section, the Court shall inform him that he may apply under Chapter XX to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of his applica-

tion, and if he places all his property in possession of a receiver appointed by the Court.

If, after such publication, the judgment-debtor express his intention so to apply, and if he furnish sufficient security that he will appear when called upon, and that he will, within one month, apply under section 344 to be declared an insolvent, the Court shall release him from arrest:

But if he fails so to apply, the Court may either direct the security to be realized, or commit him to jail in execution of the decree.

In the case of a surety such security may be realized in manner provided by section 253.

#### Notes.

This section applies to Provincial Small Cause Courts.

A person, who has taken the benefit of the insolvent sections of the Civil Procedure Code, and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree, merely because his property is in the hands of the Receiver in insolvency. Such a person is liable to arrest under the circumstances and in accordance with the procedure provided for by the Civil Procedure Code Amendment Act (VII. of 1888).—I. L. R., 16 Cal. 85.

Married women, against whom personal decrees for debt have been made, are not exempt from arrest or imprisonment in execution of such decrees under the Code of Civil Procedure.—9 Madr. 99.

A Sheriff's officer, of his own motion, delivered over to the officer in charge of the Alipore Jail a Judgment-debtor who had been duly committed to the Presidency Jail. *Held*, that the imprisonment was unlawful; that the delivery over to the officer in charge of the Alipore Jail amounted to a release; and that the prisoner was entitled, therefore, to be discharged.—11 Cal. 527.

A judgment-debtor arrested in execution of a decree for money, who has not, on his committal to jail expressed his intention of applying to be declared an insolvent under Chapter XX of the Code of Civil Procedure, is nevertheless entitled during his imprisonment to make an application for that purpose; and the Court may, under sec. 349, pending the hearing of such application, release him on his finding security to appear when called upon. The word "arrest" in sec. 349 should be read as meaning "under detention" or "detained in custody." In deciding whether or not a payment made to a particular creditor amounts to an unfair preference within the meaning of section 351 of the Code, the Courts may fairly (where there is no other reason for impeaching the transaction as an unfair preference apart from the provisions of the Insolvent Act) refer to, and be guided by, the provisions of the Insolvent Act, which treats a transaction as an unfair preference only when it has occurred within a limited time before the insolvency proceedings. Where the Legislature has provided two methods by which a debtor can obtain protection from arrest or other serious consequences, and if one of those methods, in any particular case, turns out to be more favourable to the debtor than the other, the Courts will not deprive him of that advantage.—11 Cal. 451.

Secs. 336 and 349 of the Code of Civil Procedure, 1882, are applicable to judgment debtors under arrest, but not committed to jail. A judgment-debtor committed to jail can only be discharged under sec. 341—8 Madr. 503.

A judgment-debtor, having been arrested in execution of a decree of the High Court in its Original Civil Jurisdiction, and brought before the Court under the provisions of sec. 336 of the Code of Civil Procedure, claimed to be discharged on the ground that he intended to apply to the Court to be declared an insolvent either under the provisions of ch. XX of the Code or of 11 & 12 Vic., c. 21. *Held* that the judgment-debtor, on expressing his intention to file a petition and schedule under 11 & 12 Vic., c. 21, and complying with the conditions of sec. 336 of the Code of Civil Procedure, was entitled to be discharged.—8 Madr. 276.

S, on the 16th January 1886, obtained a decree for a certain sum of money against C. In execution of that decree C was arrested on the 28th January, and upon his being brought before the Court he expressed his intention of applying to be declared an insolvent under the provisions of Chapter XX of the Code of Civil Procedure, and he was thereupon released upon furnishing security under the provisions of sec. 336 of the Code. K became surety for C, and executed a bond undertaking to produce C at any time when the Court should direct him so to do, and in default of so producing him to pay the amount of the decree, and standing security for C's applying to be declared insolvent. On the 19th February C filed his petition to be declared an insolvent before the District Judge under sec. 344 of the Code, and on the 14th May 1886 his petition was dismissed owing to his non-appearance. S thereupon applied for execution of the decree against K. *Held* that K was released from his obligation under the bond executed.—15 Cal. 171.

The liability of a surety under sec. 336 of the Civil Procedure Code ceases when the proceeding taken in execution of a decree wherein the security was furnished comes to an end. D, a judgment-debtor, was committed to jail on the 8th of August 1884, and he applied under sec. 336 of the Civil Procedure Code to be released. On the 16th of November 1884, B and C stood security for him under the provisions of sec. 336 of the Civil Procedure Code, that he would appear when called on, and that he would, within one month, apply under sec. 344 to be declared an insolvent, and D was thereupon released. Instead of applying under sec. 344 to be declared an insolvent, he applied to have the decree, which had been obtained *ex parte*, set aside. This application was disallowed, and the decree-holder was directed to take further steps. On the 21st of February 1885, the application for execution of the decree was struck off. The decree-holder on the 20th of July made a fresh application to execute the decree against the sureties, unless they should produce the judgment-debtor in Court. *Held*, that the power reserved to the Court, under sec. 336 of the Civil Procedure Code, to realise the security in execution of the decree, could not be exercised when the execution-proceeding wherein the security was furnished was no longer in existence.—14 Cal. 757.

A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under sec. 336 of the Civil Procedure Code for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond when the judgment-debtor files his petition under sec. 344 to be declared insolvent. *Koylash Chandra Shaha v. Christophoridi* (1) approved.—13 Al. 100.

Act X of 1877, sec. 336, cl. 5, applies to Small Cause Court debtors, and such persons can obtain the benefit of chap. XX of that Act by applying to a Court which has jurisdiction under that chapter.—2 Madr. 9.

Warrant of arrest directed, notwithstanding previous proceedings in attachment, the Court being satisfied that the judgment-debtor was determined to evade, if possible, the payment of his debt.—7 Bom. 301.

See I. L. R., 7 Cal. 19, noted under sec. 271.

**337.** Every warrant for the arrest of the judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

**Note.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 16 Cal. 85, noted under section 336.

**337A.\*** (1) When a judgment-debtor appears before the Court in obedience to a notice issued under section 245B, or is brought before the Court after being arrested in execution of a decree for money, and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms, (if any) as it thinks fit, make an order disallowing the application for his arrest and imprisonment, or directing his release, as the case may be.

(2) Before making an order under sub-section (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely:—

(a) the decree being for a sum for which the judgment-debtor was bound as a trustee or as acting in any other fiduciary capacity to account ;

(b) the transfer, concealment, or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was made, or the commission by him after that date of any other act of bad faith in relation to his property with the object or effect of obstructing or delaying the decree-holder in the execution of the decree ;

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\* This section has been inserted by the Debtor's Act (VI of 1888), sec. 4.



(c) any undue or unreasonable preference given by the judgment-debtor to any of his other creditors ;

(d) his refusal or neglect to pay the amount of the decree or some part thereof when he has or since the date of the decree has had the means of paying it ;

(e) the likelihood of his absconding or leaving the jurisdiction of the Court with the object or effect mentioned in clause (b) of this sub-section.

(3) While any of the matters mentioned in sub-section (2) are being considered, the Court may in its discretion order the judgment-debtor to be imprisoned, or leave him in the custody of an officer of the Court, or release him on his furnishing sufficient security for his appearance on the requisition of the Court.

(4) A judgment-debtor released under this section may be re-arrested.

(5) If the court does not make such an order as his mentioned in sub-section (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested, and, subject to the other provisions of this Code, commit him to jail.

**Note.**—This section applies to Provincial Small Cause Courts.

**338.** The Local Government may, from time to time, prescribe scales, graduated according to rank, race, and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

**Note** —This section applies to Provincial Small Cause Courts.

**339.** No judgment-debtor shall be arrested in execution of a decree, unless and until the decree-holder pays into Court such sum as, having regard to the scales so fixed, the Judge thinks sufficient for the subsistence of the judgment-debtor from his arrest until he can be brought before the Court.

When a judgment-debtor is committed to jail in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the said scales, or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

The monthly allowance fixed by the Court shall be supplied by the party on whose application the decree has been executed by monthly payments in advance before the first day of each month.

The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to jail, and the subsequent payments (if any) shall be made to the officer in charge of the jail.

**Notes.**

This section applies to Provincial Small Cause Courts.

The monthly subsistence-money under sec. 276 of Act VIII. of 1859 must be paid in advance; therefore, where a debtor was arrested and subsistence-money paid for January, but no further deposit was made till 4th February, the prisoner was held entitled to his discharge.—Bourke's Rep., (O. C.) 51

Unless subsistence-money is paid before the commitment, the commitment is illegal. The jailor is bound by the words of the Act. It is for him, and not for the prisoner, to see that the money is paid.—Bourke's Rep., (O. C.) 421.

Where a defendant is arrested prior to decree under Act VIII. of 1859, sec. 78, and a decree is afterwards obtained against him in the suit, the plaintiff, if he wishes to detain the defendant in prison, must have him brought before the Court, and his subsistence-money fixed, in the same way as in the case of an arrest in execution of a decree; and, if he fails to do so, the defendant is entitled to his discharge from prison.—1 Ind. Jur., N. S., 327; S. C. Bourke's Rep., (O. C.) 423.

**340.** Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in jail shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in jail or arrested on account of any sum so disbursed.

**Note**—This section applies to Provincial Small Cause Courts.

**341.** The judgment-debtor shall be discharged from jail—

(a) on the amount mentioned in the warrant of committal being paid to the officer in charge of the jail; or

(b) on the decree being otherwise fully satisfied; or

(c) at the request of the person on whose application he has been imprisoned; or

(d) on such person omitting to pay the allowance as hereinbefore directed; or

(e) if the judgment-debtor be declared an insolvent, as hereinafter provided; or

(f) when the term of his imprisonment, as limited by section 342, is fulfilled:

Provided that, in the second, third, and fifth cases mentioned in this section, the Judgment-debtor shall not be discharged without the order of the Court.

A Judgment-debtor discharged under this section is not thereby discharged from his debt; but he cannot be re-arrested under the decree in execution of which he was imprisoned.

**Notes.**

This section applies to Provincial Small Cause Courts.

The discharge of a judgment-debtor before imprisonment on account of the non-payment of the subsistence-money for the debtor is no bar to the debtor being re-arrested.—I. L. R., 8 Madr. 21.

A judgment-debtor once arrested and imprisoned in execution of a decree cannot under the Code be again arrested under a fresh writ of attachment on the same decree.—12 Cal. 652.

In the execution of a decree payable by instalments, the judgment-debtor cannot be arrested and imprisoned separately for default in the payment of each instalment.—7 Bom. 106.

The decree in an administration-suit directed A, a party to the suit, to pay over a sum of money, which she admitted was in her hands, to her own attorney in the suit, to be applied by him as directed by the decree. A refused to pay over the money, and she was imprisoned for disobedience to the Court's order. After she had been in prison for six months, she applied to the Judge of the Court below, under Act X of 1877, sec. 341, to be discharged. This order was refused. *Held*, on appeal, that the proceeding under which A had been imprisoned was not in execution of a decree, but that she was imprisoned under process of contempt, and that the provisions of secs. 341 and 342 did not apply to the case.—4 Cal. 655.

Imprisonment not to exceed six months.

**342.** No person shall be imprisoned in execution of a decree for a longer period than six months;

or for a longer period than six weeks if the decree be for the payment of a sum of money not exceeding fifty rupees.

When not to exceed six-weeks.

**Notes.**

This section applies to Provincial Small Cause Courts.

The Court cannot fix any period for the imprisonment of a judgment-debtor under Civil Procedure Code, sec. 342.—I. L. R., 13 Madr. 141.

*Held* by a majority of the Full Bench (SARGENT and BAYLEY, JJ., dissenting) that a judgment-debtor, imprisoned in satisfaction of the decree against him under Act VIII of 1859, is not entitled, under Act X of 1877, to be released on the coming into operation of the latter Act, if he have then been imprisoned for more than six months but less than two years.—2 Bom. 148.

The defendant was arrested before judgment, and, on the 5th February 1883, committed to jail under sec. 481 of the Civil Procedure Code. On the 6th March following, a decree in the suit was passed against him. On the 28th July, the defendant being then still in jail under the order of the 5th February, the plaintiff took out a fresh warrant of arrest in execution of the decree, and sought to have the defendant further imprisoned for the full period of six months limited by sec. 342 of the Code. *Held* that the defendant could be re-committed to jail, in execution of the decree, only

for such a period as, together with the period of imprisonment that had elapsed since the passing of the decree, would complete a period of six months, and that, consequently, he would be entitled to be liberated on the 5th September 1883. Imprisonment under sec. 581 becomes, after decree, imprisonment in execution of the decree, and the imprisonment suffered after that date must consequently be taken into consideration in calculating the period of six months, which, by sec. 342 of the Code, is the limit allowed for an imprisonment in execution of a decree.—7 Bom. 431.

See I. L. R., 4 Cal. 655, noted under sec. 341.

**343.** The officer entrusted with the execution of the warrant shall endorse thereupon the day on, and the manner in, which it was executed, and, if the latest day specified in the warrant for the return thereof has been exceeded, the reason of the delay, or if it was not executed, the reason why it was not executed, and shall return the warrant with such endorsement to the Court.

If the endorsement is to the effect that such officer is unable to execute the warrant, the Court shall examine him on oath touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where a warrant issued by a Subordinate Court, directing the nazir to arrest a judgment-debtor, in execution of a decree, was entrusted by the nazir to a subordinate for execution by endorsing his name upon it, *held* that there is nothing in the Civil Procedure Code to prohibit a nazir from authorizing a deputy to execute a warrant of arrest for him, and that his endorsement must be regarded as *prima facie* evidence of the authority of the person to whom the warrant is delivered to execute it. *Held* that it is most desirable, when the nazirs of the Subordinate Courts delegate the duty of executing warrants of arrest, that they should confer the authority in more clear and explicit terms than are expressed by a mere indorsement, and that they should be careful in selecting proper persons to discharge that duty, bearing in mind, as far as circumstances permit, the position and caste of the party to be arrested, so as to avoid, through the medium of Court process, subjecting any such party to personal indignity or offence. Further, that it is important that the person chosen should be made acquainted with the contents of the warrant, in order that he may be able to inform the judgment-debtor at whose suit and for what amount he is being taken into custody. Where a warrant for the arrest of the judgment-debtor had been executed, and an indorsement thereon, professedly under sec. 343 of the Civil Procedure Code, was irregularly made by the naib nazir, he not having been "the officer entrusted with the execution of the warrant," *held* that such irregularity had not invalidated the arrest.—I. L. R., 6 Al. 385.

## CHAPTER XX.

## OF INSOLVENT JUDGMENT-DEBTORS.

**344.** Any judgment-debtor arrested or imprisoned in execution of a decree for money, or against whose property an order of attachment has been made in execution of such a decree, may apply in writing to be declared an insolvent.

Any holder of a decree for money may apply in writing that the judgment-debtor may be declared an insolvent.

Every such application shall be made to the District Court within the local limits of whose jurisdiction the judgment-debtor resides or is in custody.

## Notes.

Sec. 8 of Act XXIII of 1861 applies only to applications made under sec. 273 of Act VIII of 1859, not to applications made under sec. 280.—5 B. L. R., App. 21.

Bad faith in sec. 281, Act VIII. of 1859, means bad faith, not only in respect of the application, but includes bad faith on previous occasions.—5 B. L. R., App. 22.

A judgment-debtor, in receipt of a monthly stipend, is not entitled to obtain a discharge under sec. 273 of Act VIII. of 1859, unless he submits to place that stipend at the disposal of the Court, that provision may be made for satisfaction of the debt.—6 B. L. R., 575 ; 15 W. R., 204. But see 13 B. L. R., 268 ; 22 W. R., 257.

"Bad faith," in sec. 281 of Act VIII. of 1859, refers only to bad faith in respect of an application under that section.—7 B. L. R., App. 23.

A surety-bond taken by the Court under sec. 8 of Act XXIII. of 1861, after judgment has been pronounced, can be enforced under sec. 204 of Act VIII. of 1859.—8 B. L. R., 205 ; 15 W. R., 21.

The fact that a judgment-debtor, who has been arrested in execution of a money-decree, is in receipt of a salary, is not sufficient cause to show against his discharge under sec. 8 of Act. XXIII. of 1861.—13 B. L. R., 268 ; 22 W. R., 257.

The discretionary power of a Judge to detain a defendant in custody, otherwise than by committing him to prison in execution of a decree, is confined to the case provided for in Act XXIII. of 1861, sec. 8.—1 M. H. C. R., 441.

*Held* that an order discharging a judgment-debtor under sec. 8, Act XXIII. of 1861, being illegal on account of non-compliance with the procedure prescribed by law, might be quashed, and afterwards treated as a nullity, so as not to bar any subsequent application for arrest.—1 Agra H. C. R., Mis., 4.

C D repaired P's ship on his express representation that the repairs would be paid for by a letter of credit which the owners had sent for that purpose. P applied the funds to the payment of other creditors. C D sued him for the amount of the repairs, and obtained a decree, in execution of which P was imprisoned. The Court having refused to give him his discharge under sec. 273 of Act VIII. of 1859, he appealed. *Held*, on appeal, that a person who gets work done on the representation that it is to be paid for

out of certain specific funds, which funds he afterwards applies in paying sums due to other creditors, is guilty of *mala fides* and of giving undue preference, and is therefore not entitled to his discharge under sec. 273 of Act VIII. of 1859.—Bourke's Rep., A. O. C., 74.

Where the judgment-debtor applied for his discharge under sec. 273 of Act VIII. of 1859, and the Court not being satisfied of his inability to pay, and that he was honest and *bona fide* in dealing with his property, refused the application. *Held* that a prisoner for debt, if he be perfectly honest, without present means of payment, and has given every facility in his power to his creditors taking possession of his property, is entitled to release: that nothing short of this will entitle him to it.—Bourke's Rep., (O. C.) 101.

A person in custody who had been guilty of bad faith in the transactions relative to which he was detained, but not with regard to his application under sec. 280 of Act VIII. of 1859, was entitled to his discharge.—1 Ind. Jur., N. S., 8.

Secs. 273 and 280 of Act VIII. 1859 did not apply to cases of insolvency where the whole of the debtor's property is vested in the Official Assignee, and cannot be handed over to the Court in the manner contemplated by those sections.—1 Ind. Jur., N. S., 247.

Where a lower Appellate Court, from the replies of a judgment-debtor whom it examined, and from the circumstances of the case as set forth in the evidence, came to the conclusion that the judgment-debtor had not proved that he was not possessed of property, so as to be entitled to the benefit of sec. 273, Act VIII. of 1859, and sec. 8, Act XXIII. of 1861, *held* that there was no error of law in this finding.—12 W. R., 125.

The question of the sufficiency of the security tendered by the judgment-debtor is one entirely for the lower Court to determine.—15 W. R., 571.

The function of the Court, acting under Chapter XX of the Code of Civil Procedure, is to compel insolvent-debtors to pay their debts if it can, either by its compulsory process, or, where that cannot be used, by withholding from them, when it has the power of doing so, the relief to which they might otherwise be considered entitled. The granting of an order of discharge under that chapter is to a certain extent discretionary with the Court, and if the Court be of opinion that an insolvent may reasonably be expected to possess an income accruing during the time of his insolvency and likely to continue, even if such income be from sources such that it could not be attached, it ought very seriously to consider whether under such circumstances it ought to exercise its power to discharge the insolvent, and not rather stay its hands and require him as a condition of such discharge to satisfy it by payments on account of his debts, that he really desires, so far as he can, honestly to discharge the debt that he owes. A Gyawal who was in receipt of a very considerable income, derived from offerings made by pilgrims, applied to be declared an insolvent under the provisions of Chapter XX of the Code of Civil Procedure. He was opposed by a judgment-creditor, who, *inter alia*, contended that the insolvent should be compelled to contribute out of his income towards the payment of his debts. The Court finding that there were no assets, and holding that such income was not property capable of being attached, and that it had no power to order an insolvent to pay anything out of future earnings towards the discharge of his debts, declared the applicant an insolvent and granted him his discharge. *Held*, that the Court had power to withhold the discharge



until the insolvent had satisfied it, by payments on account of his debts, that he really desired to discharge his debts and that, under the circumstances of the case, both having regard to the fact that the inquiry into the estate of the insolvent had been insufficient, and to the fact that he was in a position to contribute out of his income towards the payment of his debts, the order was wrong and should be set aside.—I. L. R., 19 Cal. 730.

The plaintiff Gangadhar obtained a decree against the defendant. In execution of that decree, certain property was attached on 5th March 1881. Although the judgment-debtor was not arrested in execution of that decree, nevertheless he, on the 18th October 1882, applied to the Court of the Subordinate Judge to be declared an insolvent under sec. 344 of the Code of Civil Procedure (Act XIV of 1882). He was declared an insolvent under that section, and the nazir of the Court was appointed a receiver on 22nd December 1883. The receiver proceeded, under the direction of the Court, to convert the property of the insolvent into money under sec. 356 (a) of the Code. Certain immoveable property was purchased by the petitioner *Tukaram* for Rs. 1,032 on 4th December 1884. *Tukaram*, after some time, presented an application, in which he stated that, inasmuch as the insolvent had not been arrested in execution of the decree obtained by *Gangadhar* the Court had no jurisdiction; and he prayed that, if such was the case, the sale should be set aside, and the money returned to him. No appeal was preferred by the judgment-creditor, or other creditors of the insolvent, against the order of insolvency made under sec. 351 of the Code. The Subordinate Judge referred the following question to the High Court, viz., "whether a Court, which has declared the insolvency of a judgment-debtor, can direct the receiver to proceed under sec. 356 of the Code and complete any sale, though the purchaser objects to the direction on the ground of want of jurisdiction in the Court, which objection seems to the Court to be valid, but too late." *Held* that, as the declaration of insolvency was *ultra vires*, the Subordinate Judge should take no further steps to give effect to it, but leave the parties concerned to take such measures as they may be advised.—9 Bom. 368.

A person applying under this section must satisfy the Court that his case comes within sec. 351, and the burden of proof lies on him.—4 Cal.

A judgment-debtor, having been arrested in 1871, offered to place his estate at the disposal of the Court, and was examined on oath as to the particulars of the estate, and discharged from custody. His estate was never taken possession of, and part of it was subsequently disposed of by him to a stranger. *Held* that he was not liable to be arrested again in execution of the decree.—6 Madr. 170.

A District Munsif's Court, invested with insolvency jurisdiction by the Local Government under sec. 360 of the Code of Civil Procedure, cannot entertain an application made by a judgment-debtor, whose property has been attached, to be declared an insolvent, except where such application is transferred to it by the District Court.—7 Madr. 510.

When an application to be declared an insolvent, under sec. 344 of the Civil Procedure Code, was preferred, the requirements of that section had not been fulfilled, as the applicant had not been arrested or imprisoned in execution of a decree for money, nor had his property been attached in execution of such a decree. Eleven days after the application had been preferred, the applicant's property was attached in execution of such a decree. One of the creditors subsequently objected to the application on the ground

that when it was preferred the requirements of sec. 344 had not been fulfilled. *Held* that the application should not on that ground have been dismissed.—6 AL. 289.

See I. L. R., 4 Cal. 94, noted under sec. 6; 2 Bom. 641, noted under sec. 5; 15 Cal. 171 & 13 AL. 100, noted under sec. 336.

**345.** The application, when made  
Contents of application. by the judgment-debtor, shall set forth—

(a) the fact of his arrest or imprisonment, or that an order for the attachment of his property has been made, the Court by whose order he was arrested or imprisoned, or by which the order of attachment was made, and, where he has been arrested or imprisoned, the place in which he is in custody ;

(b) the amount, kind, and particulars of his property, and the value of any such property not consisting of money ;

(c) the place or places in which such property is to be found ;

(d) his willingness to put it at the disposal of the Court ;

(e) the amount and particulars of all pecuniary claims against him ; and

(f) the names and residences of his creditors, so far as they are known to, or can be ascertained by, him.

The application, when made by the holder of a decree for money, shall set forth the date of the decree, the Court by which it was passed, the amount remaining due thereunder, and the place where the judgment-debtor resides or is in custody.

**346.** The application shall be signed and verified by the  
Subscription and verification of application. applicant in manner hereinbefore prescribed for signing and verifying plaints.

**347.** The Court shall fix a day for hearing the application, and shall cause a copy thereof,  
Service of copy of application and notice. with a notice in writing of the time and place at which it will be heard, to be struck up in Court, and served at the applicant's expense—

Where the applicant is the judgment-debtor—on the holder of the decree in execution of which he was arrested or imprisoned or the order of attachment was made, or on the pleader of such decree-holder and on the other creditors (if any) mentioned in the application :

Where the applicant is the decree-holder—on the judgment-debtor or his pleader.

The Court may, if it thinks fit, publish, at the applicant's expense, the application in such official Gazettes and public newspapers as it thinks fit.

Where the applicant is the judgment-debtor, the Court may exempt him from any payments under this section if satisfied that he is unable to make them.

**348.** The Court may also, if it thinks fit, cause a like copy and notice to be served on any other person alleging himself to be a creditor of the applicant, and applying for leave to be heard on the application.

**349.** Where the judgment-debtor "is in custody under the foregoing provisions of this Code,"\* the Court may, pending the hearing under section 350, order him to be immediately committed to jail, or leave him in the custody of the officer to whom the service of the warrant was entrusted, or release him on his furnishing sufficient security that he will appear when called upon.

#### Notes.

"Arrest," as used in sec. 349 of the Civil Procedure Code, (Act XIV.) of 1882, does not include "imprisonment." Therefore the power conferred on the Court, under that section, to release a judgment-debtor arrested in execution of a decree on security being given by him, ceases after he has been imprisoned or put into jail.—I. L. R., 12 Bom. 46.

A security-bond given under the provisions of sec. 349 of the Code of Civil Procedure, 1882, for the production of a judgment-debtor when called upon, cannot be enforced summarily.—7 Madr. 273.

**350.** On the day so fixed, or on any subsequent day to which the Court may adjourn the hearing, the Court shall examine the judgment-debtor, in the presence of the persons on whom such notice has been served or their pleaders, as to his then circumstances and as to his future means of payment, and shall hear the said decree-holder, the other creditors mentioned in the application, and the other persons, (if any) alleging themselves to be creditors, in opposition to the judgment-debtor's discharge; and may, if it thinks fit, grant time to the said decree-holder and other creditors or persons to adduce evidence showing that the judgment-debtor is not entitled to be declared an insolvent.

\* The words quoted have been substituted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 81, for the words, "is under arrest," as originally enacted.

**Notes.**

A Court is competent to take action under sec. 359 of the Civil Procedure Code at the instance of a creditor, after the hearing under sec. 350 has determined. *Per* STRAIGHT, J —It is desirable that an application under sec. 359 should be made immediately, or as soon as possible, after the hearing under sec. 350, but a delay of some months will not make the application unentertainable. When once any of the frauds referred to in clauses (a), (b) or (c) of sec. 359 have been proved at a hearing under sec. 350, the Court must under sec. 359 either itself pass sentence on the applicant who has committed such frauds, or must send him to a Magistrate to be dealt with according to law. The Court has no option to decline to adopt either of these courses. In acting under sec. 359, the Court does not retry the questions of fact decided by it at the hearing under sec. 350, but has to proceed upon the findings come to at that hearing. An applicant for a declaration of insolvency who does not avail himself of his right of appeal from the order rejecting his application, is concluded by the findings of fact at the hearing under sec. 350, and cannot afterwards question them.—14 Al. 145.

Declaration of insolvency and appointment of Receiver.

**351. If the Court is satisfied—**

(a) that the statements in the application are substantially true;

(b) that the judgment-debtor has not, with intent to defraud his creditors, concealed, transferred, or removed any part of his property since the institution of the suit in which was passed the decree in execution of which he was arrested or imprisoned, or the order of attachment was made, or at any subsequent time ;

(c) that he has not, knowing himself to be unable to pay his debts in full, recklessly contracted debts, or given an unfair preference to any of his creditors by any payment or disposition of his property ;

(d) that he has not committed any other act of bad faith regarding the matter of the application,

the Court may declare him to be an insolvent, and may also, if it thinks fit, make an order appointing a Receiver of his property, or, if it does not appoint such Receiver, may discharge the insolvent.

If the Court is not so satisfied, it shall make an order rejecting the application.

**Notes.**

Before rejecting an application by a judgment-debtor for a declaration of insolvency with reference to the provisions of sec. 251 (a), it is necessary that the Court should be satisfied that the applicant has wilfully made false statements.. unintentional inaccuracies are not sufficient grounds for rejection.—I. L. R., 7 Al. 295.

A decree-holder in respect of whose judgment-debtor an order declaring him insolvent and appointing a receiver has been passed under sec. 351 of the Code of Civil Procedure, and whose decree has been placed on the list of the judgment-debtor's scheduled debts, cannot *pari passu*, with the proceedings in insolvency, go on executing his decree in the ordinary way against that judgment-debtor. *Badal Singh v. Birch and Abdul Rahman v. Behari Puri* distinguished.—14 Al. 358.

Sec. 351 (b) contemplates a case of active concealment, transfer, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division; and it does not cover an omission by the judgment-debtor, in his application for a declaration of insolvency, of a statement as to his right to demand partition of ancestral estate in which he is a sharer, especially where there is no evidence of any intent to defraud.—7 Al. 445.

A Court cannot refuse the application of a judgment-debtor seeking to be declared an insolvent under the provisions of Chapter XX of the the Civil Procedure Code unless it finds affirmatively that the applicant has brought himself within clause (a), (b), (c) or (d) of sec. 351 of the Code; and the fact that his schedule assets exceed his liabilities does not disentitle him to such relief. A judgment-debtor applied to be declared an insolvent under the provisions of chapter XX of the Code of Civil Procedure. The District Judge refused the application on the ground that the assets were admittedly in excess of the liabilities, and that he had made no effort for a period of two years to realise his property for the benefit of his creditors. *Held* that the District Judge was bound to grant the application, as the applicant had not brought himself within clause (a), (b), (c), or (d) of sec. 351, in which cases alone he had a right to refuse the application.—14 Cal. 691.

A person applying under Act X of 1877, sec. 344, must satisfy the Court that his case comes within the provisions of sec. 351, and the burden of proof lies upon him.—4 Cal. 888.

J, in pursuance of a previous agreement with B, and on being pressed by B, who had a pecuniary claim against him, assigned to B the whole of his property by way of sale, in consideration in part of B's pecuniary claim against him. *Held* that by such assignment J did not give B an "undue preference" to his other creditors, within the meaning of sec. 351 of Act X of 1877.—3 Al. 530.

An appeal lies against an order passed under sec. 351 of Act X of 1877, although it was an order refusing to declare petitioner an insolvent. The words used in cl. d of sec. 351, "the matter of the application," embrace the insolvency, and all the facts and circumstances material to explain the insolvency. Acts of bad faith towards creditors just at the period at which the applicant was contemplating insolvency may be held to be part of the matter of the application. A Judge would not be exercising a right discretion under sec. 351 if he refused relief in the case of persons who, although knowing that they had not the means of paying at the time the debt was contracted, yet honestly believed upon reasonable grounds that they would have the means of paying eventually.—2 Madr. 219.

A judgment-debtor having applied to be declared an insolvent under sec. 344 of the Code of Civil Procedure, entered the name of A in the list of his creditors together with the amount of the debt. No creditors appearing to oppose the application or prove their debts, the Court, without fram-

ing a schedule as required by sec. 352, declared the judgment-debtor an insolvent under sec. 351. In a suit brought by A to recover the debt:—*Held*, that as the provisions of sec. 352 had not been followed, the declaration under sec. 351 could not operate as a decree between the insolvent and A, and that A was entitled to a decree.—7 Madr. 318.

See I. L. R., 9 Al. 232, noted under sec. 278.

**352.** The creditors mentioned in the application, and the other persons (if any) alleging themselves to be creditors of the insolvent, shall then produce evidence of the amount and particulars of their respective pecuniary claims against him ; and the Court shall, by order, determine the persons who have proved themselves to be the insolvent's creditors and their respective debts ; and shall frame a schedule of such persons and debts ; and the declaration under section 351 shall be deemed to be a decree in favour of each of the said creditors for their said respective debts.

A copy of every such schedule shall be struck up in the Court-house.

Nothing in this section shall be deemed to entitle a partner in an insolvent-firm, or, when he has died before the insolvency, his legal representative, to prove in competition with the creditors of the firm.

#### Notes.

It is open to a creditor, at any time while the assets of an insolvent are undistributed, to produce evidence of his debt, and to apply to be admitted on the schedule under sec. 352 of the Code of Civil Procedure.—I. L. R., 11 Madr. 1.

A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation was brought against persons who were not parties to that decree, and had purchased in execution of a prior decree. Pending the suit, one of the judgment-debtors under the hypothecation-decree was declared an insolvent, and the plaintiff scheduled his decree as a claim under sec. 352 of the Civil Procedure Code. *Held* that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was founded on a new and different cause of action against persons who were not parties to the decree, unmaintainable.—10 Al. 194.

In July 1878, a person was declared an insolvent under the provisions of Chapter XX of the Civil Procedure Code. Only one creditor then proved his debt, and no schedule was framed. This creditor having applied for the sale of property belonging to the insolvent, another creditor, in May 1883, applied to prove his debt, and to have his name inserted in the schedule which the Court then ordered to be framed. *Held* that such application could not be treated as made under sec. 353, as no schedule had been framed, but must be regarded as in the nature of a tender of proof of



debt under sec. 352 ; that it was governed by art. 178 of the Limitation Act, 1877 ; and that, the right to apply having accrued at the date of the declaration of insolvency, the application was beyond time.—6 Al. 142.

See I. L. R., 7 Madr. 318, noted under sec. 351.

**353.** Any creditor of the insolvent who is not mentioned in such schedule may apply to the Court for permission to produce evidence of the amount and particulars of his pecuniary claims against the insolvent, and, in case the applicant proves himself to be a creditor of the insolvent, for an order directing his name to be inserted in the schedule as a creditor for the debt so proved.

Any creditor mentioned in the schedule may apply to the Court for an order altering the schedule so far as regards the amount, nature, or particulars of his own debt, or to strike out the name of another creditor, or to alter the schedule so far as regards the amount, nature, or particulars of the debt of another creditor.

In the case of any application under this section, the Court, after causing such notices as it thinks fit to be served, at the applicant's expense, on the insolvent and the other creditors, and hearing their objections (if any), may comply with or reject the application.

**Notes.**

A judgment-debtor was declared an insolvent and a receiver of his property appointed under sec. 351 of the Civil Procedure Code, and his creditors were ordered to come forward and prove their claims within a certain time. No creditor came forward, for that purpose within such time, and in consequence the case was struck off the file, and the order appointing a receiver cancelled, and no schedule was framed under sec. 352. Subsequently a creditor applied to have his name entered in such schedule. *Held* that the applicant, notwithstanding no schedule had been framed, was an "un-scheduled" creditor, and was therefore entitled, under sec. 353 of the Civil Procedure Code, to make the application.—I. L. R., 5 Al. 268.

See I. L. R., 6 Al. 142, noted under sec. 352.

**354.** Every order under section 351 shall be published in the local official Gazette, and "every order under that section appointing a Receiver" shall operate to vest in the Receiver all the insolvent's property (except the particulars specified in the first proviso to section 266), whether set forth in his application or not.

**Notes.**

By an order dated the 9th July 1879, A was declared an insolvent under sec. 351 of the Civil Procedure Code (Act XIV of 1882), and his

property vested in the receiver, who was ordered to convert it into money. Nine fields, which were part of A's property, had been mortgaged to the plaintiff, who was duly cited to appear and prove his debt. The plaintiff, however failed to appear, and he was consequently omitted from the schedule of A's creditors. The receiver sold one of the fields, which was purchased by A's undivided son G. At the sale the plaintiff gave notice of his claim as mortgagee. After paying off the debts of the scheduled creditors the receiver made over to A the residue of the purchase money, and the eight unsold fields. In 1881 the plaintiff sued A for possession of the mortgaged property, and on appeal obtained a decree. While that suit was pending, G sold to the defendant the field which he had purchased. In execution of his decree the plaintiff recovered possession of the eight fields, but on attempting to get possession of the ninth field, he was obstructed by the defendant, who was in possession, and he consequently brought this suit to recover it. *Held* that the plaintiff was entitled to recover it from the defendant. The only interest the insolvent had in the mortgaged premises was the equity of redemption, and this having vested in the receiver under sec. 354, he, under sec. 356, was directed to convert it into money. G, therefore, at the sale only purchased the equity of redemption in the one field; and the defendant, who now stood in G's shoes with notice of the plaintiff's claim, although he might possibly be entitled to redeem the whole nine fields comprised in the mortgage, was bound to deliver possession to the plaintiff (the mortgagee) until that was done. The mortgaged property could not be sold by the receiver without the consent of the plaintiff (the mortgagee), or paying him off. Sec. 356 of the Civil Procedure Code (Act XIV of 1882) no doubt contemplates the payment of debts secured by mortgage out of the proceeds of the conversion of the insolvent's property in priority to the general creditors; but this must be taken in connection with sec. 354, and must be understood as referring to those cases in which the mortgaged premises have been sold after coming to an understanding with the mortgagee.—I. L. R., 12 Bom. 272.

See I. L. R., 9 Al. 232, noted under sec. 278.

### **355.** The Receiver so appointed shall give such security

Receiver to give security  
as collect assets.

as the Court may direct, and shall possess himself of all such property, except as aforesaid;

Discharge of insolvent.

and on his certifying that the insolvent has placed him in possession thereof, or has done everything in his power for that purpose, the Court may discharge the insolvent upon such conditions (if any) as the Court thinks fit.

#### **Notes.**

A judgment-debtor, arrested and imprisoned in execution, applied to be declared an insolvent, and included a mortgage-debt in his application. Notice was issued to the mortgagee, who failed to appear and prove his claim, and was consequently omitted from the schedule prepared under sec. 352 of the Code of Civil Procedure. A receiver was appointed under sec. 354; the whole of the property, of the insolvent was made over to the receiver, including the nine fields mortgaged, which the insolvent held as tenant of the mortgagee. The receiver sold one out of the nine fields to satisfy the

creditors entered in the schedule, and ultimately restored the remaining eight fields to the judgment-debtor. The mortgagee then sued to eject the judgment-debtor for default in payment of rent. The latter pleaded his discharge under sec. 355. *Held* that the discharge did not affect the mortgage-debt, and that a receiver is bound, as a condition of dealing with mortgagee property, in every case to pay off the mortgage, even when the mortgagee has not sought to be placed in the schedule,—the position of the mortgagee being essentially different from that of the unsecured creditor. *Case of Chotalal v. Nahansa* (printed Judgments for 1882, p. 80) distinguished.—I. L. R., 7 Bom. 455.

See I. L. R., 12 Bom. 272, noted under sec. 354.

**356.** The Receiver shall proceed  
 Duty of Receiver. under the direction of the Court—

- (a) to convert the property into money ;
- (b) to pay thereout debts, fines, and penalties (if any) due by the insolvent to Government ;
- (c) to pay the said decree-holder's costs ;
- (d) to discharge, according to their respective priorities, all debts secured by mortgage of the insolvent's property :
- (e) to distribute the balance among the scheduled creditors rateably according to the amounts of their respective debts and without any preference ;

and such Receiver may retain, as a remuneration for the performance of his duties, a commission, to be fixed by the Court, not exceeding the rate of five per centum upon the amount of the balance so distributed (the amount of the commission so retained being deemed a distribution), and shall deliver the surplus (if any) to the insolvent or his legal representative :

His right to remuner.  
 ation

Delivery of surplus.

Provided that, in any local area in which a declaration has been made under section 320 and is in force, no sale of immoveable property paying revenue to Government, or held or let for agricultural purposes, shall be made by the Receiver ; but, after he has sold the other property of the insolvent, the Court shall ascertain (a) the amount required to satisfy the claims of the scheduled creditors after deducting the moneys already received, (b) the immoveable property of the insolvent remaining unsold, and (c) the incumbrances (if any) existing thereon, and shall forward a statement to the Collector containing the particulars aforesaid ; and thereupon the Collector shall proceed to raise the amount so required by the exercise of such of the powers conferred on him by sections 322 to 325 (both inclusive) as he thinks fit, and subject to the provisions

of those sections, so far as they may be applicable, and shall hold at the disposal of the Court all sums that may come to his hands by such exercise.

#### Notes.

A receiver appointed in insolvency proceedings under the Civil Procedure Code is entitled to a lien for the amount of his commission on the net assets remaining after payment of the charges specified in Civil Procedure Code, sec. 356 (b), and (d).—I. L. R., 15 Madr. 233.

See I. L. R., 12 Bom. 278, noted under section 354.

**357.** An insolvent discharged under section 351 or 355 shall not be arrested or imprisoned on account of any of the schedule-debts. But (subject to the provisions of section 358) his property, whether previously or subsequently acquired (except the particulars specified in the first proviso to section 266, and except the property vested in the Receiver), shall, by order of the Court, be liable to attachment and sale until the debts due to the scheduled creditors are satisfied to the extent of one-third, or until the expiry of twelve years from the date of the order of discharge under section 351 or 355.

Effect of discharge.

**358.** If the aggregate amount of the scheduled debts is two hundred rupees or a less sum, the Court may, and in any case after the scheduled debts have been satisfied to the extent of one-third, or after the expiry of twelve years from the order of discharge, the Court shall declare the insolvent, discharged as aforesaid, absolved from further liability in respect of such debts.

Declaration that insolvent is discharged from liability.

#### Notes

An insolvent, who had procured, and taken, and acted on an insolvency order, which had been granted to him because of the withdrawal of the opposition of his creditors, by reason solely of his engagement to pay a certain sum monthly until the whole of his debts should be discharged, after his scheduled debts had been satisfied to the extent of one-third, applied under sec. 358 of the Civil Procedure Code to be declared discharged from further liability in respect of his debts. *Held* that under the circumstances, his application had been properly refused.—I. L. R., 5 Al. 258.

Procedure in case of dishonest applicant;

**359.** Whenever, at the hearing under section 350, it is proved that the applicant has—

(a) been guilty, in his application, of any concealment or of wilfully making any false statement as to the debts due by him, or respecting the property belonging to him, whether in possession or in expectancy, or held for him in trust ;

(b) fraudulently concealed, transferred, or removed any property ; or

(c) committed any other act of bad faith regarding the matter of the application,

the Court shall, at the instance of any of his creditors, sentence him by order in writing, to imprisonment for a term which may extend to one year from the date of committal ;

or the Court may, if it think fit, send him to the Magistrate to be dealt with according to law.

**Note.**—See I. L. R., 14 Al. 145, noted under sec. 350.

**360.** The Local Government may, by notification in the official Gazette, invest any Court other than a District Court with the powers conferred on District Courts by sections 344 to 359 (both inclusive), and

Courts.  
Transfer of cases.

the District Judge may transfer to any Court situate in his district, and so invested, any case instituted under section 344.

A Court so invested may entertain an application under section 344 by any person who has been arrested or imprisoned, or against whose property an order of attachment has been made, in execution of a decree for money passed by that Court.

Nothing in this chapter shall apply to any Court having jurisdiction in the towns of Rangoon, Moulmain, Akyab, and Bassein, where the property of the judgment-debtor exceeds in value two thousand five hundred rupees, or the amount of the pecuniary claims against him exceeds five thousand rupees, or such property, or any part thereof, is situate outside British Burma.

**Note.**—This section applies to Provincial Small Cause Courts.

**360A\*** Nothing in this Chapter shall apply to any Court having jurisdiction within the limits of the town of Calcutta, Madras, or Bombay.

Inapplicability of this Chapter to Presidency towns.

**Note.**—See I. L. R., 7 Madr. 510, noted under sec. 344.

\* This section has been inserted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 31.

## PART II. OF INCIDENTAL PROCEEDINGS.

### CHAPTER XXI.

#### OF THE DEATH, MARRIAGE, AND INSOLVENCY OF PARTIES.

**361.** The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

*Illustrations.*

(a.) A covenants with B and C to pay an annuity to B during C's life. B and C sue A to compel payment. B dies before the decree. The right to sue survives to C, and the suit does not abate.

(b.) In the same case, all the parties die before decree. The right to sue survives to the representative of the survivor of B and C, and he may continue the suit against A's representative.

(c.) A sues B for libel. A dies. The right to sue does not survive, and the suit abates.

(d.) A, a member of a Hindu joint family under the Mitakshara law, institutes a suit for partition of the family-property. A dies leaving B, a minor son, his heir. The right to sue survives to B, and the suit does not abate.

**Notes.**

This section applies to Provincial Small Cause Courts.

The plaintiff sued to recover damages from the defendant's father, Ramdas, for wrongful arrest and malicious prosecution. During the pendency of the suit Ramdas died, and the plaintiff substituted the defendant as his heir and representative. The defendant contended that the suit abated. Both the lower Courts disallowed the defendant's contention, and awarded damages to the plaintiff, to be recovered from the estate of the deceased. On appeal by the defendant to the High Court, *held*, reversing the decision of the lower Courts, that the suit abated on the death of Ramdas, his estate having derived no benefit, but, on the other hand, suffered loss, in consequence of his wrong-doing. It was contended for the plaintiff that Act XII. of 1855 gave the plaintiff a right to continue his suit against the heir of Ramdas. *Held* that Act XII. of 1855 did not apply to a suit, such as this, brought originally against the wrong-doer himself, and only subsequently sought to be continued against his heir.—I. L. R., 13 Bom. 677.

**362.** If there be more plaintiffs or defendants than one, and any of them dies, and if the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

*Procedure in case of death of one of several plaintiffs or defendants, if right to sue survives.*

**Note.**—This section applies to Provincial Small Cause Courts.



**363.\*** If there are more plaintiffs than one, and any of them dies, and if the right to sue does not survive to the surviving plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the Court may cause the legal representative (if any) of the deceased plaintiff to be made a party, and shall thereupon cause an entry to that effect to be made on the record, and proceed with the suit.

**364.** [*Repealed by Act VII of 1888.*]

\* In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the suit.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where the special appellant died after the High Court had referred for trial, to the Court below, an issue based upon objections taken by the respondent under sec. 348 of Act VIII. of 1859, *held* that the appeal must abate, in accordance with sec. 102 of Act VIII of 1859 and sec. 37 of Act XXIII. of 1861 ; and that the respondent cannot require that it should proceed, in order that he may have an opportunity of taking objections to the decree of the Court below. If the respondent desires to secure the right of asking for a decision on his objections, he must file a separate appeal.—3 Bom. H. C. R., (A. C.) 81.

A sole plaintiff having died after decree, an application was made more than 60 days after his death, by his legal representative, for an order that his name might be substituted on the record for that of the original plaintiff, and that a sum of money to which the original plaintiff, if alive, would have been entitled, might be paid to him, as the legal representative. *Held* that sec. 372 of the Civil Pro. Code did not apply to the case, the section contemplating a proceeding before the determination of the suit ; and, further, that the application was barred by Act XV. of 1877, sch. 2, art. 171. *Held* also that sec. 232 had no application. Sec. 365 of the Civil Procedure Code (amended by Act XII. of 1879, sec. 61) does not apply to the case of a sole plaintiff dying after decree, the right to sue being merged in the decree.—5 C. L. R., 108.

The plaintiff died on the 28th August 1883, and in December 1884, letters of administration to his estate were granted to the Administrator-General. The defendant died in June 1884, leaving a widow and one son surviving him. By his will he appointed two executors. On the 3rd February 1885, the Administrator-General took out a summons to revive the suit. *Held* that, notwithstanding the provisions of sec. 365 of the Civil

\* Sec. 363 or 365 has been substituted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 32

Procedure Code (Act XIV of 1882) and of the Limitation Act (XV of 1877), it was competent for a Judge in chambers to revive the suit by making an order for abatement under sec. 366 of the Code, coupled with an order under sec. 371 setting aside the order for abatement.—I. L. R., 9 Bom. 275.

Under sec. 368 a plaintiff may have the representatives of a deceased sole defendant placed on the record so that he may continue his suit against them, but there is no section which allows the representatives of sole defendant who has died to be placed on the record at their own request. Consequently sec. 582 gives no authority to a Civil Court to place on the record at their own request the representatives of a deceased sole respondent. Such an application cannot be entertained.—9 Bom. 56.

An order made under sec. 366 that a suit do abate, being virtually a decree within the meaning of sec. 2, is appealable. The appellant's father having died during the pendency of an appeal lodged by him, a notice was served upon the appellant's two adult brothers; but they having failed to apply within sixty days, the appellant, who was a minor applied several months afterwards to be put on the record in his deceased father's place as his legal representative, which was done. The Assistant Judge, who heard the appeal, was of opinion that, in consequence of the omission on the part of the brothers of the appellant to apply, the appeal abated, and he passed an order accordingly :—*Held*, that the application having been made by the minor son within the time limited by law, the order of abatement made by the Judge was wrong. Although the complete legal representation vested in the minor son and his two brothers, sec. 366 of the Civil Procedure Code (Act XIV of 1882) only required an application to be made by a person claiming to be the legal representative, in order to prevent an order of abatement being made. If neither of the brothers was willing to have his name placed on the record, the respondent was entitled to have them made defendants, so that they might be bound by the decree. The minor son could then proceed alone with the appeal.—10 Bom. 220.

If a plaintiff dies after decree, his representatives are not bound to apply within 60 days to be made parties to the suit, but have the same time to file an appeal as the plaintiff would have had. The Civil Procedure Code, secs. 363, 365, and the Limitation Act, sch. ii., art. 171, do not apply to the case of a plaintiff dying after decree.—3 Madr. 236.

A judgment-debtor applied that an execution-sale of property belonging to him should be set aside, as the decree-holder was dead when such sale took place, and such sale was in consequence invalid. This application was disposed of by the Court executing the decree in the presence of the judgment-debtor and purchaser. The Court held that the fact of such sale having taken place after the decree-holder's death was no ground for setting it aside, and disallowed such application, and made an order confirming such sale. *Held per* PEARSON, J., that the application for the execution of the decree abated on the death of the decree-holder, not having been prosecuted by his legal representative, and such sale was, under the circumstances, improper and invalid, and the order confirming it should be set aside. *Per* SPANKIE, J., that such sale was not invalid by reason of the decree-holder's death before it took place. The order confirming it, however, was improper, and should be reversed, and the case should be remanded to be dealt with under the provisions of secs. 365 and 366 of Act X of 1877, as the Court executing the decree should have proceeded under those sections. *Per* OLDFIELD, J., and STRAIGHT, J., that the death of the decree-holder prior to such sale did not render it void. The provisions of secs. 365 and

366 of Act X of 1877 could not be adopted to execution-proceedings. As such sale had been published and conducted according to law, it had properly been confirmed.—3 Al. 759.

See I. L. R., 8 Cal. 440, noted under sec. 582; 9 Al. 447, noted under sec. 32.

**366.** If, within the time limited by law, no such application be made to the Court by any person claiming to be the legal representative of the deceased plaintiff, the Court may pass an order that the suit shall abate, and shall, on the application of the defendant, award to the defendant the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff;

or the Court may, if it think proper, on the application of the defendant, and upon such terms as to costs or otherwise as it thinks fit, pass such other order as it thinks fit for bringing in the legal representative of the deceased plaintiff, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both those purposes.

*Explanation.*—A certificate of heirship, or a certificate to collect debts, does not of itself constitute the person holding it the legal representative of the deceased. But when the person holding any such certificate obtains thereby property belonging to the deceased, he may be treated as a legal representative liable in respect of such property.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 8 Cal. 440, noted under sec. 582; 3 Al. 844, noted under sec. 2; 3 Al. 759, noted under sec. 365; 9 Bom. 275, 9 Bom. 56 and 10 Bom. 220, noted under sec. 365.

**367.** If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

**Notes.**

This section applies to Provincial Small Cause Courts.

Pending a suit for redemption, one of the plaintiffs died. Thereupon A., claiming as the adopted son, and B., as the daughter of the deceased, made separate applications, under sec. 365 of the Code of Civil Procedure, (Act XIV of 1882), to be placed on the record. The Subordinate Judge ordered both claimants to be entered on the record as legal representatives of the deceased plaintiff, and proceeded with the suit. At the hearing he found

that A.'s adoption was proved, and that B. was not the legal heir of the deceased. He, therefore passed a decree for redemption in A.'s favour. Against this decree B. appealed, making A. alone the respondent in the appeal. The Appellate Court held that B., and not A., was the heir of the deceased. It, therefore, passed a decree in B.'s favour and against A. On second appeal to the High Court, *held*, that the Subordinate Judge could not, under section 367 of the Code of Civil Procedure (Act XIV of 1882), admit on the record both the rival claimants as legal representatives of the deceased plaintiff, or adjudicate by his decree between their rival claims. *Held*, also, that the Appellate Court ought not to have allowed one plaintiff to appeal against the other, or to have decided the rights of different plaintiffs *inter se*.—15 Bom. 145.

See 1. L. R., 9 Al. 447, noted under sec. 32.

**368.** If there be more defendants than one, and any of them die before decree, and the right to sue does not survive against the surviving defendant or defendants alone, and also in case of the death of a sole defendant, or sole surviving defendant, where the right to sue survives,

the plaintiff may make an application to the Court, specifying the name, description, and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead.

The Court shall thereupon enter the name of such representative on the record in the place of such defendant,

and shall issue a summons to such representative to appear on a day to be therein mentioned to defend the suit ;

and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant, and had been a party to the former proceedings in the suit :

Provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative.

When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period.

The legal representative of a deceased defendant may apply to have himself made a defendant in place of the deceased defendant, and the provisions of this section, so far as

they are applicable, shall apply to the application and to the proceedings and consequences ensuing thereon.\*

**Notes.**

This section applies to Provincial Small Cause Courts.

The plaintiff-respondent in an appeal pending before the High Court died on the 17th September 1885. Subsequently D applied to the High Court to be brought on the records as legal representative of the deceased; on the 15th April 1886, he was referred to a regular suit to establish his title as such representative, and on the 25th February 1887, such suit was dismissed. On the 8th February 1886, the defendants-appellants applied to the High Court for judgment; but the application was dismissed under the decision of the Full Bench in *Chajmal Das v. Jagdamba Prasad* (I. L. R., 10 Al. 260). On 24th July 1888, they applied to the High Court to bring certain persons upon the record as the legal representatives of the deceased plaintiff-respondent. *Held* that the application having been made subsequent to the 1st July 1888, when the Civil Procedure Code Amendment Act (VII. of 1888) came into force, and being an entirely fresh application not in continuation of any former proceedings between the same parties, must be dealt with under that Act and not under the Civil Procedure Code as it stood before the amendment; and that, as it was made more than six months after the death of the deceased plaintiff-respondent, the appeal abated, with reference to sec. 368 of the Code and art. 175C of the Limitation Act (XV. of 1877). *Held* also that the petitioners had not shown "sufficient cause" within the meaning of sec. 368 of the Code for not making the application within the prescribed period. *Ram Jiwan Mal v. Chand Mal* (I. L. R., 10 Al. 587) referred to.—I. L. R., 11 Al. 408.

At an auction-sale held in execution of a decree passed against one Ganpat Anandray, certain property put up for sale was purchased by one Khan Mahomed, the husband of the opponent.

Subsequently Krishnarav Anandray, the brother of Ganpat Anandray, brought a suit against the opponent to establish his right to the property purchased by the opponent's husband. On the 17th February 1882, he obtained a decree declaring that he (Krishnarav Anandray) was entitled to a half-share of the property in dispute, and an order was made that he should have joint possession with the opponent of one moiety of the property.

On the termination of the above suit, which had been brought by Krishnarav *in forma pauperis*, he was required to pay the court-fees. For that purpose he procured an advance of Rs. 290 from the applicant on the security of the moiety of the property which was awarded to him by the decree. He passed a deed of sale to the applicant on the understanding that the property should be re-conveyed to him by the applicant on the re-payment of the advance with interest. In the meantime cross appeals were filed against the above-mentioned decree passed in favour of Krishnarav, and at the hearing of the appeal the lower Appellate Court varied the decree of the Subordinate Judge, holding that Krishnarav Anandray was entitled to the possession of the property so sought for. From this decree the opponent preferred a second appeal to the High Court, which, at the time of this application, was still pending.

Before the hearing of the appeal, Krishnarav Anandray died, and the applicant thereupon applied to have his name placed on the record as res-

\* This paragraph has been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 32.

pondent. *Held* that the applicant was entitled to be made a party. The analogy of sec. 368 is to be extended generally to appeals, and the party appealing may choose his own respondent as representative of deceased. The more specific rule prescribed in that section must prevail, in the cases to which it is exactly applicable, over the more general rule in sec. 372. But the rule in section. 368 may well be intended for the case in which the death, and the death only, of the defendant constitutes the change of circumstances for which it was thought necessary to provide; but where there has been, not only the death of the respondent, but an alleged prior conveyance to him of the property awarded by the decree appealed against, there is a fact in addition to the fact contemplated by sec. 368, and the rule in sec. 372, being alone sufficiently inclusive, must apply.

An appellant may determine who shall be respondent, but not that any particular person shall not be a respondent. The choice of respondents, made by the appellant may be defective through ignorance or fraud, and the real representative of the decree-holder cannot justly be refused an opportunity of maintaining the decision which it is sought to upset.—9 Bom. 151.

After the institution of a suit for dissolution of a partnership, two of the defendants died. More than a year after their death the plaintiffs applied to have the legal representatives of the deceased entered on the record. The Subordinate Judge granted this application, holding that the case was governed by sec. 372 of the Code of Civil Procedure (Act XIV of 1882), and that the application was, therefore, within time under article 178 of the Limitation Act XV of 1877. *Held*, that the case was governed by sec. 368, and not 372 of the Civil Procedure Code (Act XIV of 1882). The application for substitution of the heirs of the deceased defendants ought to have been made within six months, as provided by article 175 C of the Limitation Act XV of 1877, and was barred, unless the delay were sufficiently explained.—16 Bom. 27.

Although a Court is bound by sec. 368 to place on the record the name of the person alleged by the appellant to be the legal representative of a deceased respondent, nevertheless, where a person, other than the person alleged by the appellant to be such representative, claims, on good *prima facie* grounds, to be the representative of the deceased respondent, and the interests of the person entitled to the estate of the deceased may be prejudiced, the Court should, under sec. 32 of the Code of Civil Procedure, proceed to make such claimant also a party to the appeal.—8 Madr. 300.

Procedure analogous to that laid down in Act X of 1877, sec. 368, in respect to the death of a defendant, must be applied in the case of the death of a respondent. Where, therefore, a respondent dies during the pendency of an appeal, it is for the appellant to take the initiative, and he is at liberty to select one or more persons to defend the appeal; and no person, other than the person so selected, has a right to force himself into the proceedings, and to claim to have his name entered as representative of the deceased respondent against the appellant's consent. Persons so introduced on the record may or may not be the real representatives of the deceased respondent, but the merits of their claim to be such, on the ground of any right or status, such as that of adoption, is immaterial to the determination of the appeal.—4 Bom. 654.

In a suit for the recovery of land against a sole defendant, the latter died before the hearing. Sixty-three days after the death of the defendant, the plaintiff applied to the Court to enter on the record as the legal representative of the deceased defendant. On the 22nd of November 1880, the Court



rejected the application under the provisions of Act XV of 1877, sch. ii., cl. 171B, and ordered the suit to abate. On the same day the plaintiff applied to the Court to set aside the order directing the suit to abate, but this application was also rejected on the 20th of September 1881. On appeal to the High Court, *held* that no appeal lay against the order of the 20th of September 1881, and that an appeal against the order of the 22nd of November 1880, was out of time; but that the High Court would take cognizance of the case under sec. 622 of the Code of Civil Procedure. *Held* also that the application which was rejected on the 22nd of November 1880 was an application under sec. 372, and not under sec. 368 of the Code of Civil Procedure, and that the applicant was entitled to make the application within three years, as allowed by Act XV of 1877, sch. ii., cl. 178. *Gocool Chunder Gossamee v. Administrator-General of Bengal* (I. L. R., 5 Cal. 726; S. C., 5 C. L. R., 108) referred to.—8 Cal. 837; 10 C. L. R., 449.

An appeal having been declared to have abated on the 12th December 1881 under sec. 368 of the Code of Civil Procedure, 1877, because the appellant had not applied within sixty days of the date of the death of the respondent to bring in his representative, an application was made in January 1882 to set aside the order, and was heard after the Code of Civil Procedure, 1882 came into force. *Held*, that the application must be disposed of under the Code of Civil Procedure as it stood at the date of the application, and, therefore that it was not open to the appellant to satisfy the Court that he had sufficient cause for not making the application within the prescribed period. Section 371 of the Code of Civil Procedure does not apply to the case in which a defendant or respondent dies.—7 Madr 195.

See I. L. R., 8 Cal. 440, noted under sec. 582; 6 Al. 225 and 15 Madr. 399, noted under sec. 234; 9 Al. 447 and 10 Al. 223, noted under sec. 32; 10 Al. 260 and 10 Al. 204, noted under sec. 3.

### **369.** The marriage of a female plaintiff or defendant

Suit not abated by marriage of female party. shall not cause the suit to abate, but the suit may, notwithstanding, be proceeded with to judgment, and, where the decree is against a female defendant, it may thereupon be executed against her alone.

If the case is one in which the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband where the husband is by law entitled to the subject-matter of the decree.

#### **Notes.**

This section applies to Provincial Small Cause Courts.

A party having died while a suit against him was pending, his widow was brought upon the record as defendant, and judgment was given against her, which was subsequently affirmed on appeal. The original decree embraced an award of certain *wasilat* (accruing after the husband's death) for which the widow was personally liable. Between the original and final judgments she married again, and execution of the decree was accordingly sought against her second husband. *Held* that he was not liable to sum-

mary proceedings in execution, and that the term "judgment" in sec. 105, Act VIII. of 1859, did not include the judgment in appeal.—9 W. R., 442.

**370.** The bankruptcy or insolvency of a plaintiff in any suit which his assignee or the receiver appointed under section 351 might maintain for the benefit of his creditors shall not bar the suit, unless such assignee or receiver declines to continue the suit and to give security for the costs thereof within such time as the Court may order.

When plaintiff's bankruptcy or insolvency bars suit.

If the assignee or receiver neglect or refuse to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's bankruptcy or insolvency, and the Court may dismiss the suit and award to the defendant the costs which he has incurred in defending the same, to be proved as a debt against the plaintiff's estate.

Procedure when assignee fails to continue suit or give security.

#### Notes.

This section applies to Provincial Small Cause Courts.

If an assignee, who has been substituted for the plaintiff under sec. 106, Act VIII of 1859, declines to furnish security for costs within such reasonable time as the Court may order, the defendant may, within eight days after such neglect and refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit.—13 W. R., 431.

Sec. 106 of the Civil Procedure Code means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the Official Assignee an opportunity of prosecuting the suit. Where, therefore, the plaintiff, after the institution of a suit, became insolvent, and the defendant thereupon obtained an order that the Official Assignee should give security for the costs of the defendant within fourteen days, and should be made a party to the suit within one month, and that, in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited, *held* that such order was irregular. *Held* also that the Official Assignee, having notice of the order, was not entitled to further notice of the setting down of the suit for dismissal, he not having given the security required, and that the giving for such security was a condition precedent to his being made a party to the suit. Where the suit was dismissed in accordance with the terms of the order mentioned above, and the Official Assignee did not apply, within thirty days of the passing of the order of dismissal, either to the Court making the order or to the Appellate Court, for its reversal, *held* that an application to the Appellate Court for the reversal of an order discharging a rule *nisi* for the reversal of the order of dismissal, and for the restoration of the suit to the board for hearing, was barred.—12 Bom. H. C. R., (O. C.) 257.

On the 3rd of August a case came on for hearing. Prior to that date the plaintiff in this suit had been adjudicated an insolvent and did not appear, but the Official Assignee appeared and applied for a postponement. The Court accordingly made the following order :—" It is ordered that the

be dismissed under section 370 of the Civil Procedure, unless the Official Assignee elects on or before the fifth day of October next to continue the suit and give security for the defendant's costs." The time for complying with the order was subsequently extended, and the plaintiff in the meanwhile obtained an order allowing the insolvency proceedings to be withdrawn. The defendant now applied that the suit should be dismissed pursuant to the terms of the above order. The plaintiff objected, as he was now no longer an adjudged insolvent, and was ready to prosecute the suit. *Held*, that the order had been made in an improper form, in as much as section 370 gives the Court no power to order the dismissal of the suit. This part of the order, therefore, was wrong, and the Court could now rectify it by cancelling that portion of the order, and as a consequence, refusing the defendant's application.—16 Bom 404.

**371.** When a suit abates or is dismissed under this chapter, no fresh suit shall be brought on the same cause of action.

Effect of abatement or dismissal.

But the person claiming to be the legal representative of the deceased or bankrupt or insolvent plaintiff may apply for an order to set aside the order for abatement or dismissal; and, if it be proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

Application to set aside abatement or dismissal.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where a suit was declared abated in 1868 under sec. 102 of Act VIII of 1859 for non-prosecution by the representative of a deceased plaintiff, *held* that the Civil Procedure Code, sec. 271, was no bar to a fresh suit instituted in 1880 on the same cause of action.—I. L. R., 3 Madr. 31.

Upon the death of a sole plaintiff, if no application to revive is made within sixty days from the date of the plaintiff's death, the suit abates. But the Court may, under Act X of 1877, sec. 371, revive the suit on the application of the legal representative of the plaintiff within three years from the time when the right to apply accrues, if he can shew that he was prevented by sufficient cause from continuing the suit—5 Cal. 139; 4 C. L. R., 374.

The defendants attached certain property, which, the plaintiffs alleged, belonged to them. The plaintiffs preferred a claim to the property under sec. 246 of Act VIII of 1859; this claim was disallowed on the 15th August 1877. In June 1878, the plaintiffs brought a suit to establish their title to the property attached, and for confirmation of possession. Pending this suit, the principal defendant died, and the plaintiff's applied for an order to substitute certain persons as defendants. The Court thereupon directed the issue of a summons on the defendants proposed by the plaintiffs to appear and defend the suit; but the plaintiffs failing to pay the costs of the service of this summons, the suit was dismissed on the 14th March 1879. On the 4th March 1880, the plaintiffs again brought a suit to establish their title to the same property, and for confirmation of possession. *Held* that the order of the 15th August 1877, not being an order passed under sec. 283 of Act X of 1877, art. 11 of sch. ii. of Act

XV of 1877 did not apply, but that art. 120 of sch. ii. was applicable; and that, as the first suit had not been dismissed upon the merits, the plaintiffs were entitled to maintain the second suit.—9 Cal. 163.

See I. L. R., 7 Madr. 195, noted under sec. 368.

**372.** In other cases of assignment, creation, or devolution of any interest pending the suit, the suit may, with the leave of the Court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objection, (if any), be continued by or against the person to whom such interest has come, either in addition to, or in substitution for, the person from whom it has passed, as the case may require.

#### Notes.

This section applies to Provincial Small Cause Courts.

Sec. 372 of the Civil Procedure Code cannot be applied to the assignment, creation, or devolution of an interest subsequent to the decree in a suit. The section has no application to proceedings in execution of decree; and a Court has no jurisdiction, reading sec. 372 with sec. 647, to bring in a party after decree, and make him a judgment-debtor for the purposes of execution. *Gocool Chander Gossammee v. The Administrator-General of Bengal* (I. L. R., 5 Cal. 726; 5 Cal. L. R., 108) and *Attorney-General v. Corporation of Birmingham* (L. R., 15 Ch. D. 423) referred to. Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal under sec. 588 of the Court, *held* that, as there was no jurisdiction to make such an order, the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment debtor—I. L. R., 10 Al. 97.

The words "pending the suit," in Act X of 1877, sec. 372, relate to a suit in which no final order has been made.—5 Cal. 726; 5 C. L. R., 569.

The "cases of assignment, creation, or devolution" of any interest pending a suit contemplated by sec. 372 of the Civil Procedure Code, are those in which "the person to whom such interest has come" is arrayed on the same side in the suit as "the person from whom it has passed." *Held*, therefore, that a compromise in a suit for land between the plaintiff and one of the defendants, whereby the latter consented to a decree being given to the former for half the land, was not a "case of assignment" of an interest in such land within the meaning of that section.—5 Al. 209.

After a decree had been made in a suit, the case was, in 1875, struck out of the board for want of prosecution. No steps were taken to have it restored. In 1879, both the plaintiff and the defendant died. In the same year the heirs of the plaintiff instituted a suit against the administrator of the defendant for the purpose of having the decree in the original suit carried out. This suit was dismissed by the Court of first instance under Act X of 1877, sec. 13; but the Appellate Court, holding that the original suit was subsisting, and might be re-constituted, directed that the plaintiffs should be allowed to amend their plaint by putting it into the form of a petition under sec. 372 of the same Act. On a petition by the plaintiffs praying that the original suit might be revived and restored to the board, *held* that the application was not barred under sch. 2, art. 178. Even if art. 178 was applicable, the application would not be barred, limit-

ation running from the time when the suit was allowed to be re-constituted.—6 Cal. 60.

A suit was instituted by the trustee appointed under a will against the executrix for the purpose of having the trusts of the will carried into execution. A decree was made and certain directions were given for the purpose of having a scheme settled by which the trusts were to be carried out; but before the scheme was finally settled and approved, and while the proceedings were pending, the case was struck out of the board for want of prosecution. Subsequently both the plaintiff and defendant died. The heirs of the plaintiff then instituted a suit against the Administrator-General as representing the estate of the defendant for carrying the trusts into execution, and prayed that their suit might be considered as supplemental to the original one. *Held* that the original suit, though no longer upon the board, was capable of revival, and that, if no person were living whose consent might be obtained, or to whom notice might be given, the Court might give leave without any such consent or notice, and that the proper course to pursue was to allow the plaintiffs to amend their plaint by putting it in the form of a petition under Act X of 1877, sec. 372, the defendant being at liberty to put in any answer which he might have done, if the proceeding had been by petition in the first instance.—5 Cal. 726.

See I. L. R., 8 Cal. 837, noted under sec. 368; 8 Bom. 323, noted under sec. 32.

Power for Court to extend period of limitation prescribed for certain applications.

**372A\*** The provisions of section 5 of the Indian Limitation Act, 1877, applicable to appeals, shall apply to applications under sections 365, 366, 368, and 371.

.—This section applies to Provincial Small Cause Courts.

## CHAPTER XXII.

### OF THE WITHDRAWAL AND ADJUSTMENT OF SUITS.

**373.** If, at any time after the institution of the suit, the Court is satisfied, on the application of the plaintiff, (a) that the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for permitting him to withdraw from the suit, or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.

If the plaintiff withdraw from the suit, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh suit for the same matter or in respect of the same part.

\* Section; 372A has been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 32

Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where the plaintiff applied under sec. 97, Act VIII. of 1859, to be allowed to withdraw from the suit, with liberty to bring a fresh suit for the same matter, the Court refused the application. Another application for leave simply to withdraw from the suit was granted, the Court dismissing the suit with costs. *Brass v. Tiruvengada Pillai* (1 M. H. C. R., 247) dissented from.—1 B. L. R., (O. C.) 45.

The High Court has no power under the Civil Procedure Code to award costs to the defendant when the plaintiff withdraws, not having asked leave to do so with liberty to bring another suit for the same matter.—1 M. H. C. R., 247.

A Small Cause Court is not bound to allow a plaintiff to withdraw a suit on the ground that he had received payment from one of the defendants in the suit, that attempt to withdraw having been made after the plaintiff had succeeded in getting a judgment against two defendants which had been set aside by the Court on various grounds, and a new trial ordered. In such a case the Court may permit the withdrawal of the suit upon the terms of plaintiff paying the first defendant's costs.—3 M. H. C. R., 27.

An appellant has no right to withdraw an appeal which has been regularly registered without the permission of the Court. Where the appellant had given notice of the withdrawal of the appeal before the day of hearing, and notice of withdrawal had been given to the respondent, but not until costs had been incurred, *held* that the appellant was not at liberty to withdraw the appeal, and the Court ordered that the appeal be set down for hearing.—3 M. H. C. R., 368.

In a suit to recover the possession of land, of which the plaintiff had been dispossessed in execution of a decree against the 1st defendant it appeared that the plaintiff had applied within one month from the date of his dispossession to the Court from which the process of execution had issued under sec. 230 of the Code of Civil Procedure, setting up his title, and it was numbered and registered as a suit under the section. Before the claim came on for hearing, the plaintiff was allowed by the Court to withdraw the proceeding, with liberty to bring a fresh suit upon the claim set up. The plaintiff subsequently brought the present suit. *Held* that the former proceeding was a suit within the meaning of sec. 97 of the Code, and liberty having been given on its withdrawal, before decree, to bring another suit, the present suit was well brought.—5 M. H. C. R., 298.

A plaintiff without leave of the Court withdrew from a suit in 1853. He filed a fresh suit on the same cause of action in 1866. *Held* that he was not debarred from doing so, as the provisions of sec. 97 of the Code of Civil Procedure did not apply.—7 Bom. H. C. R., (A. C.) 23.

A plaintiff who has withdrawn from his suit is at liberty to rescind the act of withdrawal at any time before final judgment. Sec. 97 of the Civil Procedure Code is inapplicable to a case like the present, when the plaintiff rescinded after two days a petition he had presented of withdrawal from his claim. The last clause of that section contemplates cases in which the withdrawal is not revoked.—6 N.-W. P. H. C. R., 66.



The proviso in the 3rd clause of sec. 373 of the Code of Civil Procedure does not deprive the Court of power to permit one of several plaintiffs to withdraw unconditionally from a suit, even though his co-plaintiffs do not consent to his withdrawal.—9 C. L. R., 332.

A, having brought an action against B, was allowed to withdraw, with leave to bring a fresh suit, and was also ordered to pay the costs. *Held* that, the payment of the costs not having in terms been made a condition precedent to bringing a fresh suit, the Court had no power to stay proceedings in the fresh suit, on the ground that the costs had not been paid.—2 Hyde's Rep., 212.

Where a plaintiff filed a petition withdrawing his claim unconditionally, the suit should be at once struck off the file. If the defendant had entered into some private agreement and did not fulfil the same, it might give a new right of action to the plaintiff for enforcing that agreement, but was no reason for setting aside the petition for withdrawal of the suit as null and void.—2 Agra H. C. R., 158.

A suit founded on a compromise, which was entered into when special appeal was withdrawn, was not barred by sec. 97, Act VIII. of 1859, as it was not a suit for the same matter within the meaning of that section; but if the compromise was duly made by the parties thereto, and if its terms have been broken, a party to it is entitled to maintain a suit to enforce it.—3 Agra H. C. R., 135.

Where application was made for leave to withdraw a suit, with leave to bring a fresh one, it being contended that the fact of a notarial protest on inland bills, and of their being in the hands of the holder without signature, was proof of dishonour; and further that, defendant being a Hindu, there was no necessity for notice of dishonour, the Appellate Court, reversing the decision of the Court below, granted the application under the power given by sec. 37, Act XXIII. of 1861.—Bourke's Rep., A. O. C., 99.

Where, on appeal from a decree dismissing a suit, the Appellate Court, being of opinion that the plaint was informally drawn, and its allegations regarding the cause of action not sufficiently specific, gave the plaintiff permission, under sec. 373, to withdraw the suit, with leave to institute a fresh one, *held* that the order of the Appellate Court was a "decree," and afforded a proper ground of appeal to the High Court. *Per* STRAIGHT, J.—That, with reference to the terms of sec. 582, the Appellate Court had power to avail itself of the provisions of sec. 373, and, therefore, had a discretion to make the order allowing the plaintiff to withdraw the suit and institute a fresh one. *Gregory v. Doole Chand Kandary Mull* (14 W. R., O. J., 17) and *Khatoon Koonwar v. Hurdoot Narain Singh* (20 W. R., 163) referred to. Also *per* STRAIGHT, J., that it could not be said that the Appellate Court in this case had exercised its discretion so unreasonably or erroneously as to compel the interference of the High Court with it in appeal. *Per* TYRRELL, J., that it might be taken that the Appellate Court, though not so stating in express terms, meant to set aside, and did set aside the decree of the Court of first instance, regarding it as a decree which could not have been rightly made, and must be set aside, by reason of the radical defect in the plaint, the basis of the suit and the decree; and that, in this view, there was no legal objection to the exercise by the Appellate Court of the discretionary power of Chapter XXII of the Code.—I. L. R., 8 Al. 82.

The ruling in *Sarju Prasad v. Sita Ram*, only decided that where the circumstances in regard to an application for execution of decree show that

it was withdrawn at the instance of the pleader of the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder for execution is prohibited by sec. 373 read with sec. 647 of the Civil Procedure Code. But where a Court of its own motion, and without being moved either by the decree-holder or by his pleader, takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Code which could bar a decree-holder from making a fresh application for execution. A first application for execution of a decree was ordered by the Court to be struck off for want of prosecution, and upon the statement of the decree-holder's pleader that at present the case may be struck off". No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings. *Held* that a subsequent application for execution of the decree was barred by sec. 373 read with sec. 647 of the Civil Procedure Code. *Sarju Prasad v. Sita Ram* explained and followed. *Ram Rup v. Lalji*, *Mahtab Kuar v. Sham Sundar Lal* and *Hira Singh v. Joti Prasad* distinguished. Observations as to the necessity of conducting the proceedings in execution of decree with as much care and regularity as proceedings in suits. Under sec. 647 of the Civil Procedure Code, the provisions relating to proceedings in suits are to be followed and adopted in execution proceedings, so far as they may be fairly and properly applicable thereto.—12 Al. 179.

Where a judgment-debtor, being entitled and having an opportunity to plead sec. 373 of the Code of Civil Procedure as a bar to execution of the decree against him neglects to do so, and the application in respect of which such objection might have been taken is entertained by the Court and orders passed thereon, the principle of *res-judicata* will apply to such proceedings, and the judgment-debtor cannot at a subsequent stage of the same execution proceedings object that such previous application for execution ought, in fact, to have been held to be barred by the operation of sec. 373 abovementioned.—13 Al. 564.

Sec. 647 of the Civil Procedure Code makes sec. 373 applicable to proceedings in execution of decree. The words "suit" and "appeal" in sec. 647 apply to suits and appeals in the strict sense of those terms, and were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal. An application for execution of decree by arrest of the judgment-debtor was ordered by the Court to be struck off, upon the statement of the decree-holder's pleader that the judgment-debtor was in hiding, and that the decree-holder did not desire to prosecute the application further. At that time an order for a warrant of arrest had been issued subject to the payment of fees, but those fees had not been paid nor had the diet money been deposited, and no steps were taken to proceed with the application. No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings. *Held* by the Full Bench that a subsequent application for execution of the decree was barred by sec. 373 read with sec. 647 of the Civil Procedure Code. *Sarju Prasad v. Sita Ram* and *Fakir-ullah v. Thakur Prasad* approved and followed. *Bijai Singh v. Haiyat Begum* distinguished.—12 Al. 392.

In a suit brought in a District Munsif's Court to declare certain land liable to be sold in execution of a decree for more than Rs. 2,500, the defendants pleaded that the Court had no jurisdiction. The Munsif allowed the plaintiff to amend the plaint by stating that he abandoned his claim to execute the decree against the land for more than Rs. 2,500. On appeal, the District Judge held that the plaint could not be amended after the first hear-

ing. *Held*, on appeal to the High Court, that the claim was not one which could be amended so as to bring the suit within the pecuniary jurisdiction of the District Munsif.—10 Madr. 152.

A decree-holder having applied for execution of his decree, notice issued to the judgment-debtors, and their property was attached, but the applicant failed to pay the process fees, and the application was struck off, and no leave to make a fresh application was obtained under Civil Procedure Code, sec. 373 :—*Held*, that the decree-holder was entitled to apply again for execution of his decree.—15 Madr. 240.

The plea that the plaintiff had improperly been permitted to withdraw from a former suit with liberty to bring the present one, which had not been taken in the lower Courts, and was not taken in the memorandum of second appeal, was not permitted to be urged, at the hearing of the second appeal.—3 Al. 528.

The Code of Civil Procedure (Act XIV of 1882) does not allow of a plaint or memorandum of appeal being returned to the plaintiff or appellant after a case has been heard on its merits, and just as the plaintiff or appellant discovers that the Court is about to pronounce an adverse decision. There is no provision in the Code for the return of a plaint to a plaintiff after it has been admitted, and the Court-fee stamps thereon cancelled. Even if the Code allowed the High Court to return a plaint after the Court-fee stamps have been cancelled, the plaint could not be again legally presented in any Court without new stamps being affixed to it. The Executive Government alone have power to remit Court-fees, and no Court or Judge has legal authority to admit a plaint which bears only cancelled stamps, or to direct a subordinate Court to admit such a document.—7 Bom. 487.

The plaintiffs, obtained a decree on 12th November, 1886, allowing them to redeem on payment of Rs. 168 8 0 within six months. In default of payment within the prescribed time they were to stand for ever foreclosed. Against this decree the defendant appealed to the High Court. On the 10th September, 1888, the High Court passed an order allowing the defendant to withdraw the appeal. On the 17th December, 1888, plaintiffs applied for execution of the decree of the 12th November, 1886. The lower Court, regarding the withdrawal of the second appeal as practically a confirmation of the decree of the 12th November, 1886, computed the six months allowed for redemption from the date of the order of withdrawal (10th September, 1888) and granted the plaintiff's application. On appeal to the High Court, *held*, reversing the lower Court, that the application was time barred and that the plaintiff was foreclosed. The time allowed for redemption was to be computed, not from the date of the High Court's order permitting the withdrawal of the appeal, but from the date of the decree appealed from (*i. e.*, 12th November, 1886). The order of withdrawal was not a decree. The only decree which could be executed was that of the 12th November 1886. The redemption money not having been paid within six months from that date, the plaintiffs were foreclosed. The Court could not, in execution proceedings, enlarge the time fixed for redemption. *Mahant Ishwargar v. Chudasama Manabhai* (I. L. R., 13 Bom. 106) followed. *Per* BIRDWOOD, J.—It was open to the plaintiffs to apply, if so advised, to the High Court for a review of the order of withdrawal of the 10th September, 1888, with a view to the enlargement of the time of redemption as a condition which might equitably have been permitted when the defendant was allowed to withdraw the second appeal.—15 Bom. 370.

When a plaintiff sues to recover possession of property on the allegation that he had purchased it with his own money, and the suit is dismissed in the Court of first instance, the Court of Appeal is not justified in giving the plaintiff a decree for a portion of the property, on the ground that the whole was the property of a joint Hindu family in which the plaintiff was a co-sharer. A claim to attached property made under Act VIII of 1859, sec. 246, was dismissed, and the claimant, in the year 1875, instituted a regular suit against the decree-holder under the provisions of that section. The decree holder then released the property from attachment, and the plaintiff withdrew his suit. The same property was afterwards, in the year 1878, attached again, and sold in execution of the same decree. *Held* that a subsequent suit for possession of the property against the purchaser at the execution-sale was not barred under sec. 97 of Act VIII of 1859. *Eshen Chunder Singh v. Shama Churn Bhutto* (11 Moore's I. A. 7) cited.—8 Cal. 871.

Sec. 373 of the Civil Procedure Code does not apply to applications for execution of decree. *Tarachand Magraj r. Kashi Nath Trimbak*, I. L. R., 10 Bom., 62, followed. *Radha Charan v. Man Singh*, I. L. R., 12 All., 392, dissented from.—18 Cal. 462.

See I. L. R., 18 Cal. 515, 10 Madr. 160, and 5 Al. 406, noted under sec. 43; 15 Bom. 160, noted under sec. 97; 6 Al. 211, noted under sec. 2; 10 Al. 71, noted under Art. 179, Sch. II. of Act XV of 1877.

**374.** In any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought.

Limitation-law not affected by first suits.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where a Hindu governed by the Mitakshara law seeks to set aside his father's alienations of ancestral property, if the alienees are purchasers at Court sales held in execution of decrees against the father, it is not enough for him to show that the debts, for which the decrees were passed, were contracted by the father for immoral purposes; it must also be shown that the auction-purchasers had notice that the debts were so contracted. The points to be determined in such cases are: (1) What was the interest that was bargained for and paid for by the purchaser? Was it the father's interest only, or was it the interest of the entire family? (2) Were the debts, for which the decrees were obtained under which the property was sold, contracted for immoral purposes? and (3) had the purchaser notice that the debts were so contracted? The plaintiff sued in 1883 for partition of ancestral property consisting (*inter alia*) of certain *thikans* which had been sold in execution of decrees passed against his father. The plaintiff, though an adult at the time, was not a party to the suits in which the decrees were passed against the father, nor to the execution-proceedings. In the certificates of sales granted to the different purchasers, the property sold was described as being a four-anna share, which would be equal to the shares of the father and the son together, but this description was qualified by the statement that "the right, title, and interest in the above mentioned property of the said Ravji (*i. e.*, the father) was sold." There was nothing to show that the purchasers bargained for and paid for the entire family estate. Moreover, the plaintiff's possession and enjoyment of the *thikans* in

question was never disturbed, though the sharers had each a separate possession of distinct portions of the ancestral property. *Held* that under the circumstances the father's interest alone passed to the auction-purchasers. *Held* further that the plaintiff's claim with regard to eight other *thikans* in dispute was time-barred. On the sale of those *thikans* in execution of decrees against his father, the plaintiff intervened, and obstructed the auction-purchasers in obtaining possession. His obstruction was, however, removed by an order of the Court, dated 23rd October 1873. The present suit, which was filed in 1883, not having been brought within one year from the date of that order, as required by the law then in force, the claim was clearly time-barred. The plaintiff was not entitled to a deduction of the time taken up in prosecuting a former suit, which was filed up in 1872, and disposed of in 1883; as that suit did not fail for want of jurisdiction or any defect of a like nature such as is contemplated by sec. 14 of the Limitation Act, XV. of 1877, but was withdrawn by the plaintiff himself for want of parties, with liberty to bring a fresh suit. Sec. 374 of the Code of Civil Procedure (Act XIV. of 1882), therefore, applied to the present case.—I. L. R., 12 Bom. 625.

The rule laid down in sec. 374 of the Code of Civil Procedure (Act X of 1877), that, where a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought, applies to applications for execution; and, therefore, in counting the time of three years prescribed by the Limitation Act XV of 1877, sch. ii. art. 179, cl. 4, an application allowed to be withdrawn must be discarded as if it had never been presented. The bar created by sec. 374 of the Code of Civil Procedure is, in such a case, not removed by sec. 14 of the Limitation Act as causes for which the withdrawal of a suit or application may be permitted, are not causes "of a like nature" with defect of jurisdiction.—6 Bom 681.

See I. L. R., 10 Al. 71, noted under Art. 179, Sch. II of Act XV of 1877; 18 Cal. 515, noted under sec. 43.

**375.** If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the suit, such agreement, compromise, or satisfaction, shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise, or satisfaction.

Compromise of suit.

#### Notes.

This section applies to Provincial Small Cause Courts.

On the day fixed for the hearing of a suit in a Court of Small Causes, the plaintiff's *vakil* appeared, and stated on behalf of his client that the defendant had satisfied him in respect of the matter of the suit, which he prayed might be dismissed. The defendant did not appear. *Held* that the Judge was right in dismissing the suit, but that he should have recorded an order under the first provision in sec. 98 of Act VIII. of 1859. *Held* also that, in such a case, when the plaintiff applies for a return of a



stamp-duty, he must strictly bring himself within the subsequent part of the same section as modified by sec. 26 of Act X of 1862.—1 M. H. C. R., 127.

After service of the summons, and on the day the defendant was required to appear, the parties filed in Court deeds containing terms of compromise. *Held* that the plaintiff was entitled to a return of the entire amount of the stamp-duty, there having been no settlement of issues—Marshall's Rep., 274 ; 2 Hay's Rep., 213.

According to the practice of the High Court, a consent decree upon a compromise will not be granted, unless the suit be entered in the cause list of the Court.—5 C. L. R., 464.

A sum of money having been deposited in Court under Transfer of Property Act, sec. 83, by a vendee of the mortgagor, the mortgagee refused to accept it in discharge of his mortgage except on the terms that the depositor should convey to him part of the mortgage premises, which he consented to do. This agreement was not communicated to the Court and the depositor refused to carry it out when the mortgagee had withdrawn the money as above:—*Held*, that the mortgagee was entitled to a decree for specific performance of the agreement to convey.—I. L. R., 13 Madr. 316.

Under section 375 of the Civil Procedure Code (XIV of 1882) an application to record an agreement adjusting a suit may be made, although, at the time of such application, one of the parties either denies that it was made, or wishes to withdraw from it, or otherwise objects to its enforcement. The Court, being already seized of the suit which is adjusted, the application to record the alleged agreement is a proceeding in that suit, and the Court, in connection with that proceeding, necessarily has all the powers and has thrown upon it all the duties which appertain to it in regard to any other questions arising in any suit upon its file—Ruttonsey Lalji v. Pooribai (I. L. R., 7 Bom., 304) approved and followed ; Hara Sundari Debi v. Kumar Dukhinessur (I. L. R., 11 Cal., 250) dissented from.—16 Bom. 202.

By an agreement made in writing before the hearing, the parties to a suit entered into a compromise by which the plaintiff agreed, for consideration, to withdraw the suit. When the case came on for hearing, plaintiff refused to fulfil his promise. The defendant having produced the agreement, the Munsif held that it must be enforced, and dismissed the suit. On appeal, the District Judge held that the agreement could not be treated as a compromise, as the plaintiff did not consent, and remanded the suit. *Held* that the agreement could be enforced. Ruttonsey Lalji v. Pooribai (I. L. R., 7 Bom. 304) approved.—8 Madr. 482.

After suit filed by the plaintiff against several defendants, one of whom was an infant, a petition of compromise, entered into between the adult parties, was filed in Court. The petition stated the terms of arrangement, and also that an application would be made by the guardian of the minor praying the Court to allow the compromise to be carried out on his behalf. Ten days after the petition of compromise was filed, the first defendant and the plaintiff presented petitions to the Court withdrawing from the compromise, and praying that the suit should proceed. The second defendant presented a petition praying that the compromise should be recorded, and a decree passed according to its terms. The Court made a decree in accordance with the prayer of the second defendant's petition. The first defendant appealed. *Held*, that an appeal lay, and that the lower Court was wrong in enforcing the compromise at the instance of the second defendant.



*Semble*, that sec. 375 of the Code of Civil Procedure merely covers cases in which all parties consent to have the terms entered into carried out, and judgment entered up. *Ruttonsey Lalji v. Pooribai*, (I. L. R., 7 Bom. 340) questioned.—11 Cal. 250.

The question in a suit was whether the purchase money for a house, which had been paid by the defendant, had been paid out of his own funds or out of monies belonging to the plaintiff. A witness for the defence having made statements apparently favourable to the plaintiff's case, the pleaders for both parties signed and presented to the Court a petition that if upon a particular bond in the witness' possession it should be stated that the money was received through the defendant, the Court should decree the suit, otherwise the suit should be dismissed. *Held* that this arrangement was not an adjustment or compromise of the suit within the meaning of sec. 375 of the Civil Procedure Code, so as to determine the jurisdiction of the Court and necessitate its passing a decree according to the arrangement. The Oaths Act (X of 1873) does not constrain a Court to pass a decision in favour of a particular party. If a party to a suit says he will be bound by the oath of a particular person, sec. 11 of the Act only means that *pro tanto* will be bound, *i. e.*, so far as the matter of that evidence is concerned, and that evidence will be conclusive as to its truth as against him throughout the whole of the litigation. But it in no way compels the Court trying the case to accept it as conclusive. *Vasudeva Shanbog v. Naraina Pai* (1) approved.—14 Al. 141.

The parties to an appeal, in which an issue had been remitted for trial to the Lower Court, having presented a petition to the Lower Court, stating that the suit had been compromised and the terms of the compromise, requested the Lower Court to move the Appellate Court to pass a decree in accordance with such terms. Before a decree was passed, one of the parties objected to the compromise being accepted :—*Held*, that it was open to the Court, such objection notwithstanding, to pass a decree in accordance with the agreement—*Ruttonsey Lalji v. Pooribai* (I. L. R., 7 C., 304) and *Karuppan v. Ramasami* (I. L. R., 8 M. 482) followed ; *Hara Sundari Debi v. Kumar Dukhinessur Malia* (I. L. R., 11 Cal. 250) observed upon. An oral agreement by the parties to a suit that a decree be passed creating a charge on immoveable property above Rs. 100 in value, is not rendered inoperative by sec. 59 of the Transfer of Property Act. The parties to an appeal applied to the Court to pass a decree in accordance with the terms of a compromise, and, before decree was passed, one of the parties objected to such decree being passed on the ground that certain condition precedent to be performed by the other party had not been performed. The Court (this being denied by the other party) called for affidavits in proof of the terms of the agreement of compromise, and, these being found not to be sufficiently conclusive, directed the Lower Court to take evidence on the point.—9 Madr. 103.

The only compromise with a Court can in any case be bound under sec. 375 of the Code of Civil Procedure to enforce, is one which adjusts, wholly or in part, the suit ; matters going beyond the suit cannot, if included in a compromise, be so enforced. A Court refusing to grant a decree on a compromise going beyond the suit, cannot however grant a decree modifying the terms of the proposed compromise, but must leave the parties to proceed with the suit as they may be advised. *Fajaleh Miah v. Kamaruddin Bhuya*.—13 Cal. 170.

After the hearing of the suit had begun, the plaintiffs and defendants came to an agreement, by which they settled all the matters in dispute

between them in the suit. The agreement was in writing, and dealt in one clause with the dispute, the subject-matter of the suit, and in a second clause with another dispute of long standing between the parties, with which the suit had nothing to do. The plaintiffs subsequently objecting to consent to a decree being taken in terms of the first clause of the agreement, the defendants took out a rule *nisi*, calling on the plaintiffs to show cause why the agreement should not be recorded in Court, and why the Court should not pass a decree in accordance therewith, under the provisions of sec. 375 of the Civil Procedure Code (Act XIV of 1882). The rule was argued on affidavits on either side, the plaintiffs objecting that the above section did not apply to such a case as this, and that, in any case, the matter could not be decided on affidavits, but evidence must be gone into. *Held* that sec. 375 gave the Court the power to deal with such a case as this in the manner required, and that this was a proper case in which to exercise such a power; and that, in the circumstances of this case, no definite procedure having been enjoined by the Code, the matter might properly be decided on affidavits. Rule made absolute accordingly.—7 Bom. 304

See I. L. R., 11 Al. 228, noted under sec. 257A.

Applications for execution  
of decrees not affected.

“**375A.** Nothing in this Chapter shall apply to any application or other proceeding in any suit subsequent to the decree.

“*Explanation.*—An application to the Appellate Court pending an appeal is not an application subsequent to the decree appealed from within the meaning of this section.”\*

## CHAPTER XXIII. OF PAYMENT INTO COURT.

**376.** The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

**Note.**—This section applies to Provincial Small Cause Courts.

**377.** Notice in writing of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.

**378.** No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited be in full of the claim or fall short thereof.

**Note.**—This section applies to Provincial Small Cause Courts.

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\* This section has been added by Act VI of 1892.

**379.** If the plaintiff accept such amount only as satisfaction in part of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff must pay the costs of the suit incurred after the deposit, and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

If the plaintiff accept such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed, and the Court shall pass judgment accordingly, and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

*Illustrations.*

(a) A owes B Rupees 100. B sues A for the amount, having made no demand for payment, and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b.) B sues A under the circumstances mentioned in illustration. (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(c.) A owes B Rupees 100, and is willing to pay him that sum without suit. B claims Rupees 150, and sues A for that amount. On the plaint being filed, A pays Rupees 100 into Court, and disputes only his liability to pay the remaining Rupees 50. B accepts the Rupees 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

**Note.**—This section applies to Provincial Small Cause Courts.

## CHAPTER XXIV.

### OF REQUIRING SECURITY FOR COSTS.

**380.** If, at the institution or at any subsequent stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British India independent of the property in suit, the Court may, either of its own motion or on the application of any defen-

dant, order the plaintiff or plaintiffs, within a time to be fixed by the order, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

On the application of any defendant in a suit for money in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India independent of the property in suit.\*

#### Notes.

This section applies to Provincial Small Cause Courts.

A leasehold is immoveable property within sec. 34 of Act VIII. of 1859.—7 B. L. R., App. 60.

In a suit for the administration of the estate of a deceased Hindu, the defendants admitted that the plaintiffs had an interest in the property, but disputed the extent of such interest. The defendants applied that the plaintiffs be directed to furnish security for costs under sec. 34 of Act VIII. of 1859. *Held* that the section did not apply.—10 B. L. R., App. 25.

*Held*, that a plaintiff, being resident in Wadhwan, in Kathiwar, and possessed of immoveable property in the cantonment there, could not be required to give security for costs under sec. 380 of the Civil Procedure Code (Act XIV of 1882), the cantonment of Wadhwan being within the limits of British India.—I. L. R., 9 Bom. 244.

A suit to recover certain specified articles and money alleged to have been wrongfully seized and taken possession of by the defendant, or to recover the value thereof, is a suit for money within the terms of the second paragraph of sec. 380 of the Civil Procedure Code, the term "suit for money" as there used being wider than a suit for debts. Circumstances under which the Court will order security for costs to be given by a female plaintiff in such a suit.—17 Cal. 610.

The meaning to be given to the word "residence" in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used. The '*residence*' intended in sec. 380, Act X of 1877, is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided.—3 Bom. 227.

**381.** In the event of such security not being furnished

Effect of failure to furnish security. within the time so fixed, the Court shall dismiss the suit, unless the plaintiff or plaintiffs be permitted to withdraw therefrom under the provisions of section 373,

"or show good cause why such time should be extended in which case the Court may extend it.

"Where a suit is dismissed under this section, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security

\* This clause has been added by the Debtors Act (VI of 1888), sec. 5.

within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

“The dismissal shall not be set aside unless the plaintiff has served the defendant with notice in writing of his application.

“The provisions of the Indian Limitation Act, 1877, with respect to an application under sec. 103, and of this Code with respect to an appeal from an order rejecting such an application, shall apply, so far as they can be made applicable, to an application under this section for an order to set aside the dismissal of a suit, and to an appeal from an order rejecting such an application, respectively.”\*

#### Notes.

This section applies to Provincial Small Cause Courts.

See I. L. R., 8 Al. 108, noted under sec. 2.

**382.** Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of section 380.

—This section applies to Provincial Small Cause Courts.

## CHAPTER XXV.

### OF COMMISSIONS.

#### A.—*Commissions to examine Witnesses.*

**383.** Any Court may, in any suit, issue a commission for the examination, on interrogatories or otherwise, of persons resident within the local limits of its jurisdiction, who are exempted under this Code from attending the Court, or who are, from sickness or infirmity, unable to attend it.

Cases in which Court may issue commission to examine witness.

**Note.**—This section applies to Provincial Small Cause Courts.

**384.** Such order may be made by the Court either of its own motion, or on the application, supported by affidavit or otherwise, of any party to the suit, or of the witness to be examined.

Order for commission.

**Note.**—This section applies to Provincial Small Cause Courts.

\* The clauses quoted have been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 33.

**385.** The commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute the same.

When witness resides within Court's jurisdiction.

**Note.**—This section applies to Provincial Small Cause Courts.

**386.** Any Court may, in any suit, issue a commission for the examination of—

Persons for whose examination commission may issue.

(a) any person resident beyond the local limits of its jurisdiction ;

(b) persons who are about to leave such limits before the date on which they are required to be examined in Court ; and

(c) civil and military officers of Government, who cannot, in the opinion of the Judge, attend the Court without detriment to the public service.

Such commission may be issued to any Court, not being a High Court or the Court of the Recorder of Rangoon, within the local limits of whose jurisdiction such person resides, “ or to any pleader or other person whom the Court issuing the commission may, subject to any rules of the High Court in this behalf, thinks fit to appoint.”\*

The Court, on issuing any commission under this section, shall direct whether the commission shall be returned to itself or to any subordinate Court.

#### Notes.

This section applies to Provincial Small Cause Courts.

The issue of a commission for the examination of an absent witness, without notice to the opposite party, even if not illegal, is objectionable.—3 W. R., 147.

Subsequently to the institution of the plaintiffs' suit, one of the defendants died, and his son, as his legal representative, was made a defendant in his stead. The new defendant (*inter alia*) objected that his father had been dead more than six months before the application of the plaintiffs to make him a defendant, and that, therefore, the suit should abate, as provided by the last clause of sec. 368 of the Civil Procedure Code, Act X of 1877 (introduced by the amending Act, XII of 1879), and art. 171B of the Limitation Act, XV of 1877, which prescribes a period of sixty days within which an application should be made to have the representative of a deceased defendant made a defendant to a suit. When the amending Act, XII of 1879, was passed—that is, on the 29th of July, 1879,—the original defendant had been dead more than six months ; but the plaintiff made an application to have the representative of the deceased defendant made a defendant before

\*The words quoted have been substituted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 34, for the words, “ or to any pleader of a High Court whom the Court issuing the commission thinks fit to appoint,” as originally enacted.



the publication of the Act in the Local Gazette. *Held* that the provisions of art. 171B of the Limitation Act should not be given retrospective effect, and that the plaintiff's application was not time-barred. The general rule as laid down in *Reg. v. Dorabji* (11 Bom. H. C. R., 117)—that "an Act of limitation, being a law of procedure, governs all proceedings, to which its terms are applicable, from the moment of its enactment, except so far as its operation is expressly excluded or postponed"—admits of the qualification that, when the retrospective application of a statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, then the statute is not, any more than any other law, to be construed retrospectively.—I. L. R., 6 Bom. 26.

**387.** When any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that his evidence is necessary, the Court may issue such commission.

Commission to examine witness not within British India.

**Notes.**

This section applies to Provincial Small Cause Courts.

The Kingdom of Ava is not the territory of a Native Prince or State in alliance with the British Government within the meaning of sec. 177 of Act VIII. of 1859. A commission for the examination of a witness at Mandalay can only issue from the High Court. The consent of parties is not requisite to the admissibility of evidence taken under such commission, if the examination have been upon oath or affirmation.—2 B. L. R., (A. C.) 73; 10 W. R., 385.

Court to examine witness pursuant to commission.

**388.** Every Court receiving a Commission for the examination of any person shall examine him pursuant thereto.

**Note.**—This section applies to Provincial Small Cause Courts.

**389.** After the commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court out of which it issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto, and the evidence taken under it, shall (subject to the provisions of the next following section) form part of the record of the suit.

Return of commission with depositions of witnesses.

**Notes.**

This section applies to Provincial Small Cause Courts.

*A de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court, unless the parties consent to the evidence being taken under a commission.—5 B. L. R., 252.

The evidence of a defendant, taken under a commission, may be read on behalf of the plaintiff, without the deposition being put in as part of his

case. Having been put in, the deposition, under sec. 179, became part of the record.—8 B. L. R., App. 102.

**390.** Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless

When depositions may be read in evidence.

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead, or unable, from sickness or infirmity, to attend to be personally examined, or exempted from personal appearance in Court, or

(b) the Court, in its discretion, dispenses with the proof of any of the circumstances mentioned in the last preceding clause, and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

#### Notes.

This section applies to Provincial Small Cause Courts.

Documents attached to the return of a commission, and identified with the documents referred to in the evidence, may be read at the hearing of the suit in which the commission issued, unless they have been objected to on being tendered in evidence before the commission. Objections to the admissibility of such documents cannot be taken at the hearing of the suit.—6 C. L. R., 109.

Provisions as to execution and return of commissions to apply to commissions issued by foreign Courts.

**391.** The provisions hereinbefore contained as to the execution and return of commissions shall apply to commissions issued by

(a) Courts situate beyond the limits of British India and established by the authority of Her Majesty or of the Governor-General in Council, or

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country for the time being in alliance with Her Majesty.

#### Notes.

This section applies to Provincial Small Cause Courts.

See 2 B. L. R., (A. C.) 73; 10 W. R., 385, noted under sec. 387.

#### *B.—Commissions for local Investigations.*

**392.** In any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of

Commission to make local investigations.

any property, or the amount of any mesne-profits or damages or annual nett-profits, and the same cannot be conveniently conducted by the judge in person, the Court may issue a commission to such person as it thinks fit, directing him to make such investigation and to report thereon to the Court:

Provided that, when the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

#### Notes.

This section applies to Provincial Small Cause Courts.

Local investigations are had recours to, not so much for the purpose of collecting evidence which could be taken in Court, as to obtain evidence which from its peculiar nature can only be obtained on the spot.—2 N.-W. P. H. C. R., 196.

It was never intended that Revenue Courts should delegate their functions entirely to subordinate officers. The law contemplates a careful investigation and trial in the Revenue Court. Counting the heads of the witnesses without making any attempt to weigh their evidence, or ascertain their credibility, is not such a careful investigation.—2 N.-W. P. H. C. R., 196.

An application under sec. 180, Act VIII. of 1859, should be made at the hearing of the suit, and not previously.—Bourke's Rep., (O. C.) 243.

Evidence taken by an amin is not admissible.—19 W. R., 14.

Reasonable notice must be given of the time fixed for hearing objections to an amin's report.—21 W. R., 2.

The deputation of an amin to ascertain the respective liability of several judgment-creditors is not an improper course for a Court to pursue, and at all events is not a ground for interfering in special appeal with the concurrent judgment of two Courts.—22 W. R., 183.

When an enquiry has been made by a commissioner under the Code of Civil Procedure, the Court to which it is reported ought not, unless it annuls the proceedings of the first enquiry, to order another on the same matter.—23 W. R., 93.

*Held* that a local inquiry ought not to have been ordered in this case, where the question to be decided was one of disputed boundary, which turned chiefly on possession before the date of suit, and that the Subordinate Judge would have been justified in disregarding the amin's report, and trying the appeal on the recorded evidence.—17 W. R., 472. See 4 B. L. R., App. 33; S. C., 17 W. R., 473 note.

In a suit for land where the question was as to whether the land lay within the boundaries of the plaintiff's or the defendant's land, the Court of first instance suggested to the parties that the proper mode of determining the case was in the first instance to hold a local investigation, and that such local investigation should be applied for by one or other of the parties. Both parties resolutely refused to make such application and the Court thereupon dealt with the case upon the materials before it, and passed a decree. Upon appeal the lower Appellate Court remanded the case for the purpose of a local investigation being held at the cost of the plaintiff in the first instance. *Held*, that inasmuch as neither of the parties desired to have a local investigation, the Court was wrong in remanding the case, and

that it was bound to decide it upon the evidence before it.—I. L. R., 12 Cal. 45.

**393.** The Commissioner, after such local inspection as he deems necessary, and after reducing to writing the evidence taken by him, shall return such evidence together with his report in writing, signed with his name, to the Court.

The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit, and shall form part of the record; but the Court, or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to the manner in which he has made the investigation.

**Note.**—This section applies to Provincial Small Cause Courts.

*C.—Commissions to examine Accounts.*

**394.** In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit, directing him to make such examination or adjustment.

**Notes.**

This section applies to Provincial Small Cause Courts.

Where a Commissioner, appointed under sec. 181 of Act VIII. of 1859 to investigate the state of accounts between a debtor and a creditor, made his report, on which the judgment appealed against was founded, the High Court, on a regular appeal, refused to take a fresh account.—1 M. H. C. R., 1.

The Appellate Court will not enter into the details of the account of a Commissioner appointed under sec. 181 of the Code of Civil Procedure. A party cannot be heard in the Appellate Court upon items to which he took no objection in the Court below. But where there has been error in the principal upon which such account has been taken, the Appellate Court will correct such error if excepted to in the Court below. Regular Appeal No. 54 of 1861 (1 Madr. 1) concurred in.—1 M. H. C. R., 418.

An error in the principle on which an account is taken is not the only ground on which a Court should inquire into the correctness of the report of a Commissioner appointed under sec. 181 of the Code of Civil Procedure. It is competent to an Appellate Court, under the powers conferred by sec. 37 of Act XXIII. of 1861, to examine the accounts, even if no exception has been taken to them in the Court appointing the Commissioner. Madras rulings dissented from.—6 Bom. H. C. R., (A. C.) 149.

Separate property may be acquired by a member of an undivided family by gift, and the character of impartibility attaches to gifts made

by a father to his unseparated sons. What is acquired by the father's favour will subsequently be declared exempt from partition. Separate property may be acquired by the exertions of a member of the family without detriment to the family funds. It may be acquired with money borrowed on the sole credit of the borrower, and it may be acquired by the mutual agreement of the members of the family. It is not necessary for the preservation of the joint nature of family property that the members of the family should live in commensality; they may dwell and mess apart, and yet remain joint in property. Arrangements relating to the enjoyment of joint family property, and acknowledgments of the right of the several members of the family to acquire separate property made by the adult members of the family, are to be held binding on the minor members of the family, if they are not detrimental to their interest; and such arrangements, consented to by a father, should be held binding on his minor child. The several members of a family may agree to take loans from the common fund, and treat the profits on such loans as the separate property of the several members by whom the loans have been respectively taken.—3 N.-W. P. H. C. R., 217.

The 180th section of the Civil Procedure Code, under which commissions to examine account-books are issued, contains no direction that the Commissioners are to be sworn or affirmed.—3 N.-W. P. H. C. R., 217.

Where a Commissioner was appointed by a Court under sec. 180 of Act VIII of 1859 to take accounts at the request of the plaintiffs, and his costs were not prepaid under sec. 182, and the defendant was by the decree ordered to pay the costs of the suit, but the costs of the Commissioner were not entered in the decree: *Held* in a suit by the Commissioner against the plaintiffs for remuneration for his labour that the plaintiffs were liable.—I. L. R., 4 Madr. 399.

In a suit for an account against an agent, the plaint stated that the defendant had not submitted proper accounts of his agency, and prayed that the defendant might be ordered to produce certain papers, and that, on failure to submit the accounts, he might be decreed to pay the plaintiff Rs. 1,200 by way of damages. The plaint also alleged that, in consequence of the defendant's negligence and mismanagement, the plaintiff believed that he had sustained a loss of Rs. 5,000, and prayed for a decree for this sum. *Held* that no decree could be made for the sums mentioned, or any other sum, until an account had been taken, and the amount due from the defendant ascertained. *Per* FIELD, J.—It is the duty of an agent to render proper account to his employer irrespective of any contract to that effect. And he does not discharge that duty by merely delivering to his employer a set of written accounts without attending to explain them, and produce the vouchers by which the items of disbursements are supported. Method to be followed on taking accounts in the mufassal stated. If the taking of accounts by the Judge would occasion a waste of public time, he should resort to the provisions of secs. 394 and 395 of the Civil Procedure Code, and furnish the Commissioner with such part of the proceedings and such detailed instructions as may appear necessary. In order to enable an agent to prepare accounts to be furnished to his principal, he should be allowed to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the principal's possession as may be necessary for the preparation of the accounts.—6 Cal. 754.

See I. L. R., 3 Madr. 259, noted under sec. 158; 3 Bom. 161, noted under sec. 3.

Court to give Commissioner necessary instructions.

**395.** The Court shall furnish Commissioner with such part of the proceedings and such detailed instructions as appear necessary,

and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the enquiry, or also to report his own opinion on the point referred for his examination.

The proceedings of the Commissioner shall be received in evidence in the suit, unless the Court has reason to be dissatisfied with them, in which case the Court shall direct such further inquiry as is requisite.

Court to receive Commissioner's proceedings or direct further inquiry.

#### Notes.

This section applies to Provincial Small Cause Courts.

See I. L. R., 7 Cal. 654, noted under sec. 250 ; 6 Cal. 754, noted under sec. 394.

#### *D.—Commission to make Partition.*

**396.** In any suit in which the partition of immoveable property not paying revenue to Government appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights.

The Commissioners shall ascertain and inspect the property, and shall divide the same into as many shares as may be directed by the order under which the commission issues, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

Procedure of Commissioners.

The Commissioners shall then prepare and sign a report, or (if they cannot agree) separate reports, appointing the share of each party, and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission, and transmitted to the Court ; and the Court, after hearing any objections which the parties may make to the report or reports, shall either quash the same and issue a new commission, or (where the Commissioners agree in their report) pass a decree in accordance therewith.



**Notes.**

In a suit for partition, the Subordinate Judge appointed an amin under sec. 396 of the Civil Procedure Code to effect a partition. The amin made his report, which was objected to on the merits by the defendant, but ultimately the report was confirmed, the defendant having acquiesced in the proceedings. On appeal to the District Judge, the defendant took an objection that the appointment of the amin was irregular. *Held* that, having acquiesced in the proceedings so far, it was too late for the defendant to take the objection. *Per* PONTIFEX, J. (FIELD, J., doubting).—In a suit for partition, it is competent to the Court in its preliminary decree, to appoint any one person whom it thinks fit to be a Commissioner to make the partition under sec. 396 of the Civil Procedure Code. The section uses the word 'Commissioner,' but it is not necessary for the purposes of partition that there should be more than one Commissioner, and by force of the General Clauses Act, the word 'Commissioners,' may be read in the singular number. The intention of sec. 396 is that, upon the first hearing of a suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons entitled to the property are, and shall direct by a preliminary decree or order that Commissioners be appointed to make the partition.—I. L. R., 7 Cal. 318.

Where in a suit for partition possession was sought, of a definite share of a property consisting of a number of houses, *held* that the principle in such cases is that, if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made; but where partition cannot be made without destroying the intrinsic value of the property, then a money-compensation should be given.—10 Cal. 675.

See 7 Cal. 654, noted under sec. 250; 19 Cal. 463, noted under sec. 2.

*E.—General Provisions.*

**397.** Before issuing any commission under this chapter,  
Expenses of commission to be paid into Court. the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed by the Court, paid into Court by the party at whose instance or for whose benefit the commission is issued.

NOTE.—This section applies to Provincial Small Cause Courts.

**398.** Any Commissioner appointed under this chapter  
Powers of Commissioners. may, unless otherwise directed by the order of appointment,

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of enquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

NOTE.—This section applies to Provincial Small Cause Courts.

**399.** The provisions of this Code relating to the summoning, attendance, and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this chapter, whether the commission in execution of which they are so required has been issued by a Court situate within, or by a Court situate beyond, the limits of British India.

For the purposes of this section, the Commissioner shall be deemed to be a Court of Civil Judicature.

NOTE.—This section applies to Provincial Small Cause Courts.

**400.** Whenever a commission is issued under this chapter, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

If the parties do not so appear, the Commissioner may proceed *ex parte*.

NOTE.—This section applies to Provincial Small Cause Courts.

## PART III. OF SUITS IN PARTICULAR CASES.

### CHAPTER XXVI.

#### SUITS BY PAUPERS.

**401.** Subject to the following rules, any suit may be brought by a pauper.

*Explanation.*—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

#### Notes.

This section applies to Provincial Small Cause Courts.

A claim for fees would be looked upon as a public claim, and is not subject to the ordinary rules for limitation in execution of decrees under Act XIV of 1859.—2 B. L. R., App. 22; 8 M. H. C. R., 40; 22 W. R., 512.

A next friend, who is a pauper, can bring a suit on behalf of a pauper minor.—11 B. L. R., 373.

The Judge must himself examine.—1 Bom. H. C. R., 102.

Where the pauper is not exempted from appearing in Court, it is imperative that he should present his application in person.—4 Bom. H. C. R., 91.

When a pauper petition comes on for hearing under sec. 306 of the Code of Civil Procedure, the Judge has no power to inquire into any other circumstance than the pauperism of the petitioner.—5 Bom. H. C. R. (A. C.) 59.

The plaintiff applied by petition on 20th February 1873 to the Subordinate Judge of Meerut for leave to sue *in forma pauperis*. The petition contained a statement of the claim and such particulars as are required in a plaint, and a prayer that, as part of the immoveable property claimed was situated in the Punjab, the Subordinate Judge would seek the necessary sanction to give him jurisdiction. The Subordinate Judge, considering that the suit should be instituted in the Delhi district, rejected the application. On 3rd March the plaintiff presented the petition to the Deputy Commissioner of Delhi, and was admitted by that officer to sue as a pauper. The Deputy Commissioner having applied for sanction to try the suit, the High Court, N.-W. Provinces, and the Chief Court of the Punjab, considered it advisable that the suit should be tried at Meerut, and on 10th June 1873, the Deputy Commissioner returned the petition for presentation in the proper Court in the N.-W. Provinces. On 19th July the plaintiff presented it to the Subordinate Judge of Meerut, who received and registered it as a plaint. On 10th November the defendants filed written statements, wherein they urged that the plaintiff ought not to be allowed to sue *in forma pauperis* until he had proved his pauperism in the Subordinate Judge's Court. Upon this the Subordinate Judge threw out the suit, holding that he had no jurisdiction to admit it. *Held* that the Subordinate Judge, if he regarded as ineffectual the order of the Deputy Commissioner admitting plaintiff to sue as a pauper, should himself have entered into an inquiry into the plaintiff's pauperism, and not have thrown out the suit. *Held* also that the provisions of sec. 310 of Act VIII. of 1859 were not applicable to the order of the Subordinate Judge, refusing to allow the plaintiff to sue as a pauper, as he pronounced no opinion on the point. *Held* also, with reference to the question of limitation, that the time during which the suit was pending in the Delhi Court should be deducted in computing the period of limitation. *Semble*.—That the order admitting the plaintiff to sue as a pauper, which was made by the Delhi Court, became ineffectual when the plaint was returned by that Court, and that it became the duty of the Meerut Court, when the petition was again presented to it, to pass orders *de novo* on the subject.—6 N.-W. P. H. C. R., 225.

Where no day was fixed, and the Judge, on default by non-appearance, struck off the application "for the present," it was held that, as there had been no refusal to allow the applicant to sue as a pauper, he might renew his application.—3 Agra H. C. R., Mis., 1.

Where a day was fixed, under Act VIII of 1859, sec. 305, for receiving evidence of the pauperism of the plaintiff, the Court refused, under sec. 306, to entertain any objection of the defendant other than on the single question of the pauperism of the plaintiff.—2 Ind. Jur., N. S., 121.

An unsuccessful application of a wife to sue for dower *in forma pauperis*, though opposed by her husband in a counter-petition denying his liability, is not such a demand and refusal of the dower as to constitute a cause of action. The application merely expresses an intention to demand (if allowed to do so) in a particular way.—L. R., 2 Ind. App., 235.

Where a party successfully opposed an application to sue as a pauper in a Subordinate Judge's Court on the ground of over-valuation, it was held that he could not afterwards object to the Munsif's jurisdiction.—22 W. R., 120.

The Judge was held not to have been justified in finding on evidence other than that of the petitioner that the claim was barred by limitation.—25 W. R., 74.

On an application to sue *in forma pauperis* the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the explanation to sec. 401 of the Code, of Civil Procedure, and in deciding it to ascertain the exact property, its market value, and the title thereto, and then to deal with the case under sec. 407 of the Code, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure. All orders passed under sec. 407 of the Code of Civil Procedure are not excluded from the exercise of revisional powers of the High Court under sec. 622 of the Code, *Chatterpal Singh v. Raja Ram* (I. L. R., 7 Al. 661) notwithstanding. In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order.—I. L. R., 10 Al. 467.

The petitioners prayed to be allowed as paupers to sue the respondent for certain property specified in the schedule annexed to their petition. At the hearing of the petition under secs. 408 and 409 of the Civil Procedure Code (Act XIV. of 1882) the respondent appeared and deposited in Court some of the articles claimed by the petitioners, to which, he admitted, they were entitled. The value of the articles deposited was Rs. 100. The petitioners, acknowledged that the articles were their property, but declined to take possession of them:—*Held* that the petitioners were not paupers as defined by sec. 401, (Act XIV. of 1882), being possessed of property worth Rs. 100 other than the subject-matter of the suit, and that they could not, therefore, be allowed to sue as paupers. The inquiry into pauperism under secs. 408 and 409 takes place before any suit is in existence, for, until an application to sue as a pauper is granted, there is no plaint and, consequently, no suit (see sec. 410). Any property, therefore, found at such inquiry not be really in dispute cannot be regarded as part of the "subject-matter of the suit," although it may be entered in the particulars of the application for leave to sue as a pauper. The ground for excluding the "subject-matter of the suit" under sec. 401 is because such property is presumably out of the petitioner's reach, and cannot be made use of by him to carry on his litigation. In the present case the articles deposited in Court were freely at the disposal of the petitioners, and could not, therefore, be excluded from consideration.—10 Bom. 207.

Where a suit was brought on behalf of a pauper minor by a next friend who was also a pauper, it was held that the failure of such suit was no ground for saddling the costs on the next friend.—25 W. R., 316.

Although Chapter XXIV. of the Civil Procedure Code only provides for suits to be brought by a pauper, the Court has power to allow a defendant to defend *in forma pauperis*.—I. L. R., 5 Cal. 819; 6 C. L. R., 120.

Where the representative of a pauper applies to bring a suit *in forma pauperis*, there is no necessity for the Court to inquire whether such repre-

representative is also a pauper, but if the Court, is satisfied that he is the legal representative, should allow him to carry on the suit.—3 W. R., 20.

The rule of English practice which prevents a minor from instituting a suit *in forma pauperis* through his next friend, unless he gives proof, not only that he is himself a pauper, but that the next friend is a pauper, and that he cannot get any substantial person to act as his next friend, is not to be found in, are deduced from the provisions of, the Civil Procedure Code.—3 Madr. 3.

The administrator of the estate of a deceased person may apply to sue *in forma pauperis* under the provisions of Chapter XXVI of the Code of Civil Procedure, 1882.—7 Madr. 390.

**402.** No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language, or assault.

What suits excepted.

NOTE.—This section applies to Provincial Small Cause Courts.

**403.** The application for permission to sue by a pauper shall be in writing, and shall contain the particulars required by section 50 in regard to complaints in suits: a schedule of any moveable or immovable property belonging to the petitioner, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner hereinbefore prescribed for the signing and verification of complaints.

Application to be in writing.  
Contents of application.

#### Notes.

This section applies to Provincial Small Cause Courts.

The Code of Civil Procedure does not authorize the rejection of an application for leave to sue *in forma pauperis* for want of merits when the applicant is found to be a pauper and his allegations disclose a right to sue. When an application for leave to sue *in forma pauperis* is made, the Court should not go into evidence as to the merits of the claim.—I. L. R., 4 Madr. 323.

**404.** Notwithstanding anything contained in section 36, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court under section 640 or section 641, in which case the application may be presented by a duly authorized agent, who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Presentation of applica-

#### Notes.

This section applies to Provincial Small Cause Courts.

The mere fact that several persons jointly present an application for permission to sue as paupers does not authorize the Court to entertain it on behalf of applicants who do not appear in person.—I. L. R., 10 Madr. 193.

Where the pauper is exempted from appearing in Court, it is imperative that he should present his application in person.—4 Bom. 91.

Where the pauper is exempted from appearing in Court under secs. 640 and 641, and the application is presented by a duly authorized agent, it is not necessary that such agent should also be a pauper.—3 W. R., 20. But such agent may be a pleader.—15 W. R., 198. And such pleader must have a special power-of-attorney, not an ordinary vakalatnama.—21 W. R., 308.

No judgment or order passed in a suit to which a minor subject to the provisions of Act XL of 1858 is a party will bind him on his attaining majority, unless he is represented in the suit by some person who has either taken out a certificate, or has obtained the permission of the Court to sue or defend on his behalf without a certificate. Permission granted to sue or defend on behalf of a minor under sec. 3 of Act XL of 1858 should be formally placed on the record. Chapter xxxi. of the Civil Procedure Code lays down the form in which a minor should appear as a party, and this form should be strictly followed.—5 Cal. 450.

**405.** If the application be not framed or presented in the manner prescribed by sections 403 and 404, the Court shall reject it.

Rejection of application.

NOTE.—This section applies to Provincial Small Cause Courts.

**406.** If the application be in proper form and duly presented, the Judge may, if he thinks fit, examine the petitioner, or his agent, when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

Examination of applicant.

When the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken under the provisions of this Code.

If presented by agent, Court may order applicant to be examined by commission.

#### Notes.

This section applies to Provincial Small Cause Courts.

See I. L. R., 10 Madr. 198, noted under section 404.

Rejection of application.

**407.** If it appear to the Court—  
(a) that the applicant is not a pauper, or  
(b) that he has, within the two months next before the presentation of the application, disposed of any property fraudulently or with a view to obtain the benefit of this chapter, or

(c) that his allegations do not show a right to sue in such Court, or

(d) that he has entered into any agreement with reference to the subject-matter of the proposed suit under which



any other person has obtained an interest in such subject-matter,

the Court shall reject the application.

**Notes.**

This section applies to Provincial Small Cause Courts.

The plaintiff applied for leave to sue as a pauper. She stated as her cause of action that a young girl had been left in her charge, and had been maintained by her for a number of years; that in January 1888, arrangements had been made with a Bhatia to get this girl married, and that she (the plaintiff) was to receive Rs. 2,500 on the marriage; that the defendant had also agreed to pay her (the plaintiff) Rs. 2,000 if she would give the girl to him in marriage; that before the marriage ceremony could be performed, the defendant had induced the girl to quit the plaintiff's house for immoral purposes. She claimed Rs. 2,500 as damages, and prayed leave to sue as a pauper. *Held* that, the facts being clear, and the law evident, the case might be finally disposed of on the plaintiff's application to sue as a pauper. *Held*, also, that the alleged agreement on which the suit was brought was immoral and against public policy, and that the action was not maintainable.—I. L. R., 13 Bom. 126.

Two persons, being about to sue to redeem a certain *Jaghir* village which they had mortgaged applied for permission to sue as paupers. It appeared that they had entered into an agreement with a vakil to pay him, as remuneration for his services as vakil in the case, a lump sum of Rs. 1,500 as soon as the case was decided. In default of payment the vakil was authorized to recover the money out of the revenue of the said village.—*Held* that such an agreement was within the scope of clause (d) of sec. 407 of the Civil Procedure Code (Act XIV of 1882), and their application to sue as paupers were rejected.—9 Bom. 371.

Where an application for leave to sue as a pauper was rejected with reference to sec. 407 (c), on the ground that the claim was barred by limitation, and therefore the applicant had no right to sue, *held* by the Full Bench that the Court had acted within its powers, and that its jurisdiction not having been exercised illegally or with material irregularity, the High Court had no power of interference in revision under sec. 622 of the Civil Procedure Code. *Amir Hassan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal. 6) referred to.

The terms of sec. 407 (c) of the Code must not be read as limiting the Court's discretion to merely ascertaining whether the "right to sue" arose within its jurisdiction, but have a more extended meaning, namely that an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer, and not barred by the law of Limitation or any other law.

*Per MAHMOOD, J.*—The word "case" as used in sec. 622 of the Civil Procedure Code should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal subject to the rules governing the exercise of the appellate and revisional jurisdictions respectively; and it comprehends adjudications under sec. 407, which fall under the same general category of adjudications as the rejection of an ordinary plaint under sec. 53 or sec. 54. *Phul Singh v. Jagan Nath*, (Weekly Notes, 1882, p. 39), *Bhulneshir Dut v. Bidiadhis*, (Weekly Notes, 1882, p. 69), and *Sital Sahu v. Bachu Ram*, (Weekly Notes, 1882, p. 92), referred to.

Also per MAHMOOD, J.—The provisions of sec. 407 must be interpreted strictly, inasmuch as they operate in derogation of the right possessed by every litigant to seek the aid of the Courts of justice; and an exercise of jurisdiction under that section, when such exercise of jurisdiction is open to the objection of illegality, or material irregularity, would form a proper subject of revision by the High Court. *Har Prasad v. Jafar Ali* (I. L. R., 7 Al. 345) and *Ammal v. Nayudu* (I. L. R., 4 Madr. 323) referred to.—7 Al. 661.

It is only the petitioner or his agent who is to be examined under this section, and not his witnesses.—25 W. R., 74.

See I. L. R., 4 Madr. 323, noted under sec. 403; 10 Al. 467, noted under section 401.

**408.** If the Court sees no reason to refuse the application on any of the grounds stated in section 407, it shall fix a day (of which at least ten day's previous notice shall be given to the opposite party and the Government Pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

NOTE.—This section applies to Provincial Small Cause Courts.

**409.** On the day so fixed, or as soon thereafter as may be convenient the Court shall examine the witnesses (if any) produced by either party, and may cross-examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in section 407.

The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

#### Notes.

This section applies to Provincial Small Cause Courts.

Neither sec. 441 nor 442 of the Code of Civil Procedure (Act XIV. of 1882) gives any authority to a Court to make a minor's estate liable for costs. A applied for leave to file a suit *in forma pauperis* against B. B resisted the application, on the ground that A was a minor. The Government pleader also resisted, on the ground that A was not a pauper. The Court without inquiring into A's pauperism rejected the application solely on the ground that A was a minor, and that he was not properly represented by a next friend or guardian. The Court ordered all costs to be paid out of the minor's estate. The minor died soon afterwards. The Collector then applied to the Court to attach certain property in B's hands which was alleged to form a part of the minor's estate. B objected, but the attachment was allowed. *Held* that the order for costs, as well as the attachment that followed thereon, were illegal and *ultra vires*. The order was clearly

opposed to the provisions of sec. 444 of the Code of Civil Procedure (Act XIV of 1882), under which no order affecting a minor can legally be made without such minor being represented by a next friend or guardian *ad litem*. *Held* also that, no inquiry having been made into A's pauperism, and no order passed such as is contemplated in sec. 409 or 412 of the Code, the Collector was not entitled to costs.—I. L. R., 13 Bom. 234.

The Judge must himself examine.—1 Bom. 102.

An order made under Act X of 1877, sec. 409, refusing leave to sue as a pauper, is subject to review under sec. 638. The provisions of sec. 413 do not affect the right of a person against whom such order has been made to obtain a review. A petitioner applying for such review must file a copy of the order of which he seeks a review, together with a memorandum of objections (secs. 541 and 625).—4 Bom. 414.

**410.** If the application be granted, it shall be numbered and registered, and shall be deemed the *Procedure if application admitted.* *plaint in the suit, and the suit, shall proceed in all other respects as a suit instituted under Chapter V., except that the plaintiff shall not be liable to any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader, or other proceeding connected with the suit.*

#### Notes.

This section applies to Provincial Small Cause Courts.

A suit was instituted in a Mofussil Court against two defendants, one of them being a minor. Before a guardian *ad litem* has been appointed for the minor defendant, an application was made to the High Court to transfer the case from the Mofussil Court to the High Court in its Ordinary Original Civil jurisdiction by the minor defendant through a next friend. It was contended that the application was informal, and could not be granted, and that no such application could be made on behalf of the infant defendant until a guardian *ad litem* had been appointed, and then it should be made by him. *Held* that the objection should not prevail, and that this application could be made through the next friend.—I. L. R., 16 Cal. 771.

**411.** If the plaintiff succeed in the suit, the Court shall *when pauper sue-* calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; and such amount shall be a first charge on the subject-matter of the *Recovery of Court-fees.* *suit, and shall also be recoverable by the Government from any party ordered by the decree to pay the same, in the same manner as costs of suit are recoverable under this Code.*

#### Notes.

This section applies to Provincial Small Cause Courts.

*Held* that a Collector applying on behalf of Government, under sec. 411 of the Civil Procedure Code, for recovery of Court-fees by attachment of a sum of money payable under a decree to a plaintiff suing *in forma pauperis*,



pay the same was subject to the provisions of art. 178 of the Indian Limitation Act, 1877.—4 Madr. 155.

A pauper sued his sister for the partition of property valued at a large sum. The parties belonged to the bogam caste, residing in the Godavari District. The defendant pleaded that the property had been acquired by her as a prostitute, and denied the plaintiff's claim to it. The plaintiff obtained a decree for Rs. 100, being a moiety of the property found to have been left by their mother:—*Held*, (1) on the evidence as to the local custom of the caste that the decree was right; (2) that the defendant was liable to pay Court-fees only on the sum decreed.—14 Madr. 163.

N was allowed to bring a suit as a pauper. His suit was dismissed, the decree directing that he should pay the costs of the defendants. On the defendant's application certain immoveable property belonging to N was attached in execution of this decree, and was sold. *Held* that the Crown was entitled to be paid first out of the proceeds of such sale the amount of the Court-fees N would have had to pay if he had not been allowed to sue as a pauper. The principle of the ruling in *Ganpat Putaya v. The Collector of Canara* (I. L. R., 1 Bom. 7) followed.—1 Al. 596.

With a view to recover the amount of Court-fees which J would have had to pay had he not been permitted to bring a suit as pauper, the Government caused certain property belonging to B, the defendant in such suit, who had been ordered by the decree in such suit to pay such amount, to be attached. This property was subsequently attached by the holder of a decree against B, which declared a lien on the property created by a bond. The property was sold in the execution of this decree. *Held* that the Government was entitled to be paid first out of the proceeds of such sale the amount of the Court-fees J would have had to pay had he not been allowed to sue as a pauper, the principle that the Government takes precedence of all other creditors not being liable to an exception in the case of lien-holders. The decision in the *Ganpat Putaya v. The Collector of Canara* (I. L. R., 1 Bom. 7) applied in this case.—2 Al. 196.

**412.** If the plaintiff fails in the suit, or if he is <sup>pauper</sup>paupered, or if the suit is dismissed under section 97 or 98, the Court shall order the plaintiff, or any person made, under section 32, co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper;

and, if it find that the suit was frivolous, or vexatious, it may also punish the plaintiff with fine not exceeding one-hundred rupees, or with imprisonment for a term which may extend to a month, or with both.

This section applies to Provincial Small Cause Courts.

Sec. 412 and chapter xxvi of the Code of Civil Procedure, of which sec. 2 forms a part, do not deal with the costs of a successful defendant in a pauper's suit. The costs of a defendant in such a case are to be dealt with under sec. 220 of the Code, and the Court of Original or Appellate jurisdiction has full power to give and apportion costs in any manner if it thinks fit.—I. L. R., 8 Bom. 577.

The plaintiff, after having filed his suit *in forma pauperis*, came to an amicable arrangement with the defendants, and asked the Court that the suit should be dismissed. The Court granted this application, but made no order as to the payment of Court fees. Thereupon the Collector applied to the High Court, under section 622 of the Code of Civil Procedure (Act XIV of 1882), to direct the lower Court to make an order for the payment of Court fees under section 412 of the Code. *Held*, that the Collector, though not a party to the suit, was entitled to move the High Court under section 622 of the Code. *Held*, also, that section 412 had no application to the present case, as there was no adjudication of the rights of the parties and the plaintiff could not, therefore be said to have failed in the suit. The Subordinate Judge, had therefore, no jurisdiction to make the order desired by the Collector. Section 412 of the Code applies only to cases of adjudicated failure and to the other cases specified, as where the plaintiff has been dispaupered, or where the suit has been dismissed under section 97 or 98.—15 Bom. 77.

See I. L. R., 6 Bom. 590, noted under sec. 244; 13 Bom. 234, noted under sec. 409; 13 Al. 328, noted under sec. 411.

**413.** An order of refusal made under section 409 to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right provided that he first pays the costs (if any) incurred by Government in opposing his application for leave to sue as a pauper.

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

NOTE.—This section applies to Provincial Small Cause Courts.

See I. L. R., 4 Bom. 414, noted under sec. 409.

**414.** The Court may, on motion by the defendant, or by the Government Pleader, of which one week's notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

Dispaupering.

(a) if he is guilty of vexatious or improper conduct in the course of the suit;

(b) if it appears that his means are such that he ought not to continue to sue as a pauper; or

(c) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter.

NOTE.—This section applies to Provincial Small Cause Courts.

**415.** The costs of an application for permission to sue as a pauper and of an inquiry into pauperism are costs in the suit.

Costs.

NOTE.—This section applies to Provincial Small Cause Courts.



## CHAPTER XXVII.

## SUITS BY OR AGAINST GOVERNMENT OR PUBLIC OFFICERS.

**416.** Suits by or against the Government shall be instituted by or against (as the case may be) the Secretary of State for India in Council.

Suits by or against Secretary of State in Council.

## Notes.

This section applies to Provincial Small Cause Courts.

A suit will lie against Government for damages for wrongful dismissal of a servant.—7 B. L. R., 688.

Where damages were sustained by reason of negligence in the carriage of goods by the Government Bullock Train, the Secretary of State was held liable.—3 N.-W. P. H. C. R., 195.

Under sec. 9, Act I, 1877, no suit will lie against Government for possession of immoveable property without proof of title. Where certain Government coolies let fall an iron funnel while carrying it from the Kidderpur Dockyard to a steamer in the river, and the noise startled a horse, which rushed over it, and injured itself, it was held that the Secretary of State was liable.—Bourke's Rep., 167.

The acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government in fact or in law, directly or by implication, ratifies the excess.—2 W. R., (P. C.) 61.

No suit will lie against Government for damages sustained by reason of a public ferry being taken up by a Magistrate.—7 W. R., 191.

Where damages were sustained by reason of negligence in the carriage of goods by the Government Bullock Train, the Secretary of State was held liable.—I. L. R., 3 Al. 195.

A suit will not lie in the High Court against the Collector of Madras, residing and carrying on business at Sydapet, in respect of matters arising in Chingleput, though his Deputy Collector carried on business within the local limits, and the orders and proceedings in reference to the matters in question were in his name of office as Collector of Madras.—6 Al. 46.

Under sec. 521 of the Criminal Procedure Code (Act X of 1872), a First-class Magistrate in charge of a taluka made an order, declaring certain land to be part of a public thoroughfare, and directing the plaintiff to remove the obstruction caused by him to it. The plaintiff sued the Magistrate to establish his right to the land, alleging that it was his property, and that the Magistrate's order was wrong. The Assistant Judge, who tried the suit, dismissed it, holding that it did not lie against the Magistrate. On appeal to the High Court, it was held that the Assistant Judge might have properly permitted the plaintiff to amend the suit by striking out the name of the First-class Magistrate as defendant, and substituting in that capacity the Secretary of State for India in Council. The High Court, accordingly, reversed the decree of the Assistant Judge, and remanded the suit for retrial on the merits, after making the amendment directed.—6 Bom. 670.

On the 11th August 1879, the defendant, as a Magistrate in charge of a taluka, made an order under secs. 523 and 526 of the Criminal Procedure Code (Act X of 1872), directing the plaintiff to remove a certain *ota*, on the ground that it had been built upon a public thoroughfare. The plaintiff

thereupon sued the Magistrate for a declaration that the *ota* and *site* belonged to him, and prayed for a reversal of the Magistrate's order. The Assistant Judge who tried the suit dismissed it, holding that it did not lie against the defendant. On appeal, the High Court, following the decision in *Nilkanthapa Malkapa v. The Magistrate (First-class)* in charge of Sholapur Taluka (I. L. R., 6 Bom. 670), reversed the decree of the Assistant Judge, remanded the case, in order that the plaintiff might amend his suit by striking out the name of the First-class Magistrate as defendant, and substituting in that capacity the Secretary of State for India in Council, and directing the lower Court to determine the suit upon its merits after the above amendment and due service of process.—6 Bom. 672.

Persons being, *ex officio* or otherwise, authorized to act for Government, authorized to act for Government. judicial proceeding, shall be deemed to be the recognized agents by whom appearances, acts, and applications under this Code, may be made or done on behalf of Government.

### Notes

This section applies to Provincial Small Cause Courts.

A recognized agent, under cl. 2, sec. 17, Act VIII of 1859, cannot prosecute or defend a suit in his own name. A *gumasta* of a firm ceases to be a recognized agent under cl. 2, sec. 17, Act VIII of 1859, when the business of the firm has ceased before the institution of the suit.—5 B. L. R., App. 11; 13 W. R., 344.

*Held* that, where one of several representatives of a deceased judgment-creditor applies for the execution of a decree, the general powers of attorney contemplated by sec. 17, cl. 1, of Act VIII. of 1859, are not necessary; but it is sufficient if the applicant is authorized under sec. 115 to act for the other representatives. *Held* also that, in executing a decree of a Court of competent jurisdiction, the Court executing it cannot question the validity of any portion of it. Its duties are only of a ministerial character.—2 Bom. H. C. R., (A. C.) 109; 2nd Ed. 103.

The *munim* of a firm is not, for the purpose of presenting a recognized agent (under sec. 17 of the Civil Procedure Code) of a who is present within the jurisdiction. The *munim* and such partner should join in presenting the plaint, or appointing a pleader. The partners not so joining is not a ground on which an Appellate Court should reverse the decree of a lower Court, unless the irregularity affects the merits of the jurisdiction of the Court.—6 Bom. H. C. R., (A. C.) 169.

Can an agent of a party residing within the jurisdiction of ; not being an authorized agent as contemplated by cl. 1, sec. 17, VIII. of 1859, was not competent to appear as plaintiff on behalf principal, and to file and verify the plaint as required by sec. 27 enactment.—1 Agra H. C. R., 115.

**418.** In suits by the Secretary of State for Council, instead of inserting in the plaint the name and description and place of the plaintiff, it shall be sufficient to insert the words "The Secretary of State for India in Council."

—This section applies to Provincial Small Cause Courts.

**419.** The Government Pleader in any Court, "or such other person as the Local Government may for any Court appoint in this behalf,"\* shall be the agent of the Government for the purpose of receiving processes against the said Secretary of State in Council issuing out of such Court.

NOTE.—This section applies to Provincial Small Cause Courts.

and State in sha the necessary communication for the Government through the proper channels, and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State in Council or the Government, and may extend the time at its discretion.

NOTE.—This section applies to Provincial Small Cause Courts.

**421.** The Court may also, in any case in which the Government Pleader is not accompanied by any person on the part of the said Secretary of State in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a

Attendance of person able to answer questions relating to suit against Government.

NOTE.—This section applies to Provincial Small Cause Courts.

**422.** Where the defendant is a public officer, the head of the office in which the defendant is employed, for the purpose of being served on him, if it appeared to the Court that the summons may be most

Service on public officer.

NOTE.—This section applies to Provincial Small Cause Courts.

**423.** If the public officer, on receiving the summons, considers it proper to make a reference to the Government before answering to the summons, the Court may grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel; and the Court, upon such application, may extend the time for so long as appears to be requisite.

Extension of time to officer to make reference to Government.

NOTE.—This section applies to Provincial Small Cause

\* The words quoted have been inserted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 35.

**424.** No suit shall be instituted against the said Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the District, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, and the name and place of abode of the intending plaintiff "and the relief which he claims;"\* and the plaint must contain a statement that such notice has been so delivered or left.

#### Notes.

This section applies to Provincial Small Cause Courts.

The plaintiff sued, as purchaser at a Court-sale of the interest of defendant No. 1, to redeem and recover possession of the land in dispute, alleging that it had been mortgaged by defendant No. 1 to defendant No. 2. Defendant No. 1 denied the mortgage, and that he had any title to the land, which he said belonged to R, and formed a part of R's *deshmukhi vatan*. R having died, leaving a minor widow sued as defendant No. 4 in the suit, the estate was administered by the Collector. On the application of the minor's personal guardians, the Collector was joined as a party. The Collector contended on the minor's behalf that, the suit having been brought without notice to him as required by sec. 424 of the Civil Procedure Code (Act XIV. of 1882); it was not maintainable. The Collector had also certified to the Court, under sec. 10 of the Vatan Act, III. of 1874, that the land formed part of a *vatan*. The District Judge was of opinion that notice was necessary. He therefore, rejected the plaintiff's claim, and ordered the sale to be set aside. On appeal by the plaintiff to the High Court, *held* that notice under sec. 424 of the Civil Procedure Code (Act XIV. of 1882) was not necessary. The Collector was made a party, not in respect of any alleged illegal act by him, but on the application of the minor's personal guardians, in order to protect the minor's title as set up by the first defendant. *Held*, also, following *Shanker v. Babaji* (I. L. R., 12 Bom. 550), that the Judge ought not to have acted on the certificate by setting the sale aside. Secs. 9 and 10 of the Vatan Act, III. of 1874, were not applicable to the case, as the first defendant whose interest was purchased by the plaintiff, was not a *vatandar*.—I. L. R., 13 Bom. 343.

The Official Trustee is a public officer within the definition given in sec. 2 of the Civil Procedure Code. The cases in which a public officer is entitled to notice of suit under sec. 424 of the Code are those in which he is sued for damages for some wrong inadvertently committed by him in the discharge of his official duties, and the object of giving notice is that, if a public body or officer entrusted with powers happens to commit an inadvertence, irregularity, or wrong before any one has a right to require payment in respect of that wrong, he shall have an opportunity of setting himself right, making amends, restoring what he has taken, or paying for the damages

\* The words quoted have been inserted by the Civil Procedure Code Amendment Act (VII 1888), sec.

he has done. The Official Trustee, therefore, is not entitled to notice of suit, when the question to be decided relates to the rights of the *cestius que trustent* in respect of the trust-fund, and not to a wrong committed by him. —7 Cal. 499.

See I. L. R., 9 Cal. 271, noted under sec. 32 ; 3 Al. 20, noted under sec. 2 ; 14 Bom. 395, noted under sec. 42 of the Specific Relief Act.

**425.** No warrant of arrest shall be issued in such suit without the consent in writing of the District Judge.

Arrests in such suits.

NOTE.—This section applies to Provincial Small Cause Courts.

**426.** If the Government undertakes the defence of a suit against a public officer, the Government Pleader, upon being furnished with authority to appear and answer to the plaint, shall apply to the Court ; and upon such application the Court shall cause a note of his authority to be entered in the register.

Application where Government undertakes defence.

NOTE.—This section applies to Provincial Small Cause Courts.

**427.** If such application is not made by the Government Pleader on or before the day fixed in the notice for the defendant to appear and answer to the plaint, the case shall proceed as in a suit between private parties, except that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

Procedure where no such application made.

Defendant not liable to arrest before judgment.

NOTE.—This section applies to Provincial Small Cause Courts.

**428.** In a suit against a public officer in respect of such act as aforesaid, the Court shall exempt the defendant from appearing in person when he satisfies the Court that he cannot absent himself from his duty without detriment to the public service.

Exemption of public officers from personal appearance.

NOTE.—This section applies to Provincial Small Cause Courts.

**429.** When the decree is against the said Secretary of State in Council or against a public officer in respect of such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied ; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

Procedure where decree against Government or public officer.

Execution shall not issue on any such decree unless it remains unsatisfied for the period of three months computed from the date of the report.

NOTE.—This section applies to Provincial Small Cause Courts.

## CHAPTER XXVIII.

SUITS BY ALIENS AND BY OR AGAINST FOREIGN AND NATIVE RULERS.

**430.** Alien enemies residing in British India with the permission of the Governor-General in Council, and alien friends, may sue in the Courts of British India as if they were subjects of Her Majesty.

When aliens may sue.

No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

*Explanation.*—Every person residing in a foreign country, the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of Her Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of the second paragraph of this section, be deemed to be an alien enemy residing in a foreign country.

NOTE.—This section applies to Provincial Small Cause Courts.

**431.** A foreign State may sue in the Courts of British India, provided that—

When foreign State may sue.

(a) it has been recognized by Her Majesty or the Governor-General in Council, and

(b) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.

The Court shall take judicial notice of the fact that a foreign State has not been recognized by Her Majesty or by the Governor-General in Council.

### Notes.

This section applies to Provincial Small Cause Courts.

The "private rights" spoken of in sec. 431 (cl. b) of the Code of Civil Procedure do not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a Court of Justice, as distinguished from its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals as distinguished from rights



which one State in its political capacity may have as against another State in its political capacity. *The Emperor of Austria v. Day*, (30 L. J. Ch. 690 ; 2 Giff., 628), *United States of America v. Wagner*, (L. R., 2 Ch. App. 582), approved of. There is nothing to prevent a foreign or feudatory State from holding immoveable property in British India, and to such property the rule of intestate succession laid down in sec. 5 of the Succession Act (X of 1865) does not apply. The State must be regarded as a *quasi* corporation which continues to exist as a State so long as it is recognized as such by Her Majesty, whatever the rule of succession to it may be, and whatever may be its form of Government. Case in which it was found on the facts that certain immoveable property situated in British India, which had formerly belonged to the State of Cherrapoonjee, having been granted by a former Raja of that State to the defendant, was still the property of the State, on the ground that the Raja was not competent to alienate it, and that the defendant's plea of adverse possession and limitation was not supported by the evidence. —I. L. R., 11 Cal. 17.

**432.** Persons specially appointed by order of Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India “ or at the request of any person competent in the opinion of the Government to act on behalf of such Prince or Chief,”\* to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts, and applications under this Code, may be made or done on behalf of such Prince or Chief.

An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.\*

A person appointed under this section may authorise or appoint persons to make and do appearances, applications, and acts in any such suit or suits as if he were himself a party to the suit or suits.

#### Notes.

This section applies to Provincial Small Cause Courts.

Sec. 432 of the Civil Procedure Code does not prevent the institution by an independent Prince of a suit in a Court in British India in his own name, and through a recognized agent other than one appointed under that section.—I. L. R., 10 Cal. 136.

The Desai of Patadi, a *talukdar* of the fifth class in the Province of Kathiawar, in virtue of his being the proprietor of seven villages within the British Political Agency of Kathiawar, is a ruling chief within the meaning of secs. 432 and 433 of the Code of Civil Procedure (Act XIV of 1882), and

\* The words quoted have been inserted, and the second and third paragraphs been added, by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 37.

can only be sued with the consent of the Government in a competent Court not subordinate to the District Court.—8 Bom. 415.

**433.\*** (1) Any such Prince or Chief, and any Ambassador or Envoy of a Foreign State, may, with the consent of the Governor-General in Council, certified by the signature of one of the Secretaries to the Government of India (but not without such consent), be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, Ambassador, or Envoy may be sued; but it shall not be given unless the Prince, Chief, Ambassador, or Envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits, and is to be sued with reference to such possession or of money charged on that property.

(3) No such Prince, Chief, Ambassador, or Envoy, shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, Ambassador, or Envoy.

(4) The Governor-General in Council may, by notification in the Gazette of India, authorize a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, Ambassador or Envoy named in the notification, the functions assigned by the foregoing subsections to the Governor-General in Council and a Secretary to the Government of India respectively.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, Ambassador, or Envoy from whom he holds, or claims to hold, the property.

#### Notes.

This section applies to Provincial Small Cause Courts.

In a suit against the Maharajah of Hill Tipperah, which is an independent Sovereign State, for maintenance, it appeared that, in a former

\* This section has been substituted for the original by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 38.

suit tried in British India in respect of the same claim, the Court had ordered the amount of the maintenance for which he gave a decree to be paid by the defendant Maharajah and from his estate of R which was in British India. *Held* that the suit not being a suit for immoveable property would not lie, and, further, that the decree in the former suit was not *res-judicata* to show that the maintenance claimed in the present suit was a charge upon the zemindari of R so as to give the Court jurisdiction under cl. c. of sec. 433 of the Civil Procedure Code.—12 C. L. R., 473.

The Rajah of Hill Tipperah is a Sovereign Prince within the meaning of Chapter XXVIII of Act X of 1877, and cannot be sued personally in the Courts of British India except under the conditions specified in sec. 433 of that Act.—I. L. R., 5 Cal. 535.

The fact of a defendant not subject to the jurisdiction of a Court having waived his privilege in previous suits brought against him does not give the Court jurisdiction to entertain a suit against him in which he pleads that he is not subject to such jurisdiction.—9 Cal. 535.

A suit for maintenance which seeks to have the maintenance made a charge on immoveable property is not a suit for immoveable property within the meaning of clause (c), sec. 433, Act X of 1877.—9 Cal. 535.

A claim for maintenance is not a charge upon immoveable property. A member of the royal family of Hill Tipperah brought a suit against the Rajah to have it declared that with respect to certain land situate within British India, and forming portion of the possessions of the Rajah, he was entitled to the post of jubraj, and to succeed to such land on the death of the Rajah, and also claimed maintenance, and sought to have it declared that such maintenance should be a charge on the revenue of the land situate in British India. *Held* that the British Courts had no jurisdiction to entertain the suit, it not being one for immoveable property.—9 Cal. 535.

See I. L. R., 8 Bom. 415, noted under sec. 432.

Style of Princes and  
Chiefs as parties to suits.

**434.\*** A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provide pthat, in giving the consent referred to in the last foregoing section, the Governor-General in Council or Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

#### Notes.

This section applies to Provincial Small Cause Courts.

The law of limitation applicable to the execution of a decree of the Civil Court of Cooch Behar, for rent for a sum under Rs. 500 in a suit not brought under the Rent Act, is, by sec. 434 of the Civil Procedure Code, which gives the Courts in British India power to execute decrees passed by the Courts of a foreign State, sec. 58 of Bengal Act VIII of 1869. That section is not confined to suits brought under that Act.—I. L. R., 14 Cal. 576.

\* This is a new section, substituted for the original by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 40. The original section (434) has been transposed as sec. 229B by sec. 39 of the same Amendment Act. Any reference made before the commencement of Act VII. of 1888 in any notification or other document to sec. 434 shall be read as a reference to sec. 229B.—See sec. 39 of Act VII. of 1888.

A decree of the Court of the Civil Judge of Cooch Behar was sent for execution to the Court of the District Judge of Rungpore. The copy of the record was signed by the Sheristadar instead of by the Judge himself. Upon receipt of the decree by the Subordinate Judge, a notice, under sec. 248 of the Civil Procedure Code, was served on the Judgment-debtor, calling on him to show cause why the decree should not be executed, and an order was forthwith issued for the attachment of his property. The judgment-debtor appeared and objected that the copy of the record was not properly certified, and, therefore, that the whole of the execution-proceedings were bad. The Subordinate Judge ordered that the record be sent back to the Cooch Behar Court through the District Judge, in order that a certificate might be given in proper form, and directed that the other points raised should be decided after the return of the papers. On appeal it was urged that the order of the Subordinate Judge was made without jurisdiction, but the District Judge rejected the appeal. The judgment-debtor appealed to the High Court. *Held* that the Subordinate Judge acted properly in sending the record back to the Cooch Behar Court to be properly certified, and also that he should have set aside the execution-proceedings as being altogether void, but, as that formed no portion of the grounds of appeal urged in the lower Appellate Court, the appeal should be dismissed. *Per* NORRIS, J.—*Quære*.—Whether the notification published in the *Calcutta Gazette* of 8th April 1879, signed by the then Deputy Commissioner of Cooch Behar, and stating the mode in which copies of judicial records of the Courts of Cooch Behar are certified as correct copies, and which notification was published after a notification had been published by the Governor-General of India in Council under the provisions of sec. 434 of the Civil Procedure Code to the effect that the decrees of the Civil and Revenue Courts of Cooch Behar may be executed in British India as if they had been made by the Courts of British India, was a compliance with the provision of sec. 86 of the Indian Evidence Act at a time when there was a representative of the Government of India Resident in Cooch Behar? *Per* NORRIS, J.—The notification of the 8th April 1879 is now of no use, as there is no representative of Her Majesty or the Government of India residing in Cooch Behar, and consequently certified copies of judicial records of that State cannot now be received in evidence in the Courts of British India under the provisions of sec. 86 of the Evidence Act.—14 Cal. 546.

No suit is maintainable in any Court in British India founded upon the judgment of a Court situate in a Native State. The Courts of British India cannot enforce the decrees of any Native Courts, except as provided by sec. 434 of the Civil Procedure Code (Act X of 1877). Under that section the decrees of certain Native Courts may be executed in British India, as if they had been made by the Courts of British India. A suit will not lie in the Courts of India upon the judgment of any Court in British India. The only exception to this rule is in the case of judgments of a Court of Small Causes on which suits are permitted to be brought in the High Court in order to obtain execution against immoveable property. A foreign judgment creates an obligation belonging to the class of implied contracts. A Court which entertains a suit on a foreign judgment cannot institute an inquiry into the merits of the original action or the propriety of the decision. *Quære*.—Whether suits on foreign judgments are maintainable in the Civil Courts of India?—6 Bom. 292.

A suit cannot generally be maintained in any British Court upon the judgment of a Native Court. *Quære*.—Whether it could where there had

been a notification by the Governor-General of India under sec. 434 of the Civil Procedure Code (Act XIV of 1882) ?—8 Bom. 593.

## CHAPTER XXIX.

### SUITS BY AND AGAINST CORPORATIONS AND COMPANIES.

**435.** In suits by a Corporation or by a Company authorized to sue and be sued in the name of an officer or of a trustee, the plaintiff may be subscribed and verified on behalf of the Corporation or Company, by any director, secretary, or other principal officer of the Corporation or Company, who is able to depose to the facts of the case.

Subscription and verification of plaintiff.

#### Notes.

This section applies to Provincial Small Cause Courts.

A plaint was filed in which the plaintiff was described as Mr. J. Manager of the X Company, Limited, and in the body of the plaint several allusions were made to the "plaintiff-Company," and the claim made in the plaint was a claim made on behalf of the Company. It was not suggested that the X Company was a Company authorized to sue or be sued in the name of an officer or trustee, nor was it shown that it was registered as a corporation under sec. 41 of the Indian Companies Act :—*Held* that the suit was badly framed, and that it should be dismissed.—I. L. R., 12 Cal. 41.

**436.** When the suit is against a Corporation or against a Company authorized to sue and be sued in the name of an officer or of a trustee, the summons may be served—

(a) by leaving it at the registered office (if any) of the Corporation or Company, or

(b) by sending it by post in a letter addressed to such officer or trustee at the office (or, if there be more officers than one, at the principal office in British India) of the Corporation or Company, or

(c) by giving it to any director, secretary, or other principal officer of the Corporation or Company ;

and the Court may require the personal appearance of any director, secretary, or other principal officer of the Corporation or Company who may be able to answer material questions relating to the suit.

#### Notes.

This section applies to Provincial Small Cause Courts.

For the purposes of summons, a Railway Company must be deemed to dwell at its principal office. An executive engineer of such a Company is not an officer on whom service may be made under cl. c of the above section.—1 Hyde's Rep., 197.

## CHAPTER XXX.

SUITS BY AND AGAINST TRUSTEES, EXECUTORS,  
AND ADMINISTRATORS.

**437.** In all suits concerning property vested in a trustee, executor, or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made such parties.

Representation of beneficiaries in suits concerning property vested in trustees, &c.

**Notes.**

This section applies to Provincial Small Cause Courts.

The holder of an impartible zemindari, governed by the law of primogeniture, having a son, executed a mining lease of part of the zemindari for a period of twenty years, by which no benefit was to accrue to the grantor unless mining operations were carried on with success, and the commencement of mining operations was left optional with the lessee. On the death of the grantor, his minor son and successor, by the Collector of the district as his next friend, (authorized in that behalf by the Court of Wards), now sued the assignee of the lessee to have the lease set aside. The second plaintiff was the grantee from the Court of Wards (acting on behalf of the minor zemindar) of certain mining rights on the same land. The defendant had executed a declaration of trust in respect of his interest in favour of certain persons who were not joined :—*Held* (1) *per Parker, J.*, that the first plaintiff could sue by the Collector of North Arcot as his next friend, since the Court of Wards had authorized the latter to conduct the suit ; (2) *per Muttusami Ayyar and Wilkinson, JJ.* (affirming the judgment of *Parker, J.*) (1) that the interests of the first and second plaintiffs not being inconsistent with each other, the suit was not bad for misjoinder ; (2) that the defendant's interests not having been shown to be hostile to those of the persons entitled under the declaration of trust, the suit was not bad for non-joinder ; (3) that the lease was not one which a managing member of an ordinary joint family governed by Mitakshara law could providently enter into : (3) *per Muttusawmi Ayyer and Wilkinson JJ.*, (reversing the judgment of *Parker, J.*) that in the absence of evidence of any family custom rendering the zemindari inalienable by the zemindar for the time being for purposes other than those warranted by the Mitakshara law the lease was not invalid as against the plaintiffs. *Sartaj Kuari v. Deorai Kuari* (I. L. R., 10 Al. 272) discussed and followed.—I. L. R., 13 Madr. 197.

**438.** When there are several executors or administrators, they shall all be made parties to a suit against one or more of them :

Joinder of executors and administrators.

Provided that executors who have not proved their testator's will, and executors and administrators beyond the local



limits of the jurisdiction of the Court, need not be made parties.

NOTE.—This section applies to Provincial Small Cause Courts.

**439.** Unless the Court directs otherwise, the husband of a married administratrix or executrix shall not be a party to a suit by or against her.

of married ex-  
ecutrix join.

—This section applies to Provincial Small Cause Courts.

## CHAPTER XXXI.

### SUITS BY AND AGAINST MINORS, AND PERSONS OF UNSOUND MIND.

**440.** Every suit by a minor shall be instituted in his name by an adult person, who, in such suit, shall be called the next friend of the minor, and may be ordered to pay any costs in the suit as if he were the plaintiff.

must sue by next

Costs.

“If a minor has a guardian appointed or declared by an authority competent in this behalf, a suit shall not be instituted on behalf of the minor by any person other than such guardian except with the leave of the Court granted after notice to such guardian and after hearing any objections which he may desire to make with respect to the institution of the suit, and the Court shall not grant such leave unless it is of opinion that it is for the welfare of the minor that the person proposing to institute the suit in the name of the minor should be permitted to do so.”\*

#### Notes.

This section applies to Provincial Small Cause Courts.

A stated that he was born in 1848; that his great-grandfather was, according to the tradition of the family, a European (but of what country in Europe he did not know) residing at Madras, and his great-grandmother a native Hindu or Mahomedan; that he did not know whether his great-grandfather and great-grandmother were married, or whether his grandfather was married; that his father married a lady bearing an English name; that he himself and all his relations were Christians; that he was born in Calcutta, and knew of no relatives in Europe. *Held* that he was the legitimate descendant of a European British subject, and therefore his age of majority was 21 years. Plaintiff being a minor, his suit was not dismissed, but he was directed to appoint a next friend to sue for him.—1 B. L. R., (O. C.) 10.

A suit can be prosecuted or defended by a relative, on behalf of a minor, without a certificate under Act XL. of 1858, when the subject-matter of the suit is of a small value. A suit to recover real and personal property of the value of Rs. 7,260 was allowed to be prosecuted by the brother of a minor, on behalf of himself and his minor brother, under sec. 3, Act XL. of 1858. When a suit is dismissed for default of the plaintiff, and no appearance has been entered by the defendant, the plaintiff can, under sec. 110, Act VIII. of 1859, bring a fresh suit after a lapse of 30 days, if it be not otherwise barred by lapse of time.—3 B. L. R., App. 130.

The acts of a minor are only avoidable, and not absolutely void. The purchasers of the right, title, and interest of a judgment-debtor sued to obtain immediate possession of the property purchased at a sale held in execution of a decree, after setting aside an usufructuary mortgage executed by the judgment-debtor while a minor. *Held* that the sale in execution merely transferred to the purchaser the reversionary right of the judgment-debtor in the property, after the satisfaction of the usufructuary mortgage, and not the right to set aside an act done during minority. *Held* that, until a transaction by a minor was avoided by some distinct act on attaining majority, it must be considered valid.—3 B. L. R., (A. C.) 426; 12 W. R., 378.

An application was made to a Munsif for the custody of a minor daughter, which, on appeal to the Civil Judge, was dismissed. On appeal to the High Court, *held* that all the proceedings must be quashed. The application should have been made in the principal Civil Court of original jurisdiction in the district.—4 B. L. R., App. 36; S. C. 13 W. R., 112; 23 W. R., 340.

An infant cannot sue except by a next friend, and when an objection is made on the ground of the disability of the plaintiff, the suit ought to be dismissed.—5 M. H. C. R., 435.

A suit against a minor whose estate exceeds Rs. 250 in value cannot be proceeded with unless he be represented by a person holding a certificate of administration under Act XX of 1864. The plaintiff may apply to the District Judge to appoint an administrator, if none such has been appointed.—6 Bom. H. C. R., (A. C.) 219.

Where a priest wrongfully officiates for another, and receives fees, he is bound to account for them to the rightful priest, where such fees are by custom attached to the office. The sale of an hereditary priestly office will be upheld where the purchasers are the next in succession from the vendor to such office. *Semble*.—That an hereditary priestly office descends in default of males through females. A father suing on behalf of his minor son, entitled to property in his own right, must obtain a certificate of administration under sec. 2 of Act XX. of 1864.—6 Bom. H. C. R., (A. C.) 250.

The Bombay Minors' Act (XX. of 1864) does not apply to minors who are not resident within the Presidency of Bombay. A foreign guardian will not be recognized in the Courts in this country in a suit brought by such guardian to recover, on account of a minor, profits arising from immoveable property. Where a suit was brought by the agent of a minor's guardian appointed by H. H. the Gaikwar of Baroda, it was ordered that the proceedings should be amended by describing such agent as the next friend of the minor, in which capacity he was then permitted to sue.—7 Bom. H. C. R., (A. C.) 7.

As proceedings taken to file and enforce an award under *se* 327 of the Civil Procedure Code are of the nature of a suit within

of sec. 2 of Act XX. of 1864, a minor must be represented in such proceedings by a person holding a certificate of administration.—9 Bom. H. C. R. (A. C.) 289.

There is nothing in the Minors' Act (XX. of 1864) to prevent the institution of a suit by the next friend of a minor who has not obtained a certificate of administration to the minor's estate, but who claims no right to have charge of the minor's property, asking for a declaration of the minor's rights, and for an order directing the defendant to pay money he owes to the minor into the principal Civil Court of the district. As the right, however, of a friend to institute a suit on behalf of a minor is under the control of the Court, and as the Minors' Act, by sec. 3—7, enables a friend of the minor to protect his interests by applying for the appointment of a fit person to have charge of the property of the minor, and to protect his estate, the proper course for a Court, to which a plaint on behalf of a minor is presented by his friend, is either to refuse to accept the plaint when there is no pressing necessity for its acceptance, or in case such pressing necessity exists, to accept the plaint, and stay proceedings until the plaintiff has duly obtained a certificate under the Act.—9 Bom. H. C. R., (A. C.) 310.

Sec. 2 of Act XX of 1864 does not prohibit a person having a claim against a minor from bringing a suit until a certificate of administration has been granted. He may properly bring his suit, but immediately after his doing so, he should apply to the District Judge for the appointment of an administrator, and it is competent to the District Judge under sec. 8 of the Act to make that appointment.—11 Bom. H. C. R., (A. C.) 21.

Appellant having presented a petition to a Zillah Judge under Act IX of 1861, claiming the possession and custody of his two minor children alleged to be detained by their mother, the parties being European British subjects, *held* that such Judge had no power to entertain the application.—2 N.-W. P. H. C. R., 79.

Guardians of a minor cannot be held personally liable for torts committed by such minor.—3 N.-W. P. H. C. R., 191.

The rule of Mahomedan law, that an uncle cannot be the guardian of the property of a minor, does not prevent an uncle representing his infant nephew under the Code of Civil Procedure as next friend in a suit.—6 C. L. R., 413.

In Act IX. of 1861, "the principal Civil Court of original jurisdiction in the district" means the principal Court of ordinary original civil jurisdiction.—2 Ind. Jur., N. S., 193; S. C., 7 W. R., 321.

The plea of minority should be decided on positive evidence, and not merely on the appearance of the alleged minor.—W. R., 1864, 304; W. R., 1864, 356.

Act IX. of 1861 applied to Pegu, and also to minors the lawful children of European natural-born British subjects.—3 W. R., Rec. Ref., 5.

A purchase from a minor is not *ipso facto* invalid.—3 W. R., 10.

A minor when he comes of age is not precluded from suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute.—3 W. R., 43.

Minors have a qualified power of contracting, and an implied or express contract for necessaries is binding absolutely on a minor. As a minor cannot himself, by reason of insufficient capacity for business, state and settle

an account so as to be bound thereby, so neither can he authorise another party to do for him that which he cannot do himself.—5 W. R., 2.

A statement in a decree that a vakil had appeared and was present in Court for a minor when the decree was made, was held, in a suit to set the decree aside as being made behind his back, to be notice to the minor of the decree having been made.—25 W. R., 280.

In 1862 Rajkaran and his son Amra mortgaged the property in dispute to Bezanji. In 1863, Rajkaran died, leaving a widow, Shivba, and two sons, *vis.*, Amra and Parbhu, a minor. In 1866, Amra and Shivba, the latter of whom acted for herself and as guardian of her minor son Parbhu, settled the account with Bezanji, the mortgagee, obtained a fresh advance, and passed a fresh mortgage-bond to him. In 1868 Amra died. In 1869 Bezanji's assignee filed a suit upon the mortgage, and obtained a decree against the mortgaged property against Shivba both as guardian of the minor Parbhu, and also against her in her individual capacity. At the Court-sale held in execution of this decree, Daji purchased the property in dispute in 1870. In 1881 Parbhu filed the present suit to recover possession of the property, alleging that Daji's purchase was invalid as against him, he having been a minor at the time of the Court-sale. He subsequently assigned his interest to the respondent (second plaintiff). It was contended on behalf of the defendant, Daji, that the suit, not having been brought within one year after Parbhu had attained majority, was barred by limitation under art. 12, sch. 2 of Act XV. of 1877. *Held*, that the suit was not barred by limitation. Parbhu had not been properly represented by Shivba in the suit of 1869, as she had not obtained a certificate under the Minors' Act (XX. of 1864). Parbhu was, therefore, not bound by the decree in that suit, or by the sale in execution, and art. 12, sch. 2 of Act XV. of 1877 did not apply. *Held*, also, upon the merits, that the debt for which the decree was passed, being a family and ancestral debt, was binding upon the whole family, including the plaintiff, who was, therefore, not entitled to disturb the execution purchaser.—I. L. R., 12 Bom. 18.

Sec. 440 read with sec. 3 of Act XL of 1858, does not make the receipt from the Court of a written permission to sue compulsory upon the next friend of an infant plaintiff.—12 Cal. 131.

Although the proper and regular manner of giving permission to sue on behalf of a minor is by an order recorded in the order-sheet, there is, nevertheless, nothing in the nature of the sanction provided by sec. 3 of Act XL of 1858 which takes it out of the general rule of evidence, that sanction may be proved by express words or by implication. Where on a construction of the plaint and the pleadings it is found that the minor is the real plaintiff, the mere fact of his not having been properly described in accordance with sec. 440 of the Civil Procedure Code is no ground for setting aside a decree passed in the suit.—14 Cal. 159.

Act XX of 1864 is not superseded by Act X of 1877. Where, therefore, a widow claimed to have charge of property in trust for her minor sons, it was held necessary, under sec. 2 of Act XX of 1864, that she should obtain a certificate of administration if the whole estate was of greater value than Rs. 250, and that it was competent to the Court, if there was any pressing necessity (owing to the operation of the law of limitation) that a suit should be brought at once, to accept the plaint and stay proceedings until the mother had obtained a certificate under Act XX. of 1864. *Vijker v. Zilibhai* (9 Bom H. C. R. 310) followed.—3 Bom. 149.

A volunteer guardian has no right to sue on behalf of a minor ; the accord or refusal of permission to sue is a matter in the discretion of the Court. Where a suit is brought in violation of sec. 440 of the Code of Civil Procedure, or of the provisions of Act XL of 1858, the proper course for a Court to pursue is to return the plaint, in order that the error may be rectified.—10 Cal. 102 ; 12 C. L. R., 405.

**441.** Every application to the Court on behalf of a minor (other than an application under section 449) shall be made by his next friend, or his guardian for the suit.

Application to be made by next friend or guardian *ad litem*.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 13 Bom. 234, noted under sec. 409 ; 16 Cal ; 771, noted under sec. 410.

**442.** If a plaint be filed by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. Notice of such application shall be given to such person by the defendant; and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

Plaint filed without next friend to be taken off the file. Costs.

**Notes.**

This section applies to Provincial Small Cause Courts.

The plaintiff was a widow, and sued for the administration of her deceased husband's estate. The suit was filed on the 5th April 1885. On the 2nd May the defendants' attorneys gave notice to the plaintiff's attorney that the plaintiff was a minor suing without a next friend, and that the plaint must be struck off the file in consequence. The plaintiff's attorney replied that, if the plaintiff was really a minor, he would at once take steps to have her father appointed her next friend, and the plaint and proceedings amended. On 7th May, inspection was given to the plaintiff's attorney of the plaintiff's horoscope, and after that inspection the plaintiff's attorney proposed that the proceedings should be amended by making the plaintiff's father her next friend. It appeared that the plaintiff was sixteen months under age. Nothing was done by either party for some weeks. On the 6th June the defendants' attorneys gave notice that they would apply for an order that the plaint should be taken off the file under sec. 442 of the Civil Procedure Code (Act XIV. of 1882). On hearing the application the Court refused to make the order asked for. The suit did not appear to be a vexatious one, and the plaintiff's age did not appear to have been fraudulently concealed, her father having stated on oath that he believed her to be of age, and expressing his willingness at once to be placed on the record as her next friend. The Courts, as a rule, only strike the plaint off the file where it appears, on the face of the plaint, that it was filed by a person who was a minor, or when it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff fails in the claim. When the fact of minority is a *bona fide* question of

evidence, and the defendant's allegation is found correct, then the usual course is to suspend all proceedings, and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend.—I. L. R., 13 Bom. 7.

See I. L. R., 13 Bom 234, noted under sec. 409.

**443.** Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.

“Where an authority competent in this behalf has appointed or declared a guardian or guardians of the person or property, or both, of the minor, the Court shall appoint him or one of them, as the case may be, to be the guardian for the suit under this section unless it considers, for reasons to be recorded by it, that some other person ought to be so appointed.”\*

#### Notes.

This section applies to Provincial Small Cause Courts.

In a suit intended to be brought against some minors the defendants were set out in the heading of the plaint as “Sharoda Sunderi Debya, widow of Chundra Kanta Ohuckerbutty, deceased, mother and guardian of the minors” (setting out their names). At the filing of the plaint, the plaintiff applied for and obtained an order, making Sharoda guardian of the minors for the purposes of the suit. She was not, however, guardian of the property and persons of the minors under Act XL of 1858. *Held* that the minors were not parties to the suit; that the order making Sharoda guardian *ad litem* was not made in a suit in which the minors were defendants; and that the suit must be dismissed as against the minors. *Held* also that neither the Code of Civil Procedure nor the proviso of sec. 3 of Act XL of 1858, gives a plaintiff any power to institute a suit against a person named by himself as guardian *ad litem* on behalf of a minor, nor do they give to the Court the power of transferring, by a mere order made *ex parte*, an irregular proceeding, such as the one above-mentioned, into a suit against the minor.—I. L. R., 11 Cal. 402.

A suit was brought against a mother “for self and as guardian of A and B, minor sons of C, deceased,” at a period when Act VIII of 1859 was in force. The mother had not taken out a certificate under Act XL. of 1858, and no permission was recorded by the Court allowing the mother to defend on behalf of the infants under the provisions of sec. 3 of that Act. A decree was made in the suit, and in execution thereof certain property belonging to A and B was sold and purchased by X, the decree-holder. Subsequently, on A's coming of age, A and B, by A as his next friend, instituted a suit against X and their mother to recover the property so purchased by X.—*Held* that under the provisions of Act VIII of 1859, it was not necessary to formally record sanction to the mother to defend under sec. 1 of Act XL of 1858; and that the fact of sanction having been given



might be presumed by the Court, and that on the facts of the case such presumption was warranted:—*Held* also that, though A and B were not properly described in the previous suit, it was a mere defect in form, and did not affect the merits of the case, being in accordance with the prevailing practice at the time when the suit was brought, and that there is no authority for saying that, when minors have been really sued, though in a wrong form, a decree against them would not be valid.—11 Cal. 509.

Where a guardian *ad litem* of a lunatic defendant was made a party defendant for purposes of discovery:—*Held*, that the discovery was not intended to include the right to administer interrogatories to him.—10 Bom. 167.

Although section 443 of the Code of Civil Procedure (Act XIV of 1882) read with section 463 does not oblige a Court to appoint a guardian *ad litem* for a defendant of unsound mind, except where he has been adjudged to be of unsound mind under Act XXV of 1858; still upon general principles and in conformity with the practice of the Court of Chancery, the Court should assign a guardian *ad litem* for the defendant if it finds, on inquiry, that he is of unsound mind so as to be unfit to defend the suit.—16 Bom. 132.

Where no administrator of the estate of a minor is appointed under Act XX of 1864, there is no objection to the appointment of a guardian *ad litem* under sec. 443 of the Civil Procedure Code (Act X of 1877) as amended by Act XII of 1879 for the purpose of defending a suit against a minor. Act XX of 1864, sec. 2 has no bearing on the case of a next friend or guardian *ad litem* not claiming charge of the minor's estate. Neither Act XX of 1864, nor the Civil Procedure Code (Act X of 1877) as amended by Act XII of 1879, empowers any Court to appoint a person, against his or her will, to be a next friend, guardian *ad litem*, administrator of the estate, or guardian of the person of the minor. Sec. 458 of the Civil Procedure Code (Act X of 1877) is not, so far as regards payment or costs, applicable to any person appointed to act as guardian *ad litem* without his previous assent. Sec. 3, cl. b, of Act XV of 1880, preserves jurisdiction to a Court to try suit against a minor, notwithstanding the appointment of one of its officers to be the minor's guardian *ad litem*. The decision in *Mohan Ishwar v. Kaku Rupa* (I. L. R., 4 Bom. 738) is superseded by Act XV of 1880, sec. 3 cl. b. in so far as that decision affected officers of the Court appointed guardians *ad litem* under sec. 456 of Act X of 1877 as amended by Act XII of 1879. Inconvenience pointed out, of introducing into Acts relating, and instituted as relating, to special jurisdiction only, provisions affecting Civil Procedure generally—5 Bom. 306.

See I. L. R., 14 Cal. 204, noted under sec. 100; 16 Cal. 771, noted under sec. 410.

#### 444. Every order made in a suit or on any application

before the Court, in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, if the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

Order obtained without next friend or guardian may be discharged.  
Costs.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 13 Bom. 234, noted under sec. 409.

**445.** Any person being of sound mind ~~and full age~~ may act as next friend of a minor, provided his interest is not adverse to that of such minor, and he is not a defendant in the suit.

Who may be next friend.

**Notes.**

This section applies to Provincial Small Cause Courts.

A married woman may act as the next friend of an infant plaintiff. *Guru Pershad Sing v. Gossain Munraj Puri*, I. L. R., 11 Cal. 733, overruled.—17 Cal. 488.

**446.** If the interest of the next friend of a minor is adverse to that of such minor, or if he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or if he does not do his duty, or, pending the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court (if satisfied of the sufficiency of the cause assigned) may order the next friend to be removed accordingly.

Removal of next friend.

“If the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor.”\*

**Note.**—This section applies to Provincial Small Cause Courts.

**447.** Unless otherwise ordered by the Court, a next friend shall not retire at his own request without first procuring a fit person to be put in his place, and giving security for the costs already incurred.

Retirement of next friend.

The application for the appointment of a new next friend shall be supported by affidavit showing the fitness of the person proposed, and also that he has no interest adverse to the minor.

Application for appointment of new next friend.

**Note.**—This section applies to Provincial Small Cause Courts.

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\* Added by Act VIII of 1890, (Guardians Wards Act) sec. 53, cl. a.

**448.** On the death or removal of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Stay of Proceedings on death or removal of next friend.

NOTE.—This section applies to Provincial Small Cause Courts.

**449.** If the pleader of such minor omits, within reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or the matter at issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

Application for appointment of new next friend.

#### Notes.

This section applies to Provincial Small Cause Courts.

See I. L. R., 16 Cal. 771, noted under sec. 410.

**450.** A minor plaintiff, or a minor not a party to a suit on whose behalf an application is pending, on coming of age, must elect whether he will proceed with the suit or application.

Course to be followed by minor plaintiff or applicant on coming of age.

NOTE.—This section applies to Provincial Small Cause Courts.

**451.** If he elects to proceed with it, he shall apply for an order discharging the next friend, and for leave to proceed in his own name.

Where he elects to proceed.

The title of the suit or application shall, in such case, be corrected so as to read thenceforth thus :—

“ A B, late a minor by C D, his next friend, but now of full age.”

NOTE.—This section applies to Provincial Small Cause Courts.

**452.** If he elects to abandon the suit or application, he shall, if a sole plaintiff, or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or respondent, or which may have been paid by his next friend.

Where he elects to abandon.  
Costs.

NOTE.—This section applies to Provincial Small Cause Courts.

**453.** Any application under section 451 or section 452 may be made *ex parte*; and it must be proved by affidavit that the late minor has attained his full age.

Making and proving application under sections 451, 452.

NOTE.—This section applies to Provincial Small Cause Courts.

**454.** A minor co-plaintiff, on coming of age, and desiring to repudiate the suit, must apply to have his name struck

When minor co-plaintiff coming of age desires to repudiate suit.

out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Notice of the application shall be served on the next friend, as well as on the defendant; and it must be proved by affidavit that the late minor has attained his full age. The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

If the late minor be a necessary party to the suit, the Court may direct him to be made a defendant.

NOTE.—This section applies to Provincial Small Cause Courts.

**455.** If any minor, or attaining majority, can prove, to the satisfaction of the Court, that a suit instituted in his name by a next friend was unreasonable or improper, he may if a sole plaintiff, apply to have the suit dismissed.

Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application, and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where a decree has been made against an infant duly represented by his guardian, and the infant on attaining his majority seeks to set that decree aside by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian. If the infant desire to have the decree set aside, because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree when an *ex-parte* one, the procedure adopted should be that given in the Code for setting aside *ex parte* decrees.—I. L. R., 12 Cal. 69.

**456.** An order for the appointment of a guardian for the suit may be obtained upon application in the name, and on behalf, of the minor or by the plaintiff. Such application must be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor, and that he is a fit person to be so appointed.

When there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian : Provided that he has no interest adverse to that of the minor.

**Notes.**

This section applies to Provincial Small Cause Courts.

A Subordinate Judge, who, under Act X of 1877, sec. 456, as amended by Act XII of 1879 sec. 73 appoints the nazir or any other officer of his Court to act as guardian of a minor plaintiff or defendant in a suit in his Court, has no jurisdiction to hear it, and pass a decree against that officer as guardian *ad litem* of the minor.—I. L. R., 4 Bom. 638.

See I. L. R., 5 Bom. 306, noted under sec. 443.

**457.** A co-defendant of sound mind and of full age  
 Who may be guardian *ad litem*. may be appointed guardian for the suit, if he has no interest adverse to that of the minor; but neither a plaintiff, nor a married woman, can be so appointed.

**Notes.**

This section applies to Provincial Small Cause Courts.

In a suit brought by minor sons against their father, their mother cannot act as next friend.—I. L. R., 11 Cal. 733.

**458.** If the guardian for the suit of a minor defendant  
 Guardian neglecting his duty may be removed. Costs. does not do his duty, or if other sufficient ground be made to appear, the Court may remove him, and may order him to pay such costs as may have been occasioned to any party by his breach of duty.

**Notes.**

This section applies to Provincial Small Cause Courts.

There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the nazir, who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit if it should be of opinion that the nazir has been unavoidably prevented from making himself acquainted with the case against the minor. In a suit against a minor residing in a Native State at a distance from the nazir of the Court, who was appointed guardian *ad litem*, and the nazir was prevented from conducting the minor's defence without incurring expense which the plaintiff refused to pay, *held* that the Court, if it chose, might cancel the appointment of the nazir as guardian *ad litem* under sec. 458 of the Civil Procedure Code (Act XIV of 1882).—I. L. R., 12 Bom. 553.

The plaintiff, who was a minor, sued by her next friend (her husband) for the administration of her father Purshotam Ramji's estate. The defendants in the suit were the plaintiff's mother, Nanbai, who was the widow and executrix of Purshotam Ramji, and one Burjorji, who had been appointed by Nanbai to act for her during her absence on pilgrimage. The plaintiff alleged that Nanbai was insane and unfit to manage the estate, and tha

Burjorji was mismanaging and wasting it. A receiver was appointed shortly after the filing of the suit. At the hearing the suit was dismissed as against Burjorji, and the Court ordered that his costs should be paid by the plaintiff's next friend, being of opinion that he was the real actor in the suit, and that it would be unfair to make the plaintiff's estate bear the costs of proceedings in which she had no real voice. The Court was further of opinion that at the time the suit was filed, Nanbai was not of unsound mind, but that she had subsequently become insane. The usual accounts were ordered to be taken as against Nanbai. The result of taking these accounts was that her administration of the estate as executrix was found to be unimpeachable, and in December, 1883, the Court made an order directing that the next friend should pay the costs of the infant plaintiff. The next friend became insolvent, and his solicitors (the respondents) obtained an order from the Judge in chambers that the receiver should pay their costs out of the estate in his hands. The plaintiff appealed. The respondents contended that the plaintiff had adopted the suit, and that they had a lien for their costs—at any rate so far as they were incurred for the recovery and preservation of the estate:—*Held*, that the respondents were not entitled to be paid out of the estate. The plaintiff had done no overt act signifying her adoption of the suit, and the fact that she remained passive was consistent with her disapproval of it, as the decree did not immediately affect her, or require her to take action until the death of her mother Nanbai:—*Held*, also, that the property in the hands of the receiver could not be held to have been recovered by means of the suit, as it appeared that the investments were of a perfectly legitimate nature; that there was no cause for alarm with respect to the safety of the property, and that the suit, so far as it was based on alleged danger to the estate, was quite uncalled for. It was argued for the respondents that the appointment of a receiver preserved the estate from future risk arising from the fact that the executrix Nanbai was of unsound mind:—*Held*, that the mere fact that the appointment of a receiver would preserve the estate from a possible danger in the future, could not bring the case within the ordinary rule as to solicitor's lien.—10 Bom. 248.

The Civil Procedure Code does not authorize a Court to decree costs against the guardian of a defendant except in the case referred to in sec. 458.—3 Madr. 263.

See I. L. R., 5 Bom. 306, noted under section 443.

**459.** If the guardian for the suit dies pending such  
Appointment in place of  
guardian dyingpendentelite. suit, or is removed by the Court, the  
 Court shall appoint a new guardian in  
 his place.

NOTE.—This section applies to Provincial Small Cause Courts.

**460.** When the enforcement of a decree is applied for  
Guardian ad litem of  
minor representative of de-  
ceased judgment-debtor. against the heir or representative, being  
 a minor, of a deceased party, a guardian  
 for the suit of such minor shall be ap-  
 pointed by the Court, and the decree-holder shall serve on  
 such guardian notice of such application.

NOTE.—This section applies to Provincial Small Cause Courts.



Receipt by next friend or guardian *ad litem* of property under decree for minor.

**461.\*** (1) A next friend or guardian for the suit, shall not, without the leave of the Court receive any money or other moveable property on behalf of a minor, either—

- (a) by way of compromise before decree or order, or
- (b) under a decree or order in favour of the minor.

“(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.”

NOTE.—This section applies to Provincial Small Cause Courts.

**462.** No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian.

Next friend or guardian *ad litem* not to compromise without leave of Court.

Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor.

Compromise without leave voidable.

#### Notes.

This section applies to Provincial Small Cause Courts.

It was agreed by the defendants, who were majors, and by the father and guardian of a minor defendant on his behalf, that one of the issues in a suit should be determined under the Oaths Act, sec. 9, by the oath of the plaintiff. The oath was taken, and a decree was passed accordingly. *Held* that the minor defendant was bound by the consent of his guardian, since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under sec. 462, Civil Procedure Code.—I. L. R., 12 Madr. 483.

An application to stay execution of and to set aside a decree, passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under sec. 462, Civil Procedure Code, was rejected. *Held* no appeal lay against the order of rejection.—12 Madr. 503.

Sec. 18 of the Minors' Act, XX. of 1864, applies only to persons to whom a certificate has been granted under that Act. An assignment of a mortgage, therefore, by a widow, acting as natural guardian of her minor son, but who has not obtained a certificate under the Act (XX. of 1864), is

\* Substituted by Act VIII of 1890 (Guardians and Wards Act), sec. 53, cl. d.

not invalid because effected without the sanction of the Court. Where a widow acting as natural guardian of her minor son assigned a mortgage which had been executed to her deceased husband for a consideration, a part of which was a sum due under a decree to the assignee, *held* that such an assignment was not invalid under sec. 462 of the Civil Procedure Code (Act X. of 1877). Assuming that section to be applicable to the compromise of a decree, the circumstance that the compromise was voidable would only affect the consideration for the assignment by reducing its amount. The plaintiff sued, as assignee of a mortgage, to recover the debt due from the mortgagors personally and from the property mortgaged. The assignor was a Hindu widow, acting as natural guardian of her minor son. The consideration for the assignment was a sum of Rs. 68-9-0 due to the plaintiff under a decree obtained by him and Rs. 30-7-0 cash paid. The lower Courts held that, as to the Rs. 68-9-0, the transaction really amounted to a satisfaction or adjustment of the decree under which it was due, and that as such adjustment had not been certified to the Court it was invalid; they further held that, the consideration for the assignment of the mortgage having so far failed, the assignment was without adequate consideration, and, therefore, they dismissed the suit. On appeal to the High Court, *held* that, although in ordinary cases it is the rule that where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, yet that under the peculiar circumstances of this case that rule did not apply. The mortgage-deed was assigned by a widow acting as the natural guardian of a minor, and a great part of the consideration for the assignment had admittedly failed, confirmation of the decree which formed part of the consideration not having been certified to the Court. There was on the record no admission of the assignment by the assignor. It might be that the minor in a suit by his next friend or guardian appointed under Act XX of 1864 might dispute the assignment. The defendants in order to protect themselves had a right to call on the plaintiff to prove the assignment, and a Court ought in the interests of justice to see that they were so protected. The assignment was on behalf of a minor, and the person acting as his guardian had not admitted it, and it might be that even her admission would not be binding on him, since he was not a party to the suit. It was necessary that the point should be so tried and determined as to bind the minor, and to do that it was essential that he should be made a party to the suit. The Court, therefore, reversed the decree of the lower Court, and remanded the case.—12 Bom. 686.

The conditions of section 462 of the Civil Procedure Code, requiring the sanction of the Court to compromises entered into by the guardian *ad litem* of an infant suitor, are not sufficiently complied with by the Court passing a decree in the terms of a compromise presented by the guardian *ad litem*. A decree passed under such circumstances should be set aside.—3 Madr. 103.

See. I. L. R., 15 Bom. 594, noted under sec. 11.

**463.** The provisions contained in sections 440 to 462 (both inclusive) shall, *mutatis mutandis*, apply in the case of persons of unsound mind, adjudged to be so under Act No. XXXV of 1858, or under any other law for the time being in force.

Application of sections 440 to 462 to persons of unsound mind.

**Notes.**

This section applies to Provincial Small Cause Courts.

A guardian *ad litem* cannot be appointed under chapter xxxi. of the Code of Civil Procedure for a lunatic defendant to whom Act XXXV of 1858 applies, until the defendant has been adjudged a lunatic under the provisions of the said Act.—I. L. R. 6 Madr. 380.

See. I. L. R., 16 Bom. 132, noted under sec. 443.

**464.** “Nothing in this Chapter applies to a Sovereign Prince or ruling Chief suing or being sued in the name of his State or being sued, by direction of the Governor-General in Council or a Local Government, in the name of an agent or in any other name, or shall be construed to affect, or in any way derogate from, the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.”\*

**Notes.**

This section applies to Provincial Small Cause Courts.

A Jain, who was subject to the Aliyasantana law, made a will, whereby he disposed of the property of his family in favour of certain persons, and died. The plaintiff, a female, was the sole surviving member of the testator's family, but it was admitted that she was, and for more than fifty years had been, a lunatic, though she had not been declared to be so under Act XXXV of 1858; it appeared that her lunacy was not congenital. She sued, by the Collector of South Canara, the agent for the Court of Wards:—*Held*, (1) that the plaintiff was not excluded from inheritance by reason of lunacy under Aliyasantana law, and the will, in favour of the defendants, was invalid; (2) that the Court of Wards had power to take cognizance of the plaintiff's case under Regulation V of 1804; (3) that although the Court of Wards should ordinarily obtain a declaration under Act XXXV of 1858 in cases where the lunacy of a ward is open to question their failure to do so in the present case was not fatal to the suit; (4) that Civil Procedure Code, sec. 464, was accordingly applicable to the case; (5) that the appointment of the Collector, as guardian to the plaintiff, was legal and valid. In deciding what was the extent of the property which the plaintiff was entitled to inherit under the above rulings, certain documents adduced as evidencing partition of the family property were held to evidence merely arrangements for separate enjoyment.—14 Madr. 289.

**CHAPTER XXXII.****SUITS BY AND AGAINST MILITARY MEN.**

**465.** When any officer or soldier actually serving the Government in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecut-

Officers or soldiers who cannot obtain leave may authorize any person to

\* Substituted by Act VIII of 1890 (Guardian and Wards Act), sec. 53, cl. e.

ing or defending the suit in person, he may authorize any person to sue or defend in his stead.

The authority shall be in writing, and shall be signed by the officer or soldier in the presence of (a) his commanding officer, or the next subordinate officer if the party be himself the commanding officer, or (b) where the officer, or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

When so filed, the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

*Explanation.*—In this chapter the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, detachment, or depôt to which the officer or soldier belongs.

NOTE.—This section applies to Provincial Small Cause Courts.

**466.** Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may act personally or appoint pleader. may prosecute or defend it in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

NOTE.—This section applies to Provincial Small Cause Courts.

**467.** Processes served upon any person authorized by an officer or a soldier, as in section 465, or upon any pleader appointed as aforesaid by such person to act for, or on behalf of, such officer or soldier, shall be as effectual as if they had been served on the party in person or on his pleader.

NOTE.—This section applies to Provincial Small Cause Courts.

**468.** When a soldier is a defendant, the Court shall send a copy of the summons to his commanding officer for the purpose of being served on him.

The officer to whom such copy is sent, after causing it to be served on the person to whom it is addressed, if practicable, shall return it to the Court with the written acknowledgment of such person endorsed thereon.

If, from any cause, the copy cannot be so served, it shall be returned to the Court by which it was sent, with information of the cause which has prevented the service.

**Notes.**

This section applies to Provincial Small Cause Courts.

A sued a soldier to recover a debt not amounting to £30:—*Held*, that the suit was cognizable by a Court of Small Causes. *Semble*.—The Commanding Officer of the defendant is bound to cause the summons of the Small Cause Court to be served on him.—I. L. R., 10 Madr. 319.

**469.** [*Repealed by the Cantonments Act (XIII of 1889), sec. 2 and*

## CHAPTER XXXIII.

### INTERPLEADER.

**470.** When two or more persons claim adversely to one another the same payment or property from another person, whose only interest therein is that of a mere stakeholder, and who is ready to render it to the right owner, such stakeholder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property should be made or delivered, and of obtaining indemnity for himself :

When interpleader-suit be instituted.  
Provided that, if any suit is pending in which the rights of all parties can properly be decided, the stakeholder shall not institute a suit of interpleader.

NOTE.—This section applies to Provincial Small Cause Courts.

**471.** In every suit of interpleader the plaintiff must, in addition to the other statements necessary for complaints, state—

- Plaint in such suit.
- (a) that the plaintiff has no interest in the thing claimed otherwise than as a mere stakeholder ;
  - (b) the claims made by the defendants severally ; and
  - (c) that there is no collusion between the plaintiff and any of the defendants.

NOTE.—This section applies to Provincial Small Cause Courts.

**472.** When the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit.

NOTE.—This section applies to Provincial Small Cause Courts.

Procedure at first hearing.  
**473.** At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit ;

or, if it thinks that justice or convenience so require,

(b) retain all parties until the final disposal of the suit ;  
and, if it finds that the admissions of the parties or other evidence enable it,

(c) adjudicate the title to the thing claimed : or else it may

(d) direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims.

NOTE.—This section applies to Provincial Small Cause Courts.

**474.** Nothing in this chapter shall be taken to enable

When agents and tenants may institute interpleader suits.

agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

*Illustration.*

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-suit against A and C.

NOTE.—This section applies to Provincial Small Cause Courts.

**475.** When the suit is properly instituted, the Court

Charge of plaintiff's costs. may provide for the plaintiff's costs by giving him a charge on the thing claimed or in some other effectual way.

NOTE.—This section applies to Provincial Small Cause Courts.

**476.** If any of the defendants in an interpleader-suit

Procedure where defendant is suing stakeholder.

is actually suing the stakeholder in respect of the subject of such suit, the Court in which the suit against the stakeholder is pending shall, on being duly informed by the Court which passed the decree in the interpleader-suit in favour of the stakeholder that such decree has been

Costs.

passed, stay the proceedings as against him ; and his costs in the suit so stayed may be provided for in such suit ; but if,



and so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

## PART IV. PROVISIONAL REMEDIES.

### CHAPTER XXXIV.

#### OF ARREST AND ATTACHMENT BEFORE JUDGMENT.

##### *A.—Arrest before Judgment.*

**477.** If at any stage of any suit, other than a suit for the possession of immoveable property, the plaintiff satisfies the Court by affidavit or otherwise—

that the defendant, with intent to avoid or delay the plaintiff, or to avoid any process of the Court, or to obstruct or delay the execution of any decree that may be passed against him,

(a) has absconded or left the jurisdiction of the Court, or

(b) is about to abscond or to leave the jurisdiction of the Court, or

(c) has disposed of or removed from the jurisdiction of the Court his property or any part thereof, or

that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the plaintiff may apply to the Court that security be taken for the appearance of the defendant to answer any decree that may be passed against him in the suit.

##### **Notes.**

This section applies to Provincial Small Cause Courts (except as regards immoveable property).

A suit was instituted against the master of a vessel for repairs done to his vessel and for hire of a dock in which the vessel had been. The master being about to leave the jurisdiction of the Court with his vessel, the plaintiffs, under sec. 477 of the Code of Civil Procedure, applied for an order that the defendant should give security for his appearance to answer any decree that might be passed against him, and a rule was issued calling on him to show cause why such security should not be furnished. The defendant showed cause, and alleged that the amount claimed for the repairs was excessive, that the repairs were badly done, that the plaintiffs were not entitled to dock-hire, and that some of the repairs charged for had not been executed. He further counter-claimed for a large sum for demurrage

wing to the detention of his vessel and damages caused to it by the wrongful act of the plaintiffs. It was contended that, as the claim was on a contested account which on the face of it was stated, but unsettled, on the principle of the English authorities, the plaintiffs were not entitled to the order asked for. It was further contended that the suit was not a *bona fide* one, but brought merely to harass the defendant, and that for this reason security should not be ordered to be given. It was not disputed that the defendant had no domicile in this country, and that he was shortly leaving in his vessel in the ordinary course of his business. The Court found the plaintiffs were undoubtedly entitled to recover some amount on account of repairs, and that the mere fact that the plaintiffs added on to such a claim one of a disputable character did not go to show that the suit was not a *bona fide* one. *Held* that there is no authority for saying that the principles applied in England to the granting of writs *ne exeat regno* should be applied in this country; and that the Court can only look to the provisions of the Code of Civil Procedure; that when a person comes on business to this country in which he has no property or domicile, and enters into a contract with a person to do work in connection with that business, and which must be done before he leaves the country, and it is known he intends to leave as soon as the work is completed, there is an implied understanding, if the work was done on his credit, that it should be paid for before he leaves. *Held*, also, that the case fell within the provisions of sec. 477 of the Code, and that the defendant should furnish security for his appearance while the suit was pending within a week in terms of sec. 479, such security to be for the amount of the claim — I. L. R., 14 Cal. 695.

See I. L. R., 15 Bom. 160, noted under sec. 97.

Order to bring up defendant to show cause why he should not give security.

**478.** If the Court, after examining the applicant, and making such further investigation as it thinks fit, is satisfied—

that the defendant, with any such intent as aforesaid,

(a) has absconded or left the jurisdiction of the Court, or

(b) is about to abscond or to leave the jurisdiction of the Court, or

(c) has disposed of or removed from the jurisdiction of the Court his property or any part thereof, or

that the defendant is about to leave British India under the circumstances last aforesaid,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance.

NOTE.—This section applies, to Provincial Small Cause Courts (except as regards immoveable property).

**479.** If the defendant fail to show such cause, the Court

If defendant fail to show cause, Court may order him to make or deposit or give security.

shall order him either to deposit in money or other property sufficient to answer the claim against him, or to give security for his appearance at any time

when called upon while the suit pending, and until execution or satisfaction of any decree that may be passed against him in the suit.

The surety shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

**Notes.**

This section applies to Provincial Small Cause Courts (except as regards immoveable property).

See I. L. R., 14 Cal. 695, noted under sec. 477.

**480.** The surety for the appearance of the defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure in case of application by surety to be

On such application being made, the Court shall summon the defendant to appear, or, if it thinks fit, may issue a warrant for his arrest in the first instance.

On the appearance of the defendant pursuant to the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

**NOTE.**—This section applies to Provincial Small Cause Courts (except as regards immoveable property).

**481.** If the defendant fail to comply with any order under section 479 or section 480, the Court may commit him to jail until the decision of the suit, or, if judgment be given against the defendant, until the execution of the decree: Provided that no person shall be imprisoned under this section in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

Procedure where defendant fails to give security or find fresh security.

Provided that no person shall be detained in prison under this section after he has complied with such order.

**Notes.**

This section applies to Provincial Small Cause Courts (except as regards immoveable property).

A Judge of a Small Cause Court in the mofussil can direct the Jailor to bring up before the Court, at the hearing of the suit, a defendant committed to custody, under sec. 78 of Act VIII. of 1859, without having recourse to the Procedure under Act XV of 1869.—5 B. L. R., 215; 13 W. R., 278.

See I. L. R., 7 Bom. 431, noted under sec. 342.

Subsistence of defendants arrested.

**482.** The provisions of section 339 as to allowances payable for the subsis-

tence of judgment-debtors shall apply to all defendants arrested under this chapter.

NOTE.—This section applies to Provincial Small Cause Courts (except as regards immoveable property.)

*B.—Attachment before Judgment.*

**483.** If at any stage of any suit, the plaintiff satisfies the Court by affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,

Application before judgment for security from defendant to satisfy decree, and, in default, or attachment of property.

(a) is about to dispose of the whole or any part of his property, or to remove the same from the jurisdiction of the Court in which the suit is pending, or

(b) has quitted the jurisdiction of the Court, leaving therein property belonging to him,

the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him in such suit, and, on his failing to give such security, to direct that any portion of his property within the jurisdiction of the Court shall be attached until the further order of the Court.

The application shall, unless the Court otherwise directs, specify the property required to be attached, and the estimated value thereof.

Contents of application.

**Notes.**

This section applies to Provincial Small Cause Courts (except as regards immoveable property).

The words in sec. 81 of Act VIII. of 1859, "where the defendant is about to dispose of his property or any part thereof" &c., refer only to property within the jurisdiction of the Court where the suit is pending; therefore, where an order under that section by the first Subordinate Judge of the 24-Pergunnas in respect of property in Calcutta

it. In

A and B obtained a decree for possession of land against C. On their proceeding to execute their decree, D, who was in possession, presented a petition to the Munsif, complaining that they were thereby attempting unlawfully to interfere with his possession. The case was tried, on remand from the Judge as a suit under the provisions of sec. 229 being made on the 17th idem. P and Co. were, on the 20th idem, adjudicated insolvents on the petition of the Agra Bank, and on the same day a vesting order was made vesting the estate and effects of the insolvents in the Official Assignee. An application was made on behalf of the Official Assignee for an order directing the release of the attached property on the ground that the Official Assignee's claim under the vesting order was entitled to priority. The High

Court ordered the prohibitory order to be set aside, and the property thereunder to be released.—12 B. L. R., App. 1.

The words "any portion of his property" in the latter part of sec. 483 of the Code of Civil Procedure, 1877, mean any portion of the property of the defendant which is within the jurisdiction of the Court in which the suit is pending.—1 C. L. R., 336.

Before proceeding under sec. 483 of the Civil Procedure Code to attach property, the Court should be thoroughly satisfied that the defendant is really disposing of his property with intent to obstruct or delay the execution of any decree that may be passed against him.—13 C. L. R., 356.

Under the provisions of secs. 483 and 484 of the Code of Civil Procedure, 1882, property of the defendant, which is not within the jurisdiction of the Court, cannot be attached before judgment.—I. L. R., 8 Madr. 20.

See I. L. R., 17 Cal. 436, noted under sec. 278; 10 Al. 506, noted under sec. 311.

**484.** If the Court, after examining the applicant, and making any further investigation which it thinks fit, is satisfied that the defendant is about to dispose of or remove his property with intent to obstruct or delay the execution of any decree that may be passed against him in the suit, or that he has, with such intent, quitted the jurisdiction of the Court, leaving therein property belonging to him, the Court may require him, within a time to be fixed by the Court, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

The Court may also, in the order, direct the conditional attachment of the whole or any portion of the property specified in the application.

#### Notes.

This section applies to Provincial Small Cause Courts (except as regards immoveable property).

The title of the official assignee of an insolvent debtor under Act 11 and 12 Vic., c. 21 (the Indian Insolvent Act), is preferable to that of a creditor of the insolvent who before the vesting order has obtained an order for attachment before judgment under secs. 83 and 84 of the Civil Procedure Code in respect of the property comprised in such attachment. The effect of attachment before judgment is to secure that the property attached shall be forthcoming at the time of pronouncing the decree, to abide whatever order the Court shall make upon it.—1 Bom. H. C. R., (O. C.) 224.

The defendants were, on the 10th of March 1881, called upon, under sec. 484 of the Civil Procedure Code (Act X of 1877), to furnish security for the satisfaction of a decree that the plaintiff might obtain against them, or to show cause, on the 23th March 1881, why security should not be furnished. To this direction the order was appointed, which is provided by

the form at the end of the Code of Civil Procedure, for a provisional attachment under sec. 484. The defendants, to avoid the attachment, gave security on the 12th March 1881 for satisfaction of the decree, and the attachment was not carried out. On the 28th March 1881, they showed cause why security should not be furnished; but the Subordinate Judge, as security had been furnished, thought the matter was at an end, and that he could not cancel the security-bond. *Held* that the Subordinate Judge was wrong; the security so given was really not the security expressly provided under sec. 484, and did not preclude the defendants from showing cause why no security should be furnished.—I. L. R., 5 Bom. 643.

**485.** If the defendant fail to show cause why he should not furnish security, or fail to furnish the security required, within the time fixed by the Court, the Court may order that the property specified in the application, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, shall be attached.

If the defendant show such cause or furnish the required security, and the property specified in the application or any portion of it has been attached, the Court shall order the attachment to be withdrawn.

#### Notes.

This section applies to Provincial Small Cause Courts (except as regards immoveable property).

See I. L. R., 14 Al. 162, noted under sec. 268.

Mode of making attachment.

**486.** The attachment shall be made in the manner herein provided for the attachment of property in execution of a decree for money.

NOTE.—See I. L. R., 14 Al. 162, noted under sec. 268.

**487.** If any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for money.

NOTE.—This section applies to Provincial Small Cause Courts (except as regards immoveable property).

**488.** When an order of attachment before judgment is passed, the Court which passed the order shall remove the attachment whenever the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

NOTE.—This section applies to Provincial Small Cause Courts (except as regards immoveable property).



**489.** Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Attachment not to affect rights of strangers, or bar decree-holder from applying for sale.

**Notes.**

This section applies to Provincial Small Cause Courts (except as regards immoveable property).

Sec. 89 of the Code of Civil Procedure renders an attachment before judgment ineffectual as a bar to process of execution against the property attached in satisfaction of a decree in another suit, whether obtained before or after the attachment.—6 M. H. C. R., 135.

**490.** Where property is under attachment by virtue of the provisions of this chapter, and a decree is given in favour of the plaintiff, it shall not be necessary to re-attach the property in execution of such decree.

Property attached under chapter not to be re-attached in execution of decree.

**NOTE.**—This section applies to Provincial Small Cause Courts (except as regards immoveable property.)

*C.—Compensation for improper Arrests or Attachments.*

**491.** If, in any suit in which an arrest or attachment has been effected, it appears to the Court that such arrest or attachment was applied for on insufficient grounds,

Compensation for obtaining arrest or attachment on insufficient grounds.

or if the suit of the plaintiff fails, and it appears to the Court that there was no probable ground for instituting the suit,

the Court may, on the application of the defendant, award against the plaintiff in its decree such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the arrest or attachment:

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

Proviso.

An award under this section shall bar any suit for compensation in respect of such arrest or attachment.

**Notes.**

This section applies to Provincial Small Cause Courts (except as regards immoveable property).

The omission to apply for compensation under sec. 88, Act VIII. of 1859 (assuming that section to be applicable to the present case), does not

bar a regular suit for compensation for illegal attachment; and the fact that security was not given, by which release of the property might have been obtained, does not affect the right of suit for the improper attachment. Further that, under the circumstances, the attachment being needless and unjustifiable, and without due authority of law, the award of damages was fair and unquestionable.—1 Agra H. C. R., 104.

See I. L. R., 15 Bom. 160, noted under sec. 97.

## CHAPTER XXXV.

### OF TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

#### A.—*Temporary Injunctions.*

Cases in which temporary injunction may be granted.

**492.** If in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or is about, to remove or dispose of his property with intent to defraud his creditors.

the Court may, by order, grant a temporary injunction to restrain such act, or give such other order, for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property, as the Court thinks fit, or refuse such injunction or other order.

#### Notes.

An appeal was preferred against an order granting an injunction under sec. 92 of the Code of Civil Procedure for the purpose of stopping the execution-proceedings in respect of certain immoveable property which had been attached with a view to sale in execution of a decree obtained by R against N. Upon the attachment of the property, S put forward a claim. That claim was refused, and, as provided by sec. 246, S immediately brought a suit against R to establish his right, and it was in this suit that the order now complained of was made. The injunction was one restraining the defendant, R, from executing his decree. N was subsequently made a party to the suit. R appealed to the High Court against the order granting the injunction. *Held* that the provisions of sec. 92 did not justify the issue of the injunction. It could not be said that the property was in danger of being wasted, damaged, or alienated by R, nor has the property been in his possession. The proper course should have been for S to present a petition to the lower Court for a postponement of the sale, the attachment continuing. The High Court therefore ordered that the injunction be dissolved, and that the application should be dealt with as if it were made in the execution-proceedings, and that an order should be entered on those proceedings staying the sale pending the suit which had been commenced, provided always that it should be competent to R, in case of any under delay in prosecuting the suit, to make a further application to the Court for an immediate sale.—11 B. L. R., App. 27; 20 W. R., 11; 24 W. R., 70.

The plaintiffs being in possession of a certain mud-dock used for docking and repairing vessels, and being threatened by the defendants with a suit

to eject them therefrom, sued for specific performance of an alleged agreement between themselves and the defendants, under which they were, on certain terms, entitled to the use and occupation of the dock until the repairs of two of their vessels were completed; and for an injunction to restrain the defendants from ejecting them until the completion of the repairs. In support of an application for an *interim* injunction to restrain the defendants from taking proceedings to eject the plaintiffs until their suit had been heard, the affidavits of the plaintiffs stated that on the faith of the agreement one of their steamers had been docked and taken to pieces; that the repairs could not be finished for a considerable time, and that the vessel could not be removed from the dock without great loss and irreparable injury to them. The affidavits of the defendants denied the making of the agreement alleged by the plaintiffs, and set forth another agreement, under which they alleged the plaintiffs had been in possession of the dock, and which agreement having come to an end they were entitled to eject the plaintiffs; they did not deny the loss to the plaintiffs which would be the result of moving the vessel before the repairs were completed, nor did they allege any delay in making the repairs, but they submitted that such loss would be the consequence of the plaintiffs' own act in docking their vessel without any final agreement having been come to between the parties. The dock was situated in the district of Hooghly, and the defendants' suit for possession, unless transferred to the High Court, would be tried in the Hooghly Court. There were facts which in the opinion of the Court went to show that the plaintiffs' had acted *bona fide*. *Held* (*per* MARKBY. J.), on the above facts, that inasmuch as the plaintiff's statements, if true, raised a fair and substantial question for decision as to the rights of the parties, and looking to the inconvenience of allowing the same matter to be litigated simultaneously in different Courts between the same parties, the plaintiffs were entitled to an *interim* injunction restraining the defendants from bringing their suit until the plaintiffs' suit was heard. *Semble*.—An *interim* injunction may issue, although there is a contradiction on the facts. On appeal the Court was of opinion that, under the circumstances, there was an equity which entitled the plaintiffs to be kept quiet and undisturbed possession of the dock until the repairs were completed; and confirmed the order for an *interim* injunction, but modified it by restraining the defendants, not from bringing their suit, but merely from executing any decree they might obtain therein until the plaintiffs should have had a reasonable time to complete the repairs of their vessel. Although, by the Letters Patent of 1865, the provisions of Act VIII. of 1859 were not expressly made applicable to the High Court, as was done by the Letters Patent of 1862—*semble*, the order granting the injunction was an order under sec. 92, Act VIII of 1859, and therefore an appeal lay under sec. 94.—14 B. L. R., 352.

An appeal will not lie against an order refusing to appoint a receiver under Act VIII. of 1859, sec. 92.—1 M. H. C. R., 129.

Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted. Mere notice not to continue building so as to obstruct a plaintiff's rights is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief. *Jamnadas Shankarlal v. Atmaram Harjivan* (I. L. R., 2 Bom. 138) referred to. The law regarding relief by mandatory injunction explained.—I. L. R., 16 Cal. 252.

An objection made under sec. 278 of the Civil Procedure Code to the attachment in execution of a decree of a mortgage-bond of which the objector claimed to be the assignee from the judgment-debtors under an instrument dated prior to the attachment was disallowed; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (a) a declaration of his right to the bond, and (b) to recover a sum of money from the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was a collusive transaction entered into after the attachment between the objector and the judgment-debtors for the purpose of defeating the attachment. Pending an appeal to the High Court, the objector applied to that Court for a temporary injunction under sec. 492 of the Code, restraining the decree-holder from bringing the bond to sale in execution of the decree. *Held* that, although in such cases the provisions of sec. 492 should be applied with the greatest care, one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as many complications probably resulting in further litigation were likely to arise if the decree-holder were allowed to proceed with the execution-sale, and no practical injury to any one would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted, subject to security being given by the appellant.—10 Al. 80.

A claim by R to certain property which had been attached by B in the course of execution-proceedings in the Court of the First Subordinate Judge of Dacca having been rejected, R instituted a suit in the Court of the Second Subordinate Judge to establish his title to the property. In that suit he applied to the Court in which his suit was brought for an injunction under sec. 492 to stay the sale of the property attached by B in the execution proceedings; but that application was rejected, and R thereupon applied for and obtained from the Court of the First Subordinate Judge an order staying the sale of the attached property until the hearing of the suit brought by him to establish his right to it:—*Held*, in an application under sec. 622 of the Code, to set the latter order aside, that sec. 492 of the Code of 1882 has, and was intended to have, a wider application than sec. 92 of Act VIII of 1859 had, and provides a remedy where property is “*in danger of being wrongfully sold*”; if the circumstances justified it, an order could have been obtained under that section from the Court of the Second Subordinate Judge to stay the sale. There being this alteration in the law, and such a remedy provided and no express provision in the Code for stay of execution by a Court executing a decree on the application of a third party, the order of the First Subordinate Judge was made without jurisdiction, and should be set aside.—12 Cal. 515.

Where a Court made an order granting a temporary injunction under sec. 492, without directing notice of the application for injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex-parte*, without the other side being given an opportunity to show cause, *held* that the order was irregular. Where ancestral property was attached in execution of a decree, and a son of the judgment-debtor instituted a suit to establish his right to the property, and made an application for a temporary injunction directing stay of sale pending the decision of the suit, *held* that, inasmuch as what was advertised to be sold was the rights and interests of the plaintiff's father in the property, and it could not be said that the property was being “*wrongfully sold in execution of a decree*,” and the application on the face of it disclosed no sufficient ground

to warrant an order under sec. 492 of the Civil Procedure Code being made as prayed, the temporary injunction ought not to have been granted.—7 Al. 550.

#### Notes.

The effect of a temporary injunction granted under sec. 492 (b) of the Civil Procedure Code is not to make a subsequent mortgage of the property in question illegal and void, within the meaning of sec. 23 of the Contract Act (IX of 1872). Such a penalty must not be read into sec. 493, which provides otherwise for the breach of an injunction granted under sec. 492.—9 Al. 497.

**493.** In any suit for restraining the defendant from committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

Injunction to restrain repetition or continuance of breach.

The Court may, by order, grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit, or refuse the same.

In case of disobedience, an injunction granted under this section or section 492 may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property, or both.

No attachment under this section shall remain in force for more than one year, at the end of which time, if the defendant has not obeyed the injunction, the property attached may be sold, and out of the proceeds the Court may award to the plaintiff such compensation as it thinks fit, and may pay the balance (if any) to the defendant.

NOTE.—See I. L. R., 9 Al. 497, noted under sec. 492.

**494.** The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Before granting injunction, Court to direct notice to opposite party.

#### Notes.

A petition praying for a temporary injunction in a suit was presented by the plaintiff in a Subordinate Court. The Judge refused to pass orders

on it without hearing the defendants, and ordered notice to issue to them. The plaintiff appealed to the District Judge who granted the injunction prayed for. *Held* that no appeal lay from the Subordinate Court, and that the District Judge had purported to exercise a jurisdiction not vested in him by law.—I. L. R., 12 Madr. 186.

**495.** An injunction directed to a Corporation or public Company is binding, not only on the Corporation or Company itself, but also on all members and officers of the Corporation or Company whose personal action it seeks to restrain.

Injunction to Corporation binding on its members and officers.

**496.** Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Order for injunction may be discharged, varied, or set aside.

**497.** If it appears to the Court that an injunction which it has granted was applied for on insufficient grounds, or

Compensation to defendant for issue of injunction on insufficient grounds.

if, after the issue of the injunction, the suit is dismissed, or judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit,

the Court may, on the application of the defendant, award against the plaintiff in its decree such sum, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant, for the expense or injury caused to him by the issue of the injunction :

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

Proviso.

An award under this section shall bar any suit for compensation in respect of the issue of the injunction.

#### *B.—Interlocutory Orders.*

**498.** The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner, and on such terms as it thinks fit, of any moveable property being the subject of such suit, which is subject to speedy and natural decay.

Power to order interim sale of perishable articles.

Power to make order for detention, &c., of subject-matter, and to authorize entry, taking of samples, and experiments.

**499.** The Court may, on the application of any party to a suit, and on such terms as it thinks fit,



(a) make an order for the detention, preservation, or inspection of any property being the subject of such suit ;

(b) for all or any of the purposes aforesaid, authorize any person to enter upon or into any land or building in the possession of any other party to such suit ; and

(c) for all or any of the purposes aforesaid, authorized any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

The provisions hereinbefore contained as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this section.

**Note.**

An application for an order under sec. 499 of the Code of Civil Procedure can only be made by a plaintiff after summons has been served, and after reasonable notice of the intention to apply for the order has been given in writing to the defendant.—I. L. R., 7 Madr. 231.

**500.** An application by the plaintiff for an order under section 498 or section 499 may be made after notice in writing to the defendant at any time after service of the summons.

An application by the defendant for a like order may be made after notice in writing to the plaintiff, and at any time after the applicant has appeared.

**501.** When land paying revenue to Government, or a tenure liable to sale, is the subject of a suit, if the party in possession of such land or tenure neglects to pay the Government-revenue or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure ;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereupon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereupon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

**502.** When the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

## CHAPTER XXXVI.

### APPOINTMENT OF RECEIVERS.

**503.** Whenever it appears to the Court to be necessary for the realization, preservation, or better custody or management of any property, moveable or immovable, the subject of a suit, or under attachment, the Court may, by order—

(a) appoint a Receiver of such property, and, if need be,

(b) remove the person in whose possession or custody the property may be from the possession or custody thereof;

(c) commit the same to the custody or management of such Receiver; and

(d) grant to such Receiver such fee or commission on the rents and profits of the property by way of remuneration “as the Court thinks fit,”\* and all such powers as to bringing and defending suits, and for the realization, management, protection, preservation, and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of instruments in writing, as the owner himself has, or such of those powers as the Court thinks fit.

Receiver's liabilities.

Every Receiver so appointed shall—

(e) give such security (if any) as the Court thinks fit duly to account for what he shall receive in respect of the property;

(f) pass his accounts at such periods and in such form as the Court directs;

(g) pay the balance due from him thereon as the Court directs; and

(h) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

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\* The words quoted have been inserted by Act VII of 1888, sec. 42.

Nothing in the section authorizes the Court to remove from the possession or custody of property under attachment any person whom the parties to the suit, or some or one of them, have or has not a present right so to remove.

**Notes.**

This section applies to Provincial Small Cause Courts.

An appeal lies from an order passed under sec. 243 of Act VIII of 1859, postponing the sale of the property attached in order to enable the judgment-debtor to raise the amount of the decree against him (JACKSON, J., dissenting).—1 B. L. R., (F. B.) 7; 10 W. R., (F. B.) 5.

The fact of the judgment-debtor's possessing properties other than the one attached is no ground for rejecting an application, under sec. 243, Act, VIII of 1859, for the appointment of a manager. To save a particular property from sale, a judgment-debtor must shew the value and condition of other properties in her possession, and the Judge must consider how and by what arrangement such a disposal of different portions of such property may be made, so as to avoid the sale of the property already attached.—3 B. L. R., App. 107; 12 W. R., 66.

The receiver in a suit is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court, in order to preserve the subject-matter of the suit *pendente lite*; and the possession of the receiver is simply the possession of the Court. He has no personal rights in the property, nor can he take any steps with regard to it without the sanction of the Court. If it is necessary for him to take action of any sort, he should be put in motion by the Court on the application of the parties to the suit; and whatever he rightly does with regard to the property, he does simply as the agent of the owners of the property. Where the receiver in a suit had, by order of Court, sold certain property in the suit, and had executed the contract of sale in his own name, a plaint praying for specific performance against the purchaser for refusing to complete the contract was admitted with the receiver as co-plaintiff, he having obtained leave to sue.—6 B. L. R., 486.

Where a duly appointed manager is in charge of property belonging to a judgment-debtor, and the judgment-debtor applies that other properties should also be placed in the manager's charge, it is necessary that the property already in the manager's charge should be attached before he is appointed to take charge of the other properties. The rule of Court of 11th July 1871 does not limit to two years the time for which a manager should be appointed; but the Judge should exercise a proper discretion in the matter.—8. B. L. R., App. 23; 16 W. R., 275; 17 W. R., 101.

The plaintiff, resident in Calcutta, sued H, resident in Bombay, but carrying on business by his gomasta in Calcutta, and others resident in Bombay, to set aside a release, executed in Calcutta, of his interest in certain property situate in Bombay, on the allegation that it had been obtained from him by false representations made by H. The plaint prayed that the release might be declared void, and cancelled; that a certain inventory and account relating to the said property, which the plaintiff alleged he had been induced to file in Bombay by the false representations of H, might be declared not binding on the plaintiff; for an account; and for the appointment of a receiver. *Held* that the whole cause of action did not

arise in Calcutta so as to enable the plaintiff to sue in Calcutta without leave of the Court under cl. 12 of the Letters Patent. The word "defendant" in that clause means all the defendants, if there are several defendants to a suit. It is not sufficient that one of the defendants should dwell or carry on business within the jurisdiction. An appeal lies from an order granting leave to the plaintiff to institute a suit under cl. 12 of the Letters Patent. *Quære*.—Whether the High Court at Calcutta can appoint a receiver of property situate at Bombay?—13 B. L. R., 91; 21 W. R., 303.

Numerous decrees had been obtained against the defendants, part of whose property consisted of a village which was attached in 1859. The village was under the management of the Collector, whom the Courts below treated as a manager put in under sec. 243 of the Code of Civil Procedure. The decree-holders received rateable shares in the net income of the village in liquidation of their respective decrees. It appeared that it would take fifteen years to pay off the various decree-holders. The petitioner applied to the Civil Court for an attachment of the village in execution of his decree. The application was refused on the ground that the village was already under attachment in satisfaction of other decrees. Upon appeal the High Court ordered a sale of the village; the sale-proceeds to be dealt with in accordance with the proper provisions of the Code on the ground that it could never have been intended to give the Civil Courts for an indefinite length of time the management of the encumbered estates of the country, or to compel decree-holders to submit to such an unreasonable delay as fifteen or twenty years before obtaining satisfaction of their decree. *Quære*.—Whether sec. 243 was intended to be applied to the case of more than a single decree-holder.—5 M. H. C. R., 272.

Sec. 243 of the Civil Procedure Code does not authorize an order in the execution-department having the effect of staying the sale of certain property for one year.—2 N.-W. P. H. C. R., 1.

A manager may be appointed by the Court under Act VIII. of 1859, sec. 243, without the consent of the decree-holder.—Marshall's Rep., 261; 2 Hay's Rep., 112.

The Court has no power to order that the manager should, out of the proceeds of the estate, satisfy the claims of persons other than decree-holders.—Marshall's Rep., 261; 2 Hay's Rep., 112.

A receiver appointed by order of the Supreme Court can only sue for possession, and has no right to question the title of a third party in a suit with respect to the property put under his management.—2 Hay's Rep., 395.

The appointment of a receiver is a matter resting in the discretion of the Court. The powers of appointing a receiver conferred by sec. 503 of the Code of Civil Procedure must be exercised with a sound discretion, upon a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted, and has to be established. The Court will not interfere by appointing a receiver where a right is asserted to property in the possession of a defendant claiming to hold it under a legal title, unless a strong case is made out. *Owen v. Homan* (4 H. L. C., 997, 1032) *Clayton v. Attorney-General* (Cooper's cases, Vol. 1., p. 97) referred to.—I. L. R., 15 Cal. 818.

In a suit brought in 1880 by the widow of a deceased partner, to wind up a partnership, the surviving partner was prohibited by the Court, at

the instance of the plaintiff, from collecting debts due to the firm; but leave was given to apply for the recovery of debts which might become barred by limitation. After decree, on the application of the plaintiff, a receiver was appointed under sec. 503 to collect outstanding debts for the purpose of executing the decree. The receiver having sued in 1883 to recover a debt which was due to the firm in 1879, the suit was dismissed (1) on the ground that the appointment of a receiver after decree was *ultra vires*; (2) because the debt was barred by limitation:—*Held* (1) that the appointment of the receiver was valid; (2) that under sec. 15 of the Limitation Act the suit was not barred.—8 Madr. 229.

In 1879 a zemindar granted a lease of part of the zemindari for twenty years, reserving a rent of 18,000 rupees per annum. In 1881, the zemindari having been attached by a creditor, the zamindar granted a new lease, in perpetuity in lieu of the former lease, reserving a rent of Rs. 12,000 a year. A receiver of the zemindari, having subsequently been appointed with full powers under the provisions of sec. 503, sued the lessee to recover rent at the rate reserved in the first lease from 1881. *Held* that the receiver was entitled to recover the rent claimed. The provisions of sec. 503 were intended to declare that the receiver, in respect of all property which was or could be attached, had the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment, provided that they have not ceased by operation of law.—8 Madr. 418.

A zemindari was attached in execution of certain decrees against the zemindar, and the plaintiff was appointed receiver with full powers, under sec. 503 of the Code of Civil Procedure, to manage the zemindari. Before the appointment of the receiver, the zemindar had expended certain sums at the defendants' request to repair a tank for the irrigation of lands held by them in common with him. This suit was brought to recover the sums so expended. It was objected that the receiver could not maintain the suit on the ground that the sum sued for was neither the subject of a suit against the zemindar, nor property attached in execution of a decree against him:—*Held* that the receiver could maintain the suit. It was also contended that the suit, whether viewed as one for contribution or upon a contract, was barred by limitation in respect of all payments made by the zemindar more than three years before the suit; and, further, that the receiver could only sue the defendants severally for their proportionate shares of the sum claimed:—*Held* that the suit being for work and labour done at their request was not barred by limitation, and that the defendants were jointly and severally liable for the sum sued for.—9 Madr. 334.

An order rejecting an application to appoint a receiver is an order passed under sec. 503, and is therefore appealable under sec. 588, cl. 24, of the Code of Civil Procedure. *Subramanya v. Appasami*, (I. L. R., 6 Madr. 355,) overruled.—10 Madr. 179.

In a suit for partition of a joint estate the words "property the subject of a suit" in sec. 503 of the Civil Procedure Code mean the whole joint estate. In such a case "the owner" in sec. 503 (*d*) means the whole body of owners to whom the joint estate belongs. The Court has jurisdiction to place the whole of a joint estate out of which a plaintiff seeks to have his share partitioned in the hands of a receiver, and to order that a receiver so appointed shall be at liberty to raise money on the security of the whole of such joint estate.—17 Cal. 614.

An order refusing to appoint a receiver under sec. 503 of the Code of Civil Procedure is not appealable.—6 Madr. 355.

A servant of a firm, the business of which is being managed by a receiver appointed under sec. 503 of the Code of Civil Procedure, 1877, has no preferential claim over the attaching creditor, on the assets of the firm for wages due before the appointment of the receiver.—6 Madr. 138.

A manager appointed under sec. 243 of Act VIII of 1859 is appointed merely to collect rent and other receipts and profits of the land, to carry on the existing state of affairs as the proprietor himself had been doing, and he has no power to issue notice of enhancement.—8 Cal. 719; 11 C. L. R., 13.

No appeal lies from an order passed under sec. 505 of the Civil Procedure Code by a Court subordinate to a District Court, submitting the name of a person sought to be appointed a receiver, together with the grounds for the nomination, such being only a preliminary order or expression of opinion, and not an order under sec. 503. Nor does an appeal lie from the order of the District Court confirming such nomination, but the District Court ought, when the question is raised, to decide on the necessity for the appointment of a receiver, the words "or pass such other order as it thinks fit" in sec. 505 being sufficient to include that question, and not merely to decide the fitness or otherwise of the person nominated to the office of receiver.—7 Cal. 719.

The powers conferred by sec. 503 of the Civil Procedure Code are not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a receiver, that it can do no harm to appoint one. The discretion given by that section is one that should be used with the greatest care and caution. Because a plaintiff in his plaint makes violent and wholesale charges of waste and malversation against a defendant in possession of property as executor under a will or as the tenant for life, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made. *Held* in this case, where the sons of a Hindu widow, in possession of her husband's estate under a will, sued their mother, as reversioners under the will, for possession of the estate, on the ground of mismanagement and waste, and on the same grounds applied for the appointment of a receiver under sec. 503 of the Civil Procedure Code, that a receiver had been appointed on insufficient grounds.—5 Al. 556.

See I. L. R., 5 Bom. 45, noted under sec. 244; 11 Bom. 448, noted under section 267.

**504.** Where the property is land paying revenue to Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, "the Court may, with the consent of the Collector, appoint him"\* to be receiver of such property.

**Note.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 7 Cal. 719, noted under sec. 503.

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\* The words quoted have been substituted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 43, for the words, "the Court may appoint the Collector".



**505.** The powers conferred by this chapter shall be exercised only by High Courts and District Courts : Provided that, whenever the Judge of a Court subordinate to a District Court considers it expedient that a Receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment, and submit such person's name, with the grounds for the nomination, to the District Court, and the District Court shall authorize such Judge to appoint the person so nominated, or pass such other order as it thinks fit.

Courts empowered under this chapter.

**Notes.**

This section applies to Provincial Small Cause Courts.

See I. L. R., 7 Cal. 719 & 10 Madr. 179, noted under sec. 503.

## PART V. OF SPECIAL PROCEEDINGS.

### CHAPTER XXXVII.

#### REFERENCE TO ARBITRATION.

**506.** If all the parties to a suit desire that any matter in difference between them in the suit be referred to arbitration, they may, at any time before judgment is pronounced, apply in person, or by their respective pleaders specially authorized in writing in this behalf, to the Court for an order of reference.

Parties to suit may apply for order of reference.

Every such application shall be in writing, and shall state the particular matter sought to be referred.

**Notes.**

This section applies to Provincial Small Cause Courts.

The subject of the suit before the Munsif was referred to arbitration. The Munsif set aside the award given by the arbitrators ; but, on appeal, the Judge reversed that decision, and gave judgment in accordance with the award. In special appeal, *held* " it is unnecessary to enter into the grounds set forth in the petition of special appeal against the Judge's decision, because it is manifest that the order of reference to arbitration is void. It appears that the application for this purpose was not concurred in by all the defendants, inasmuch as one defendant, who had substantial interest in the suit, did not apply. We think that there can be no doubt that an application for arbitration, as provided by sec. 313 of Act VIII of 1859, must be made by all the parties who are materially interested ; and in this case, the reference, having been made to arbitration upon an application, not by all the parties, was wholly invalid, and must be set aside."—*Per* L. S. JACKSON and GLOVER, JJ.—Special Appeal, No. 371 of 1868, from Manbhoom, 16th July 1868, 1 B. L. R., (S. N.) 10 ; 10 W. R., 71.

It appears to me that the case of *Nusserwanji Pestanji v. Meer Mynuddin Khan, Wullud Mher Sodrudin Khan, Bahadoor*, is binding upon us; and that, in consequence of no time having been fixed, in the order directing the award, for sending in the award, the award itself falls to the ground. We do not think that this is a mere technical objection. Sec. 318 of Act VIII. of 1859 provides that "an award shall not be liable to be set aside, only by reason of its not having been completed within the period allowed by the Court, unless," &c. But the award could not be set aside even if any of the excepted reasons existed, unless a time for making the award was fixed in the order referring the case to arbitration.—*Per PEACOCK, C.J., and MITIER, J.*—Miscellaneous Regular Appeals, Nos. 253 and 254 of 1868, from Beerbhoom, 27th July 1868, 1 B. L. R., S. N., 12; 10 W. R., 206.

An Appellate Court can *ipso motu* raise the question of limitation for the first time where it appears on the face of the plaint that the suit is barred. When A sued for reversal of a survey-award, and for recovery of possession, alleging dispossession subsequent to the date of the award, *held* that his suit was not barred by reason of its being brought beyond three years from the date of the award.—1 B. L. R., (A. C.) 25; 10 W. R., 71.

The property of several co-sharers, some of whom were minors, was sold to a single purchaser, under a deed of sale, which contained a covenant by the vendors, who professed to act on behalf of themselves and the minors, that they would compensate the vendee for any loss he might incur, should the minors, when they come of age, not ratify the sale. A sued to enforce her right of pre-emption in respect of the lands sold. The lower Appellate Court was of opinion that A could not enforce her claim of pre-emption in respect of the shares of the minors, and on the Court's suggestion the plaint was amended so as to ask only for enforcement of her claim in respect only of the shares of the vendors of full age. *Held* that A was bound to claim her right against all the shares, and could not enforce it in respect of some only. *Semble*.—A plaint cannot be amended in an Appellate Court.—1 B. L. R., (A. C.) 78; 10 W. R., 111.

Where all matters in difference between the parties in the suit were referred to arbitration under an order of Court, *held* that the arbitrators had power to award interest after the date of the submission, and to deal with the costs of the reference and award.—1 B. L. R., (O. C.) 144.

Where, in a case referred to arbitration, no provision was made in the order of reference for any difference of opinion as laid down in sec. 316 of Act VIII of 1859, *held* that the first Court should have, when the case came before it, and objection was taken to the award, ordered that the arbitrators should appoint an umpire, or should have declared that the decision should be with the majority, or should have appointed an umpire, or should have made such other arrangement as might have been agreed upon by the parties, or, if they could not agree, such as the Court might think proper. This not having been done, the High Court in special appeal, ordered that the case should be remitted through the lower Appellate Court to the first Court, and the case again submitted by it to the arbitrators for decision by them, with a distinct order in the terms of sec. 316.—2 B. L. R., (S. N.) 14; 10 W. R., 398.

Arbitrators ought only to take such evidence as is required by the terms of the agreement referring the question in dispute to arbitration.—2 B. L. R., App. 25.

An Appellate Court is competent at any stage to allow objections to be taken to an apparent defect in the plaint. *Held* that a party against whom

an order has been obtained under sec. 246, Act VIII of 1859, must, if sue for its reversal, assert substantially the same right as that which has been contended for in the execution. *Held* by JACKSON, J., that in a suit for declaration of title, defendants must have given a cause of action by impugning it antecedently to plaint filed, even though their written statement be hostile.—2 B. L. R., (A. C.) 212 ; 11 W. R., 40.

When a person goes away from this country, and remains away, and there is no evidence to show an intention to return, that person becomes incapable of acting as umpire within the meaning of sec. 319 of Act VIII of 1859.—4 B. L. R., (O. C.) 89.

Two out of three arbitrators appointed in the case submitted their award before the Munsif. The defendant, against whom the award had been made, applied to the Munsif to set aside the award, on the grounds of corruption and misconduct, and that the award was a nullity, inasmuch as only two out of three arbitrators had made the award. The Munsif overruled the objections, and passed a decree in terms of the award. On appeal to the Judge, the order of the Munsif was set aside, on the ground that the award was illegal, as two only of the three arbitrators originally appointed had made the award, and that the evidence did not prove the plaintiff's case. On an application to the High Court to set aside the order of the Judge, *held* that, under sec. 325, Act VIII. of 1859, the Judge had no jurisdiction to set aside the award when the Court of first instance had passed judgment according to the award.—5 B. L. R., App. 57 ; S. C. 14 W. R., 38.

By an order of Court, of January 17th, 1867, a suit was referred to two arbitrators, under sec. 312, Act VIII. of 1859, who were to make their award in writing, and submit the same to the Court within three months. No order for enlarging that time was made. The first meeting of the arbitrators was held on May 22nd, 1867, and four subsequent meetings were held, at which all the parties attended, and evidence was taken ; at the last of which meetings, namely, on 27th July, an objection for the first time was taken on behalf of the defendant that the time limited by the order of reference had expired, but the arbitrators proceeded with the reference. The award was made on 12th August 1867, and remained with one of the arbitrators until his death in August 1868. Subsequently it was produced by the other arbitrator on the application of the parties to the suit, and delivered to the successful party, by whom it was brought into Court on the 10th May 1870, and judgment was moved for in accordance therewith. *Held* that the arbitrators had authority to make the award. The award was properly submitted to the Court. Sec. 320, Act VIII. of 1859, does not make it necessary for the arbitrators to submit the award to the Court personally. Submission to the Court, under sec. 320, is not necessary to the completion of an award under secs. 315 and 318. Although an arbitrator may deliver his award to one of the parties, he ought not to hand over with it the proceedings, depositions, and exhibits.—5 B. L. R., 357.

A suit was, by order of Court, referred to three specified arbitrators, who were to make an award within six months, and, in case of difference of opinion, all matters in dispute were to be referred to the decision of an umpire. The arbitrators had only one meeting, at which an agreement was come to by the parties to settle all matters in dispute among themselves, and withdraw the matters from arbitration, which was accordingly done, but nothing appeared to have been afterwards done. No award was made by the original arbitrators within six months from the reference. On application by the plaintiff to have the suit restored to the file of the Court, *held* that the suit was still pending, the arbitrators not having determined

it while they had jurisdiction to do so, and it was ordered that it should be brought again before the Court.—6 B. L. R., App. 74.

Where parties had executed a deed, agreeing to refer all matters in dispute to the arbitration of three persons, and one of the arbitrators refused to continue to act, and the other two consequently refused to proceed with the reference, the Court refused to order the agreement to be filed in Court.—2 B. L. R., App. 13.

Where, in a suit to recover a sum of money on an award, the five arbitrators came to a decision, and made, dated, and signed a rough draft of their award, and the defendant then withdrew from the submission, and a fair copy was then made, bearing the same date as that of the rough draft, but signed by only four of the arbitrators, *held* that the award was complete at the date of the rough draft, and that its validity was not affected by the subsequent occurrences. The validity of an award cannot be impeached, because the arbitrators afterwards do an act required neither by the law nor the terms of the submission.—1 M. H. C. R., 178.

Either of the parties in a reference to arbitration may withdraw from the proceedings at any time previous to the making of the award, unless the submission to arbitration has been made a rule of Court under sec. 526 of the Civil Procedure Code. If a revocation by deed can set aside a deed by which a person binds himself to abide by the decision of arbitrators, revocation by parol may set aside a parol agreement. Notice is not necessary. 3 M. H. C. R., 82. But see 8 M. H. C. R., 46.

No appeal lies from an order directing that an agreement to submit matters in dispute to arbitration should be filed under the provisions of sec. 326 of Procedure Code. The fact of one of the parties to the agreement revoking his submission is not a "sufficient cause" within the meaning of that section. The English cases on the subject considered.—3 M. H. C. R., 183. S. C. on appeal, 12 Moore's L. A., 112; 10 W. R., (P. C.) 51; 7 M. H. C. R., 257.

A suit lies to enforce an award made without the intervention of a Court of Justice. The procedure provided in sec. 327 of the Civil Procedure Code is not imperative upon a plaintiff who seeks to enforce an award so made.—4 M. H. C. R., 119; 8 M. H. C. R., 81.

B submitted to arbitration the matters in dispute between himself and the other parties to a suit, on the terms that an umpire should be selected from seven persons whom he named. Those terms were not objected to by the other side. Arbitrators were agreed upon, and R, one of the seven persons named in the submission, was appointed an umpire. But R and some of the arbitrators declined to act. Fresh arbitrators were then chosen, but no umpire, and the arbitrators being equally divided in their opinion on the case, the Court of its own motion appointed as umpire L, who was not one of the seven persons named in the submission. B objected to L's appointment, but the Judge overruled the objection, and passed judgment in accordance with the umpire's award. *Held*, on appeal, that, as it was stipulated as an essential part of the submission that an umpire should be chosen from seven persons named, the power of the Court to appoint an umpire, under sec. 319 of the Civil Procedure Code, was controlled and limited by that stipulation; and that the umpire not being one of the seven persons named in the submission there was no valid award.—7 M. H. C. R., 72.

Plaintiff brought this suit to obtain a decree dismissing defendants—committee and manager of a certain pagoda—from their offices on the ground of malversation. The Court made an order expressed to be by consent of

the parties concerned, and in exercise of the Court's discretionary power under sec. 16 of Act XX. of 1863, referring the matters in difference to three arbitrators for final determination, said arbitrators "to make their award in writing, and submit the same" within a certain period. Each arbitrator delivered a separate award in writing, two arbitrators finding for the plaintiff. The Civil Judge made a decree in accordance with the award of the majority of the arbitrators. The first defendant appealed on the grounds (1) that he had not consented to the arbitration; and (2) that, there being no provision in the order of reference to the effect that the finding of a majority of the arbitrators should prevail, there was no valid award. *Held* that in this case the order of the Judge was valid without the assent of the persons to be bound. That he might, when he made the order, have inserted as a provision that the decision of the majority should be that of the body, and that there was no reason why his ratification of that mode of decision wholly within his discretion should not be equivalent to a previous command.—7 M. H. C. R., 173.

An agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract; and a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable.—8 M. H. C. R., 46.

In an application to set aside an order made by a Judge in chambers, extending the time (of ten days) for making an application, under sec. 324 of Act VIII. of 1859, to set aside an award, on the ground of misconduct of one of the arbitrators and of the umpire, *held* the words of the section being in their ordinary import obligatory, and there being nothing in the other parts of the Code to show that such construction was at variance with the intention of the Legislature, and a similar provision having been held by the Courts in England to be imperative, that the application, to set aside the award must be made within the ten days, provided the Court be then sitting, and if not, on the first day of its sitting after that time; and that there is no power to enlarge the time to make such application.—2 Bom. H. C. R., (O. C.) 285; 2nd Ed. 270; S. C., 1 Ind. Jur., N. S., 234.

In determining the stamp required for any particular instrument, regard must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties, if the contents of the instrument show that the title is a misnomer. The discretion vested in a Court of Justice must be exercised in a sound and reasonable manner, and a capricious and unreasonable exercise of discretion on the part of a Court of first instance is an error in law, which it is the duty of an Appellate Court to correct.—3 Bom. H. C. R., (A. C.) 94.

By a Government notification of the 3rd of June 1863, published in the *Gazette*, it was declared, under the provisions of Act VI. of 1857, that a certain strip of land, passing by the mill of the defendants, was required for a public purpose—the B., B., & C. I. Railway, a plan of which land was to be seen in the Collector's office. On the 4th of November following, the Secretary of the defendant's Company received a notice, signed by the Collector, requiring the owner of the mill to call at the Collector's office to signify his acceptance or otherwise of the compensation for the land required. The Secretary went to the Collector's office, and there saw a plan, from which it appeared that an adjoining well, from which the engine of the mill was supplied with water, was intended to be taken, but no compensation for the well or land required was then agreed upon. On the 28th of November, a notice was served upon the defendants, signed by

the Collector, stating, that he had appointed an arbitrator on behalf of Government, and requiring the defendants to appoint a second arbitrator to determine the amount of compensation for the land (describing it) required by the B., B., & C. I. Railway Co. The defendant's Secretary wrote, in reply, that the defendants had appointed an arbitrator on their behalf to determine the amount of compensation for their land required for the B., B., & C. I. Railway Co. *Semble*, that a contract was entered into by the last-mentioned notice, and letter of reply to it, of which specific performance could be enforced. *Held* that the defendants had, by appointing their arbitrator to determine the compensation for the land required, waived any irregularity in the previous proceedings, and precluded themselves from claiming to have the whole manufactory taken under sec. 32 of Act VI. of 1857, though no proceedings were taken in the arbitration for nearly twelve months subsequently, and the defendants had shortly before such proceeding made such a claim. A well in a mill-compound, from which the mill's engine is by means of pipe supplied with water, is part of a manufactory within the meaning of Act VI. of 1857, sec. 32.—5 Bom. H. C. R., (O. C.) 27.

The separately recorded opinions of different dates of arbitrators (appointed under Act VI. of 1857 to assess the value of land taken for a public purpose), who have never met or consulted together, do not constitute an award under the Act. An award to be good must contain the *joint* judgment of the arbitrators up to the latest period previous to the execution of the award. Where a suit for the recovery of land taken, or compensation for being deprived of it, was filed *after* the expiration of three months from the date of an award, and the Court held the award to be null, the Court, following the procedure laid down in sec. 31 of Act VI of 1857, referred the parties to a fresh arbitration.—8 Bom. H. C. R., (A. C.) 79.

Where one of two arbitrators, appointed under sec. 10 of Act VI. of 1857, by a letter and also verbally authorized his co-arbitrator to appoint a certain person as third arbitrator, and the co-arbitrator wrote to the proposed third arbitrator informing him that he had been so appointed, *semble* that there was a good appointment "by writing" of the third arbitrator within the meaning of sec. 12 of Act VI of 1857. Where a third arbitrator appointed under sec. 12 of Act IV of 1857, considering that his services were required merely as an umpire, though he had due notice of the first meeting, neglected to attend that or any subsequent meeting of the arbitrators, and took no part in the making of the award, it was *held* that such non-attendance of the third arbitrator did not render the award a nullity but was only a ground for setting it aside on the ground of irregularity. Where an officer, appointed under Act VI. of 1857 to conduct arbitration-proceedings on behalf of Government, attended the first two meetings of the arbitrators, and did not object to two of the arbitrators proceeding with the reference in the absence of the third arbitrator, and did not attend the subsequent meetings of the arbitrators, it was *held* that Government had thereby waived their right to insist on the non-attendance of the third arbitrator as a ground for setting aside the award.—9 Bom. H. C. R., (O. C.) 177.

Upon a motion to amend an award filed under sec. 327 of the Civil Procedure Code on the ground of obvious errors contained in it, it was *held* that the Court had no power under sec. 327 to amend an award, or remit it for the reconsideration of the arbitrators, but has only the power to file and enforce the award, or reject it.—10 Bom. H. C. R., (A. C.) 391.



Where nine months were allowed to elapse without either party taking action to carry out an agreement to refer a dispute to arbitration, plaintiff was held not to be debarred from prosecuting his suit.—1 N.-W. P. H. C. R., Ed. 1873, 252.

All matters in difference in the suit, including all dealings and transactions between the parties, having been referred to the arbitration and award of certain persons, the arbitrators should ascertain upon what points the parties are at issue, and upon each of these points come to a finding. If a Court regards an award as not open to objection, such Court must deliver judgment in accordance with the terms of such award, and not modify the same. An award, defective and illegal on the face of it, should be at once remitted to the arbitrators under sec. 323 of ch. 6 of Act VIII. of 1859.—2 N.-W. P. H. C. R., 150.

A judgment given according to an award under sec. 325 of Act VIII. of 1859, without waiting the ten days prescribed by sec. 324 of that Act, is illegal, and will be set aside. After passing judgment according to an award, such award cannot be re-submitted to the arbitrator for re-consideration and correction.—2 N.-W. P. H. C. R., 235.

A Court should make full enquiry into the objections made to an award before setting it aside, and should not hastily assume that the mere circumstance of the arbitrator having some interest in the matter at issue would necessarily bring the award within the provisions of sec. 324 of Act VIII. of 1859, and render it liable to be set aside.—2 N.-W. P. H. C. R., 241.

Where the lower Appellate Court omitted in its order referring the case to arbitration to fix a time for the delivery of the award, as directed by sec. 315 of Act VIII. of 1859, but both the parties permitted the reference to proceed, and took part in the proceedings, without making any objection until after the award was delivered, and when the omission in the order of reference could work no injury to either party, the High Court saw no reason why the omission should be held to avoid the award.—7 N.-W. P. H. C. R., 351.

An appeal will lie from a decree which varies an award by containing a direction for payment by instalments which is not contained in the award. The plaintiff in the suit, which was one on accounts stated, agreed to refer to arbitration the question whether the accounts were correct or not. It was unnecessary for the arbitrators to determine whether the account stated was proved. The decree was passed on the very day the award was filed. The plaintiff was not estopped from taking objections to the award by reason of his silence when the decree was pronounced. The award was held invalid, among other reasons, because it purported to be the award of four persons, whereas the order of reference was addressed only to three.—7 N.-W. P. H. C. R., 367.

It was decided by the Full Bench in *Lala Ishuri Pershad v. Hur Bhunjun Tewaree* (15 W. R., F. B., 9) that the question of the existence of a legal award is one which is open to appeal, but that, when the existence of the award has been finally determined, and judgment is given in accordance with the award, than there is no appeal.—2 C. L. R., 362.

Where the partners of a firm in their partnership-deed agreed to refer their disputes to arbitration, and the reference made in pursuance of this agreement gave the arbitrators a power to make partition, but omitted a power to sell, held, on the award being made a rule of Court, that the Court had no power, under sec. 326, Act VIII. of 1859, to order the sale of

certain property of which the arbitrators were unable to make partition, and the sale of which they recommended on that ground.—3 C. L. R., 357.

Where an arbitration-bond provides that the matters in dispute referred to the arbitrators may be taken up and dealt with *seriatim* and the award delivered bit by bit (khund-khund), it is not necessary under sec. 327 of Act VIII. of 1859 (corresponding with secs. 525, 526, Act XIV., 1882) that all the matters referred to should have been decided before the first portion of the award dealing with some only of the subjects in dispute can be filed.—4 C. L. R., 92.

Where the house and lands of a joint Hindu family were partitioned by the Court according to an award made by an arbitrator to whom the parties had agreed to refer the matter, *held*, in a subsequent suit, that the Court could not go behind the award and allow one of the members of the family to claim a right of way from the family house to a public road, through the lands allotted by the award to another member, such right of way not having been granted by the award, and there being no such right of way of necessity.—5 C. L. R., 338.

The Court has no power under the provisions of the Code of Civil Procedure to sanction an order passed by the arbitrators to whom a matter has been referred, making the payment of their fees a condition precedent to their hearing the reference.—8 C. L. R., 439.

Refusal by an arbitrator to call witnesses produced by either party amounts to judicial misconduct within the meaning of sec. 521 of the Civil Procedure Code.—12 C. L. R., 564.

When complaint has been preferred to a Criminal Court, and the Magistrate has directed that the subject-matter of the complaint be referred to arbitration, if the parties consent, and proceed to such reference, the award may be enforced under the provisions of sec. 327, Act VIII. of 1859.—1 Agra H. C. R., 45.

When an award has been made, no plea of jurisdiction or limitation can be raised before the Court, which is to pass its decree according to the award.—1 Agra H. C. R., Rev., 53.

An award made by the consent of the parties cannot be set aside merely by reason of its having been sent in a week later than the date appointed, when such delay is not owing to misconduct or corruption.—1 Agra H. C. R., Rev. 53.

*Held* that the parties, having signed the award of arbitration, must be bound by that until it is legally set aside, and until it is set aside a suit to enforce rights irrespective of the award is not maintainable.—2 Agra H. C. R., 224.

*Held* that an award made by one of the arbitrators and the umpire in the absence of the second arbitrator, who declined to attend, was not a valid award.—3 Agra H. C. R., 93.

The Judge intimated that he should refer the suit to arbitration, and allowed a certain time to the parties to object to that course. No objection was made within such time, and thereupon the Judge referred the cause to arbitrators named by him. After the day fixed the defendants objected. *Held* that the reference was not warranted, there having been no express consent by the parties.—Marshall's Rep., 517; 2 Hay's Rep., 583.

Where an award was held to be bad on the ground that the deed of submission to arbitration did not contain all the conditions required by the

law (Bom. Reg. VII of 1827), as it made no provision as to the "time within which the award was to be given," *held* that the parol consent of the parties to the deed of submission before the arbitrator to waive such omission will not cure the defect.—6 Moore's I. A., 134.

An award directed that the defendant should pay the costs of the suit, and of the reference, and of the award, without fixing the scale. On application to the Court to do so, the case was sent back to the arbitrator for that purpose. *Held* that, when the order of reference gives the arbitrator full discretion over costs, he alone can fix the scale.—Bourke's Rep., (O. C.) 7; Cor. 150.

Where one of the arbitrators had been ill, and the time for sending it in elapsed before they could make their award, the Court superseded the arbitration, and recalled the suit.—Bourke's Rep., (O. C.) 359.

To set aside an award, there must have been some fraudulent suppression of evidence or other mal-practice of the successful party, which should be definitely stated in the plaint.—1 Ind. Jur., O. S., 12.

Sec. 326 of the Civil Procedure Code made all submission to arbitration by an instrument in writing practically a rule of Court.—1 Ind. Jur., N. S., 69.

Where by the terms of a reference to arbitration all matter in difference are referred to the arbitrator, the Court will not modify (sec. 322), remit (sec. 323), or set aside (sec. 324) the award, on the ground that the arbitrator in his discretion has awarded damages to the plaintiff, and at the same time make him pay all the costs, when it is not shown that he exercised the discretion given him improperly.—1 Ind. Jur., N. S., 224.

Where by an order of reference made pending a suit, all matters in difference between the parties are referred to an arbitrator by the Court under Act VIII. of 1859, sec. 317 *et seq.*, the arbitrator has power to deal with the costs of the suit.—2 Ind. Jur., N. S., 12.

An application that an award be remitted to the arbitrators, in order that the proceedings, depositions, and exhibits in the suit which have not been submitted with it to the Court under Act VIII. of 1859, sec. 320, should be so submitted, ought to be made within 10 days after the award has been originally submitted; otherwise, if the award be good on the face of it, the Court will give judgment upon it.—2 Ind. Jur., N. S., 16.

There is no appeal from an order refusing to file an award under this section.—4 Ind. Jur., 392.

Except in the cases mentioned in the Act, there is no appeal from a decree which is passed in terms of an award.—4 Ind. Jur., 396.

There is nothing in Act VIII. of 1859 to prevent parties, who have a suit pending in Court, to submit the subject-matter of that suit and other matters in dispute to arbitration under this section.—W. R., Sp. Mis. 21.

Application for reference to arbitration must be made to the Court in writing by parties in person or by pleaders specially authorized.—W. R., Sp. 41.

An award of arbitrators cannot be set aside on the ground of its being inconsistent, because the plea of the defendant was proved as to part of the case, and not as to the other.—W. R. 1864, 153.

Arbitrators are not bound by the technical rules of Court.—1 W. R., 12.

An award is not reversible, unless the provisions of sec. 324, Act VIII. of 1859, apply.—1 W. R., 12.

A plaintiff must show special authority to assent to an arbitration on behalf of another plaintiff.—1 W. R., 80.

The Court cannot legally allow a case, as regards an absent plaintiff, to be decided by reference to arbitration.—1 W. R., 80.

Award should be filed in Court. Effect of not filing as laid down in sec. 327, Act VIII. of 1859 (corresponding with secs. 525, 226 Act XIV of 1882).—1 W. R., 163. See also 25 W. R., 152.

A partial disagreement of two arbitrators does not nullify their award as a whole.—2 W. R., 32.

Arbitrators should give separate awards in a case referred to them by the judge, and on other matters referred to them by the parties, instead of mixing them all up and giving a general award.—3 W. R., Mis., 27.

The refusal of arbitrators to amend a clearly bad award is misconduct under sec. 324, Act VIII. of 1859.—3 W. R., 168.

Where an order of reference to arbitration does not provide for difference of opinion among the arbitrators, and for authorizing a majority to decide the case, the award will, on objection taken, be set aside.—4 W. R., 4.

An Appellate Court has jurisdiction under sec. 37, Act XXIII. of 1861, to separate misjoined suits, and to try them separately.—4 W. R., 109.

In appealing to set aside an award as not binding upon the appellant, he is not bound to appeal against every interlocutory order.—5 W. R., P, C, 21 (P. C. R., 616).

The benefit of this section will be lost if the application for enforcement of an award of private arbitration be not made within six months.—5 W. R., 123.

In a suit pending before arbitrators, a person who is made a co-plaintiff on application, and makes no objection to the arbitration, is bound by the award.—5 W. R., 130.

A plaintiff's allegation in a former suit having been overruled in arbitration, he is not estopped from bringing a fresh suit on the finding of the arbitrators.—6 W. R., 68.

Possession under a private award of arbitration would suffice to make the award valid under cl. 3 sec. 3, Reg. VI. of 1813, without the intervention of the Court.—6 W. R., 94.

When a case which has been referred in the Principal Sadr Amin's Court to arbitration is withdrawn by the Judge for trial in his own Court, the Judge is not bound to refer it to arbitration.—6 W. R., 290.

Where both parties could not agree in nominating an arbitrator, and the Judge nominated one under sec. 314, Act VIII. of 1859, and one of the parties, six weeks after the nomination, objected to the Judge's nominee, but could not show on appeal that he did not request the Judge to nominate some one, the appointment was held good and binding upon the both parties.—7 W. R., 13.

It is no ground to set aside an award of arbitrators, under sec. 324, Act VIII. of 1859, that the arbitrators decided the case against the written statement of the defendant.—7 W. R., 28.

A judgment of a Court, given in accordance with an award of arbitration, is final under sec. 325, Act VIII., 1859 (corresponding with secs. 522, 588, Act XIV., 1882), even if there has been corruption and misconduct on the part of the arbitrators.—7 W. R., 205; 8 W. R., 171.

Sec. 323, Act VIII. of 1859, authorizes a Court which refers a case to arbitrators to remand it to them for re-consideration when their award contains mistakes, omissions, or defects which cannot be amended by the Court under sec. 322. Such award, on the refusal of the arbitrators to reconsider it, becomes null and void, without proof of corruption or misconduct under sec. 324.—7 W. R., 406.

The neglect of some of the arbitrators to attend meetings of the arbitrators is misconduct within the meaning of sec. 324, justifying the setting aside of the award by the Court which appointed the arbitrators, but not by a Court of Appeal.—8 W. R., 171.

Where the reference fixes no time for the award to be made, either party may hasten the proceeding by giving notice to the arbitrators that the award must be made, and an umpire appointed, within a reasonable time; but when the time elapsing after the notice has been actively employed by the arbitrators, and the delay has been owing to necessity which they could not control, the parties cannot recede from their submission by reason of the notice.—10 W. R., (P. C.) 51.

Under this section all parties materially interested must concur in the reference to arbitration.—10 W. R., 171.

Where a reference to arbitration fixes no time for the arbitrators to make the award, the award itself falls to the ground.—10 W. R., 206.

*Quære, per Jackson, J.*—What is the effect of an award arrived at in a pending suit which was referred to arbitration by an order of Court otherwise than by consent of all the parties?—10 W. R., 463.

Although no appeal will lie under this section against a judgment passed according to the award as prescribed in sec. 327 (corresponding with sec. 525), an appeal will lie, under sec. 11, Act XXIII. of 1861, against an order made in execution-proceedings taken upon that judgment.—13 W. R., 62.

An Appellate Court has under this section power to allow a suit to be withdrawn.—14 W. R., (O. C.) 17.

Where matters in dispute are referred to arbitration, and it is found that one question at issue is omitted from the reference, and that the award returned by the arbitrators contains no decision thereon, the party interested should bring the omission to the notice of the Court. If he fails to do so, the Court is not wrong in not passing any order, or coming to any decision on that point.—14 W. R., 247.

Any application to enforce an arbitration-award under this section may be made without any valuation of the suit.—14 W. R., 255.

On questions of caste a lower Appellate Court has a right to come to a finding based on history or the custom of the country.—14 W. R., 364.

Whatever matters parties to a suit may agree to refer to arbitration, they can refer such matters, or any of such matters as are in difference between them in the suit.—14 W. R., 469.

The decision of arbitrators in a matter not in difference between the parties, nor referred to them, is null and void for want of jurisdiction.—15 W. R., 172.

A Judge should not, without the consent of the parties, allow his judgment in one case to govern his decision in another, even if the subject of dispute is of a similar nature, and the evidence similar in character, when the parties are not the same, and the subject-matter of the suit is different.—15 W. R., 342.

An arbitration-award, not being one which has been made upon a reference by all the parties to the suit, is not capable of being converted into a final decree under the provisions of ch. 6, Act VIII. of 1859, though it is evidence against any party who agreed to the reference.—15 W. R., 427.

It is very doubtful whether a Judge has power, under Act X. of 1859, to refer a case to arbitration.—16 W. R., 160.

The mere absence of a clause in the order of reference providing for a difference of opinion between the arbitrators cannot vitiate the award where there is no such difference of opinion.—17 W. R., 30.

A reference to arbitration made under an order of Court cannot be revoked at the instance of a party.—17 W. R., 516.

An Appellate Court ought not reverse the decision of a first Court based upon very careful inspection of the land in dispute, except upon a very clear and strong opinion upon the evidence, and upon recording sufficient and satisfactory reasons for such opinion.—18 W. R., 452.

In arbitrations not started with the sanction of the Court, it is not necessary that the agreement should be reduced to writing before it can be binding.—18 W. R., 533.

Where the terms of a submission to arbitration give no authority for the majority of the arbitrators to make the award, it should be made by the whole of the arbitrators. An award made by the majority only would not be a valid award.—19 W. R., 47.

No presumption can be raised against a party to a suit from his refusal to withdraw from the determination and submit to arbitration.—20 W. R., 172.

An Appellate Court has no power to refer a case to arbitration, ever on consent of the parties.—21 W. R., 210.

The above section incorporates the provision of sec. 522 as to the finality of the judgment given according to the award, and puts the award filed under sec. 525 in the same position as the award filed under sec. 522. Where a Court files an arbitration-award, and passes a decree, that decree is final.—21 W. R., 248.

Nor can the first Court, by consent of parties, refer so much of the matter in dispute which it has already determined, and which is pending in appeal.—22 W. R., 207.

An Appellate Court, in remanding a case, cannot direct the first Court to call upon the parties to agree to arbitration, or, on their failing to do so, to appoint arbitrators.—22 W. R., 396.

Where an Appellate Court directed the first Court to call upon the parties to agree to arbitration, and the parties waived the irregularity, and consented to the matter being tried by arbitrators, *held* that they could not afterwards, on special appeal, object to the proceedings.—22 W. R., 396.

But where the decree is appealed from, the Appeal Court has power to take cognizance of the question of misconduct of arbitrators. See sec. 363, Act VIII of 1859.—22 W. R., 420 ; 22 W. R., 418.

The Court can only give judgment in accordance with the award, and cannot add an order for interest to it, if interest has not been given.—23 W. R., 105.

Secs. 312 and 325 of the Code of Civil Procedure (Act VIII. of 1859) were enabling, and were not intended to be restrictive or exclusive. Parties who are *sui juris* are competent, before decree, to make any agreement as to the settlement of the suit.—24 W. R., 41.



Where an arbitrator imported into his proceedings a previous enquiry alleged to have been made by him, and relied upon admissions made in the former proceedings, his award was held to be bad, and the decision based upon it was set aside.—24 W. R., 81.

In a case in which, although the plaint mentioned no overt act justifying the plaintiff's request for a declaration of title, and still it appeared on the admitted facts of the case that there was a cause of action, and the Court of first instance adjudicated on the merits and passed a decree in favour of plaintiffs, *held* that it was too late for the lower Appellate Court to dismiss the claim on the ground of the above defect in the plaint.—24 W. R., 242.

On an application under this section to have an award filed in Court, it was held that the word "award" as sued in the plaint must be taken to include the whole document which is scheduled to the plaint, *i. e.*, the formal judgment as well as the decree.—26 W. R., P. C., 10 ; L. R., 3 I. A. 209.

R. M, party to a suit, having authorized his agent to conduct the suit, the agent consented to the case being referred to arbitration by the court. The arbitration was carried on to the knowledge and with the assent of R. M. On an application by R. M., under sec. 622 of the Code of Civil Procedure, to set aside the award made by the arbitrators on the ground (1) that his pleader had not been authorized in writing, as required by sec. 506 of the Code, to apply for arbitration; and (2) that he himself had not consented to the reference:—*Held*, that, under the circumstances, R. M. was not entitled to relief.—I. L. R., 9 Madr. 451.

On 19th June 1884, on application for an order of reference was made, under sec. 506 by both parties to a suit. It was signed by both defendants and by the plaintiff's pleader. As the plaintiffs' pleader had not been "specially authorized in writing," to join in the application, the Court postponed making any order of the application till the 23rd *idem*. On that day the first defendant did not attend the Court, but the plaintiff's pleader produced the requisite authority, and the Court made an order referring the suit to the decision of the arbitrator nominated in the application of the 19th. On the 27th June, the first defendant made an application to the Court to revoke the authority of the arbitrator, and appoint a new arbitrator in his place, on the ground that, after signing the application of the 19th, he had become aware of certain circumstances connected with the arbitrator which showed that he was not worthy of the confidence reposed in him. No final order was made upon this application till after the submission of the award, when it was rejected, on the ground that the charges of misconduct and partiality imputed to the arbitrator were not made out:—*Held*, first, that the first defendant not having objected to the appointment of the arbitrator on or before the 23rd June 1884, when the order of reference was made, must be taken to have tacitly acquiesced in the course adopted by the Court, and that such acquiescence amounted to a fresh submission. The objections raised by the first defendant could only be considered after the submission of the award, and then only to the extent permitted by sec. 521. When once a matter is referred to arbitration, it is not competent to the Court, under the second paragraph of sec. 608, to "deal with" the matter in difference between the parties, except as provided in Chapter XXXVII of the Code. There is no section of that chapter which authorizes the Court to revoke the authority conferred on an arbitrator, and to appoint a new one, except in cases falling strictly within the purview of sec. 510 of the Codes where "the scope and object of the

reference cannot be executed." It is only in those cases, apparently, that the authority conferred on arbitrators can be revoked "for good cause," the cause being such as is contemplated in that section, as where "an arbitrator refuses or neglects, or become incapable to act, or leaves British India under circumstances showing that he will probably not return to India at an early date." The enactment of the second paragraph of sec. 508, which does not occur in the corresponding sec. (315) of Act VIII of 1859, has the effect to rigidly restricting the Courts to the exact procedure laid down when dealing with cases in which the appointment of a new arbitrator becomes necessary.—10 Bom. 381.

Under secs. 523 & 525, of the Civil Procedure Code (Act X of 1877), parties to a suit as well as persons not engaged in litigation may agree to refer matters in dispute between them to private arbitration without the intervention of the Court, and may apply to have the agreement filed ; and the mere fact that a suit is pending with respect of the matters in dispute, is not of itself a sufficient reason to induce the Court to refuse to file the agreement —4 Bom. 1.

Notwithstanding that chap. xxxvii of Act X of 1877 (in reference to arbitration) does not refer specially to suits brought under Act X of 1859, yet if both parties to a suit for a kabuliyat brought under the latter Act agrees to refer the matters in dispute between them to certain arbitrators named by them, and file a joint petition in the Court of the Deputy Collector, stating that they had so agreed, and praying that the case may be referred to such arbitrators, neither of them will be afterwards at liberty to object to a decree made, embodying the award of the arbitrators, on the ground that the reference to arbitration was irregular, and not warranted by any of the provisions of Act X of 1877. When a case has been so referred, the arbitrators are at liberty to determine what appears to them to be a fair and equitable rate of rent, and notwithstanding the amount so found is less than that demanded by the plaintiff in his plaint, the Court out of which the reference issued is not at liberty on that ground to dismiss the suit but is bound to order the defendant (with the alternative of eviction) to execute a kabuliyat in favour of the plaintiff at the rate determined by the arbitrators to be fair and equitable.—6 Cal. 251 ; 7 C. L. R., 92.

Where the parties agreed to refer a suit to arbitration, but no provision was made that a decision by the majority of arbitrators should be binding, and two of five arbitrators withdrew :—*Held*, that a decision by the majority was invalid.—7 Madr. 174.

**507.** The arbitrator shall be nominated by the parties in such manner as may be agreed upon between them.

**Nomination of arbitrator.** If the parties cannot agree with respect to such nomination, or if the person whom they nominate refuses to accept the arbitration, and the parties desire that the nomination shall be made by the Court, the Court shall nominate the arbitrator.

#### Notes.

This section applies to Provincial Small Cause Courts.

Section 522 of the Code of Civil Procedure, 1877, which provides that no appeal shall lie from a decree upon an award, except in so far as the

decree is in excess of, or not in accordance with, the award, assumes that the award has been regularly and properly passed by arbitrators duly appointed. Where two of five arbitrators nominated by the parties to a suit, and appointment by the Court, had not consented before, and, after appointment, declined to act, and the Court appointed two arbitrators in their place against the consent of one of the parties to the suit, *held* that, under the circumstances, the appointment of the new arbitrators was not warranted by the provisions of sec. 510 of the Code of Civil Procedure, and the order of reference to such arbitrators, the award made by them, and the decree passed upon the award were illegal, *held*, also, that the High Court could set aside the decree under the powers given by sec. 622 of the Code of Civil Procedure.—I. L. R., 6 Madr. 414.

**508.** The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award, and specify such time in the order.

Order of reference.

When once a matter is referred to arbitration, the Court shall not deal with it in the same suit, except as hereinafter provided.

#### Notes.

This section applies to Provincial Small Cause Courts.

The provision contained in sec. 508 of the Civil Procedure Code, requiring the Court to fix a reasonable time for the delivery of the award, is not imperative but directory, and non-compliance with it does not make the order of reference abortive, and any subsequent arbitration-proceedings ineffectual and bad. Under sec. 514 of the Code, the Court may extend the time for making the award after the time fixed therefor has expired. The last paragraph of sec. 521 does not imply that an omission by the Court to fix a positive date within which the award is to be filed is fatal to the validity of the award. Where an order extending the time for delivery of an award was made after the time fixed therefor had expired, and did not fix any positive date for the filing of the award, *held* that the adoption of the award by the Court amounted to an enlargement of the time for delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators and that the parties, having made no objection to the action of the Court, must be taken to have waived any objection to the award. The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not formally divest him of his character as arbitrator. *Maharajah Joymungul Singh Bahadoor v. Mohun Ram Marwaree* (23 W. R., (P. C.) 429) referred to.—I. L. R., 10 Al. 137.

An award cannot be set aside by the Court on the mere surmise that the arbitrator has been partial. After the parties to a suit have agreed to refer to arbitration and the order of reference has been made by the Court under sec. 508 neither of them can arbitrarily and on no sufficient ground withdraw from the agreement. *Pestonjee Nussurwanjee v. Maneckjee & Co.* followed.—7 Al. 273.

The law contained in secs. 508 and 514 requires that there shall be an express order of the Court fixing the time for delivery of the award or for extending or enlarging such time; and the mere fact the

Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given. An award which is invalid under sec. 521 because not made within the period allowed by the Court, is not an award upon which the Court can make a decree, and a decree passed in accordance with such an award is not a decree in accordance with an award from which no appeal lies with reference to the ruling of the Full Bench in *Lachman Das v. Brijpal*. Where objection to the validity of the award on the ground that it was made beyond the time allowed was not taken by the defendant in the first Court :—*Held* that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first Court he was aware of the defect, or had done anything to imply consent to extension of the time.—8 Al. 548.

In an agreement to refer certain matters to arbitration, which was filed in Court under sec. 523 of the Civil Procedure Code and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire or otherwise. The arbitrators being unable to agree upon the matters referred, the Court on the application of one of them, appointed an umpire, and directed that the award should be submitted on a particular date. An award was made by the umpire and one arbitrator without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree :—*Held* that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award such as the law contemplated. *Lachman Das v. Brijpal* (I. L. R., 6. Al. 174) referred to :—*Held* that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint, an umpire, and required that the award should be made by the arbitrators named by the parties. *Held*, that sec. 509 and the other sections preceding sec. 523 of the Civil Procedure Code, relating to the power of the Court to provide for difference of opinion among the arbitrators, were only made applicable to cases coming under sec. 523, so far as their provisions were consistent with the agreement filed under that section. *Held* also that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art. 158, sch. ii of the Limitation Act, inasmuch as that article applied to applications referred to in sec. 522 of the Civil Procedure Code, i. e., applications to set aside an award on any of the grounds mentioned in sec. 521, and the defendant did not contest the award on any of those grounds.—8 Al. 64.

When once an award has been delivered it is no longer competent to the Court to grant further time, or to enlarge the period for the delivery of this award under sec. 514 of the Code of Civil Procedure. Where an award was not made within the period fixed by the Court's order but was made after the date given in the last order extending the time for its delivery, *held*, that the award was invalid. The decree of the Court dealing with the award as if duly made within the time, could not be treated as enlarging it. The judgment in *Okuha Mal v. Hari Ram* approved. Order to be that the suit should proceed. Neither party to be entitled to costs in either Court below after the first judgment with regard to the stage at which the objection was taken; and the costs prior to that to abide the issue.—13 Al. 300.

An order of reference to arbitration was made on 21st January. Six weeks time was allowed for the return of the award. No application was made for extension of time. The award having been returned on 8th May the Court refused to give judgment in accordance with it under sec. 622 of the Code of Civil Procedure on the ground that it was not valid. The plaintiffs now petitioned High Court under sec. 622 of the Code of Civil Procedure:—*Held*, that the award was invalid and the Court had not failed to exercise jurisdiction within the meaning of sec. 622 of the Code of Civil Procedure.—9 Madr. 475.

When a Court has referred a suit to arbitration it has jurisdiction over the arbitrators to compel them to give up documents filed before them as exhibits during the course of the arbitration, and to return the original records of the suit which may have been handed to them. Such jurisdiction can be exercised by an application made in the suit on notice to the arbitrators.—17 Cal. 832.

When reference is to two or more, order to provide for difference of opinion.

**509.** If the reference be to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators,

- (a) by the appointment of an umpire, or
- (b) by declaring that the decision shall be with the majority, if the major part of the arbitrators agree, or
- (c) by empowering the arbitrators to appoint an umpire, or
- (d) otherwise, as may be agreed between the parties; or, if they cannot agree, as the Court determines.

If an umpire is appointed, the Court shall fix such time as it thinks reasonable for the delivery of his award in case he is required to act.

#### Notes.

This section applies to Provincial Small Cause Courts.

A case cannot, in special appeal, be sent back to the arbitrators with a provision for difference of opinion, where the arbitrators having given in different awards, the case was tried anew by the first Court, whose decision has been affirmed by the lower Appellate Court.—14 W. R., 150.

The mere absence of a clause in the order of reference to arbitration, providing for a difference of opinion between the arbitrators, cannot vitiate the award where there is no such difference of opinion.—17 W. R., 30.

See. I. L. R., 7 Madr. 174, noted under sec. 506.

**510.** If the arbitrator, or, where there are more arbitrators than one, any of the arbitrators, or the umpire, dies, or refuses, or neglects, or becomes incapable to act, or leaves British India under circumstances showing that he will probably not return at an early date, the Court may, in its discretion, either appoint a new arbitrator or umpire in the place of the person so dying, or refusing, or neglecting, or becoming incapable to act, or

Death, incapacity, &c., of arbitrators or umpire.

leaving British India, or make an order superseding the arbitration, and in such case shall proceed with the suit.

**Notes.**

This section applies to Provincial Small Cause Courts.

It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act; and the finality of the award is based entirely upon the principle that the arbitrators are judges chosen by the parties themselves, and that such judges are willing to settle the disputes referred to them. Where certain matters were referred to arbitrators who refused to act, and the Court of first instance passed an order directing them to proceed and to make an award, and they, on the passing of such order, made an award, *held* that all proceedings taken by the arbitrators in obedience to the order of the Court directing them to arbitrate against their will were null and void.—I. L. R., 7 Al. 20.

See I. L. R., 6 Madr. 414, noted under sec. 507; 7 Madr. 174, noted under sec. 506.

**511.** Where the arbitrators are empowered by the order of reference to appoint an umpire, and fail to do so, any of the parties may serve the arbitrators with a written notice to appoint an umpire; and if, within seven days after such notice has been served, or such further time as the Court may in each case allow no umpire be appointed, the Court, upon the application of the party who has served such notice as aforesaid, may appoint an umpire.

Appointment of umpire  
by Court.

**Notes.**

This section applies to Provincial Small Cause Courts.

The appointment, of an umpire under this section is required, where there are two or more arbitrators, to provide for any difference of opinion amongst them; but not where, with the consent of the court, only one arbitrator has been appointed.—25 W. R., 11.

**512.** Every arbitrator or umpire appointed under section 509, section 510, or section 511, shall have the like powers as if his name had been inserted in the order of reference.

Powers of arbitrator or  
umpire appointed under  
sections 509, 510, and 511.

NOTE.—This section applies to Provincial Small Cause Courts.

**513.** The Court shall issue the same processes to the parties and witnesses whom the arbitrators or umpire desire or desires to examine, as the Court may issue in suits tried before it.

Summoning witnesses.

Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages.

Punishment for default,  
&c.



tages, penalties, and punishments, by order of the Court, on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

NOTE.—This section applies to Provincial Small Cause Courts.

**514.** If, from the want of the necessary evidence or information, or from any other cause, the arbitrators cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either grant a further time, and from time to time, enlarge the period for the delivery of the award, or make an order superseding the arbitration, and in such case shall proceed with the suit.

Extension of time for making award.

Supersession of arbitration.

#### Notes.

This section applies to Provincial Small Cause Courts.

Under this section the time for delivery of an award may be extended at the discretion of the Court without the consent of the parties.—2 W. R., 297.

The present suit for dissolution of partnership and all matters in dispute between the parties thereto were by judge's order, dated 18th July 1887, referred to the arbitration of A and B. The time for making and filing the award was by subsequent orders extended to the 18th May 1888. The award was made on that day, but was not filed until the 18th June 1888. The second defendant obtained a rule calling on the other parties to show cause (*inter alia*) why the award should not be set aside by reason of its not having been filed in time. *Held* that the omission to file the award on or before the 18th May 1888 did not render it invalid. The word "made" in secs. 514 and 521 of the Civil Procedure Code (Act XIV of 1882) does not include the filing of the award.—I. L. R., 13 Bom. 119.

A Court has power to act under sec. 514 of the Code Civil Procedure at any time before the award is actually made, whether the time previously limited for making the award has expired or not. *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* referred to.—14 Al. 343.

Where a decree purports to have been made in terms of an award under sec. 522 of the Code of Civil Procedure, an appeal lies against it if there was no award in fact or in law. An order extending the time for the presentation of an award upon an application presented within time is not bad in law by reason of its having been made after the expiry of the term which it purports to extend. It is not a valid objection to an award that the arbitrators have not acted in strict conformity with the rules of evidence.—11 Madr. 85.

A suit was referred to an arbitrator, who did not make his award within the period limited for that purpose. After that period had expired, an application was made for its extension, both parties consenting; the application was granted and the award was made within the time so extended, and a decree was passed in its terms:—*Held*, that the order extending the time was not illegal, and the party dissatisfied with the decree was not entitled to have the award and the decree made upon it set aside.—15 Madr. 384.

Application for the extensions of the period for the submission of an award and orders thereon should be made in writing and recorded. When a party has been prejudiced by having the time allowed for taking objections to an award curtailed by the Court, no appeal lies, but a review should be granted by the Court of first instance.—3 Madr. 59.

See I. L. R., 13 Al. 300, noted under sec. 503.

**515.** When an umpire has been appointed, he may enter on the reference in the place of the arbitrators,

When umpire may arbitrate in lieu of arbitrators.

(a) if they have allowed the appointed time to expire without making an award, or

(b) when they have delivered to the Court or to the umpire a notice in writing, stating that they cannot agree.

#### Notes.

This section applies to Provincial Small Cause Courts.

As in the case of an arbitrator, so in the case of an umpire a Court has power to extend the period within which the award is to be submitted. Where the parties prayed the Court to appoint two arbitrators and an umpire and to refer the case to them for decision, and undertook to abide by such decision as might be passed by them unanimously or by the majority of them, *held* that an award by the umpire alone, the arbitrators being unable to decide was valid. *Held* also that the plaintiff, having appeared before the umpire, and taken no objection to the procedure of the umpire from March to August, was estopped from raising the objection that an award of the umpire alone was invalid. The Court can extend the time allowed to an umpire under sec. 509 of the Code.—I. L. R., 4 Madr. 311.

**516.** When an award in a suit has been made, the persons who made it shall sign it, and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them ; and notice of the filing shall be given to the parties.

Award to be signed and filed.

#### Notes.

This section applies to Provincial Small Cause Courts.

A Civil Court's judgment cannot affect the rights of parties as declared in an award.—2 W. R., 297.

Where an arbitrator imported into his proceedings a previous inquiry alleged to have been made by him, and relied upon admissions made in the former proceedings, his award was held to be bad, and the decision based thereon set aside.—24 W. R., 81.

A District Munsiff passed a decree in the terms of an award without giving notice of the filing of the award under sec. 516 of the Code of Civil Procedure. *Held* that the District Munsiff acted with material irregularity within the meaning of sec. 622 of the Code of Civil Procedure.—I. L. R., 11 Madr. 144.

The act of an arbitrator, in handing in an award to the proper officer of the Court, for the purpose of the award being filed, cannot be considered

as an 'application' within the meaning of the Limitation Act.—7 Cal. 333.

See I. L. R., 17 Cal. 832, noted under sec. 508.

**517.** Upon any reference by an order of the Court, the arbitrators or umpire may, with the consent of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court; and the Court shall deliver its opinion thereon; and such opinion shall be added to, and form part of, the award.

NOTE.—This section applies to Provincial Small Cause Courts.

Court may, on application, modify or correct award in certain cases.

**518.** The Court may, by order, modify or correct an award—

(a) where it appears that a part of the award is upon a matter not referred to arbitration, provided such part can be separated from the other part, and does not affect the decision on the matter referred, or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision.

#### Notes.

This section applies to Provincial Small Cause Courts.

The arbitrators to whom the matters in difference in two suits for money were referred to arbitration made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award, in so far as it directed payment by instalments, and the Court, holding that the arbitrators had no power to make such a direction, modified the award to that extent, under sec. 518 of the Civil Procedure Code. On appeal, the District Judge, while allowing the power of the arbitrators to direct payment by instalments, reduced the number of instalments which had been fixed. *Held* that the decree of the first Court not being in accordance with the award, an appeal lay to the Judge, with reference to sec. 522 of the Code. *Held* also that, as it was clear that the reference to arbitration gave the arbitrators full powers, not only as to the amount to be paid, but also as to the manner of payment, the lower Appellate Court was wrong in reducing the number of instalments which had been fixed. *Per* MAHMOOD, J.—The word "award" used in the last sentence of sec. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under sec. 518. The words "in excess of, or not in accordance with, the award," used in sec. 522, were intended to enable the Court of appeal to check the improper use of the power conferred by sec. 518.—I. L. R., 8 Al. 449.

**519.** The Court may also make such order as it thinks fit respecting the costs of the arbitration, if any question arise respecting such costs, and the award contain no sufficient provision concerning them.

NOTE.—This section applies to Provincial Small Cause Courts.

**520.** The Court may remit the award or any matter referred to arbitration to the re-consideration of the same arbitrators or umpire, upon such terms as it thinks fit,

When award or matter referred to arbitration may be remitted.

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration ;

(b) where the award is so indefinite as to be incapable of execution ;

(c) where an objection to the legality of the award is apparent upon the face of it.

#### Notes.

This section applies to Provincial Small Cause Courts.

Sec. 323, Act VIII. 1859 (corresponding with sec. 520, Act XIV. 1882), authorizes a Court to remand a case to arbitrators for reconsideration when there are mistakes which it cannot amend ; and if the arbitrators refuse to reconsider their award, it becomes null and void without proof of corruption or misconduct.—7 W. R., 406.

This section does not authorize a Court to remit a case to the arbitrators except as to matters in difference between the parties.—14 W. R., 469.

Where, in a suit for the filing of an award made on a private reference to arbitration, the Court of first instance, holding that there was no reason to remit such award to the reconsideration of the arbitrator under the provisions of Act X of 1877, sec. 520, or to set it aside under sec. 521, did not proceed to give judgment according to such award followed by a decree, but merely directed that such award should be filed, *held* that its order was not appealable as a decree or as an order.—I. L. R., 2 Al. 471.

An award was remitted under sec. 520 of Act X of 1877. The arbitrators refused to reconsider it, and the Court thereupon proceeded with the suit, and gave the plaintiffs a decree. The defendants appealed from such decree on the ground, amongst others, that the award had been improperly remitted under sec. 520. *Held* that the question whether the award had been properly remitted under sec. 520 or not could be entertained in such appeal. The worshippers at a public mosque can maintain a suit to restrain the superintendents of such mosque from using it or its appurtenant rooms for purposes other than those for which they were intended to be used, and from doing acts which are likely to obstruct worshippers in entering or leaving such mosque.—3 Al. 636.

The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given. The plaintiff objected to the award, not on any of the grounds mentioned in secs. 520 and 521 of the Civil Procedure Code, but on the ground that the procedure of the arbitrator had been illegal. The Court disallowed this objection, and gave a judgment and decree in accordance with the award. *Held* by Straight, J., that such decree, being in accordance with the award, was not appealable. *Held* by

Stuart, C. J., that the award not being open to objection on any of the grounds mentioned in secs. 520 and 521 of the Civil Procedure Code, and the decree being in accordance with the award, the decree was not appealable. *Held* by Oldfield, J., that the procedure adopted by the arbitrator being illegal, not being warranted by the Oaths Act, and there being in reality no award within the meaning of the Civil Procedure Code, the decree therefore was appealable. *Per* Stuart, C. J., that the procedure of the arbitrator did not require to be warranted by the Oaths Act, as he was entitled by virtue of his office to proceed as he did.—4 Al. 283.

The plaintiff in this suit sued the defendants to recover certain moneys presented to him on his marriage, which he alleged the defendants had received and appropriated to their own use. The defendants denied that they had received such moneys, but admitted that such moneys had been credited by the plaintiff's father to the firm in which they, the plaintiff, and the plaintiff's father were jointly interested, against a larger amount of moneys belonging to the firm which had been expended on the plaintiff's marriage. The parties agreed to refer the matter in dispute between them to arbitration, and to abide by the decision of the arbitrator. The arbitrator decided that the plaintiff could not recover the moneys he sued for, and which had been credited to the firm of which he was a partner, as a larger sum had been expended on his marriage out of the funds of the firm. The plaintiff obtained the opinions of certain *pandits* to the effect that, under Hindu Law, gifts on marriage are regarded as separate acquisitions, and prayed that the Munsiff would remit the award with these opinions to the arbitrator. The Munsiff remitted the award with the opinions, requesting the arbitrator to consider them, and to return his opinion in writing within a certain period. The arbitrator having refused to act further, the Munsiff proceeded to determine the suit, and gave the plaintiff a decree on the ground that, in a joint Hindu family, presents received on marriage do not fall into the common fund. *Held* (Pearson, J., dissenting) that, there being no illegality apparent on the face of the award, the Munsiff was not justified in remitting the award, or in setting the award aside and proceeding to determine the suit himself, but that he should have passed judgment in accordance with the award.—2 Al. 181.

When an application is made to a Court to file an award under sec. 525 of the Code of Civil Procedure, and an objection is made to the filing of it upon any of the grounds mentioned in sec. 520 or 521, the proper course for the Court to pursue is to dismiss the application, and to leave the applicant to bring a regular suit to enforce the award in which all the objections as to its validity may be properly tried and determined. Where no such ground of objection is made to the filing of the award, and the Court consequently orders it to be filed, no appeal lies against that order.—10 Cal. 74.

See I. L. R., 6 Bom. 663, noted under sec. 526 ; 3 Al. 541, noted under sec. 525 ; 3 Al. 286, noted under sec. 2.

**521.** An award remitted under section 520 becomes

void on the refusal of the arbitrators or umpire to reconsider it. But no award shall be set aside except on one of the following grounds (namely) :—

- (a) corruption or misconduct of the arbitrator or umpire ;
- (b) either party having been guilty of fraudulent conceal-

ment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;

(c) the award having been made after the issue of an order by the Court superseding the arbitration and restoring the suit ;

and no award shall be valid unless made within the period allowed by the Court.

#### Notes.

This section applies to Provincial Small Cause Courts.

An award of arbitration can only be set aside for corruption or partiality, but not on the ground of inconsistency.—W. R., Sp. 153.

An award is not reversible except under this section. An arbitrator is not bound by technical rules of Court. He is appointed to give an equitable award, and can decide a case upon a document whether stamped or unstamped.—1 W. R., 12.

An arbitration-award as to division of property left to minor sons, though assented to by their guardian, was set aside so far as regarded those sons on proof that the partition was injurious to them.—1 W. R., 280.

Where a suit was referred to arbitration, and objection was taken to the award on the ground that one of the arbitrators had not attended a meeting when witnesses examined by the other arbitrators, *held* that the award was invalid by reason of misconduct on the part of the arbitrators within the meaning of sec. 521 (a) of the Code of Civil Procedure.—I. L. R., 12 Madr. 113.

By reason of sec. 582 of the Civil Procedure Code, where a Court of first instance wrongly sets aside an arbitration-award and passes a decree against the terms thereof, and a Court of first appeal, holding that the award was not open to objection upon the grounds mentioned in sec. 521, passes a decree strictly in accordance with the award, such appellate decree is entitled to the same finality as the first Court's decree would have been under the last paragraph of sec. 522, and cannot be made the subject of second appeal. *Pureshnath Dey v. Nobin Chunder Dutt* (12 W. R., 93) and *Rughoober Dyal v. Maina Koer* (12 C. L. R., 564) dissented from.—10 Al. 8.

The principle of the ruling of the Privy Council in *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* is application also to arbitrations under sec. 221 of Act No. XIX of 1873.—14 Al. 347.

All matters in dispute in a suit were referred to arbitration. An award was duly made and filed, and a decree passed in accordance with the terms thereof. Subsequently on the application of the plaintiff in the suit, the Court passed an order setting aside the decree and the award, and ordering the case to be set down for hearing upon the ground that the proceedings in connection with the arbitration had been taken, and the award had been filed, without notice to the plaintiff, and that, although the award was alleged to have been made with the consent of the parties, the plaintiff had not consented to it. *Held*, that no appeal lay from such order. *Howard v. Wilson*, (I. L. R., 4 Cal. 231), dissented from ; *Mothooranauth Tewaree v. Brindabun Tewaree*, 14 W. R., 327, followed.—11 Cal. 172.

The rule that no award shall be valid unless "made" within period fixed by the Court, is equivalent to a rule that the award must be "delivered"



within that period. Upon a reference to the arbitration of three persons, the Court ordered that the award made by them should be filed on the 19th September, 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September, on which day it was filed. It had been agreed that the opinion of the majority should carry the decision :—*Held* that the award was not “made within the period fixed by the Court” within the meaning of sec. 521 of the Civil Procedure Code.—8 Al. 543 ; 12 Cal. 173.

The word “misconduct” as used in sec. 521 cl. (a) of the Civil Procedure Code should be interpreted in the sense in which it is used in English law with reference to arbitration-proceedings. It does not necessarily imply moral turpitude, but it includes neglect of the duties and responsibilities of the arbitrators, and of what Courts of justice expect from them before allowing finality to their awards. An arbitrator to whom the matters in difference in a suit were referred under sec. 508 of the Civil Procedure Code, and who was directed by the order of reference to deliver his award by the 22nd September, applied on the 17th September for an extension of time, on the ground that a very full investigation was necessary, which it was not possible to make within the prescribed period. On the 20th Sept. without waiting for the order of the Court, he notified to the parties that he proposed to hold an inquiry in the case on the 24th, and it appeared that he did not expect this intimation to reach them before the 21st or 22nd. On the 23rd, he informed the plaintiff’s pleader that a new date would be fixed for the inquiry, of which notice would be given to the parties. Notwithstanding this, on the 23rd, the arbitrator took evidence for the defendant in the absence of the plaintiff and his pleader. All these proceedings were held before the arbitrator received an order of the Court extending the time for delivery of the award up to the 26th October. On the 27th September he directed the parties to be informed that the investigation would be held on the 5th October. On the 4th October the plaintiff presented a petition, praying the arbitrator to summon witnesses and to take documentary evidence, and upon this nothing definite was settled at the time ; but, after the pleaders had left, the arbitrator passed an order rejecting the petition, on the ground that the evidence sought to be produced was unnecessary. On the same date, and on the 5th and 6th October, he took evidence for the defence in the absence of the plaintiff and his pleader. On the 10th he rejected a petition by the plaintiff, praying for further time to produce evidence, and complaining of his having taken evidence in the plaintiff’s absence, and having received in evidence a fabricated document. On the 25th October, the arbitrator delivered his award in favour of the defendant. Subsequently, upon objections made by the plaintiff, the Court set aside the award, and directed that the trial of the suit should proceed. *Held* that, although no case of “corruption” within the meaning of sec. 521 (cl. a) of the Civil Procedure Code had been made out against the arbitrator, the circumstances above stated amounted to “misconduct,” and the award was therefore bad in law, and had rightly been set aside. *Soobul Thakur Opadatah v. Punchunund Tikha* (S. D. A., L. P., 1848, p. 115), *Reedoy Kristo Mujoomdar v. Puddo Lochun Mujoomdar* (1 W. R., 12), *Sada Ram v. Beharee* (S. D. A. N. W. P., 1864, vol. 2, p. 399), *Parns Dass v. Khoobee* (S. D. A., N. W. P., 1861, vol. 2, p. 199), *Howard v. Wilson* (I. L. R., 4 Cal 231), *Bhagiruth v. Ram Ghulam* (I. L. R., 4 Al. 283), *Wazir Mahton v. Lulit Singh* (I. L. R., 7 Cal. 166), *Nainsukh Rai v. Umadai* (I. L. R., 7 Al. 273), and *Pestonjee Nursurwanjee v. Manockjee*, (12 Moors I. A. 112), distinguished. —9 Al. 253.

An order under sec. 251 of the Civil Procedure Code, setting aside an award, made a on reference to arbitration in the course of a suit, under chapter XXXVII of the Code, on the ground of the arbitrator's misconduct, is not subject to revision by the High Court in the exercise of the powers conferred on it by sec. 622 of the Code.—5 Al. 293.

A case was referred by consent to arbitration and after having been recalled into Court was again referred. An award was made by the arbitrator, and filed in Court. The defendants then objected, on the ground that they had no notice after the second reference, and that they were not heard, and that the arbitrator had otherwise misconducted himself. These objections were disallowed by the Subordinate Judge, who gave a decree in the terms of the award. This decree was upheld by the Judge on appeal, who, however, found that the arbitrator has been guilty of misconduct. *Held* that, if the decree of the first Court was not final under sec. 325, Act VIII of 1859, all that the lower Appellate Court could do was to remand the case to be dealt with on its merits; but, inasmuch as there had been an award and a decree thereon, which was final within the terms of that section, the lower Appellate Court had no jurisdiction to hear the appeal, or to express any opinion on what had passed in the first Court.—7 Cal. 166.

See I. L. R., 10 Cal. 74, noted under sec. 520; 3 Al. 636, noted under sec. 520; 11 Madr. 85; 15 Madr. 384, 13 Bom. 119, noted under sec. 514, 13 Al. 300, noted under sec. 508.

**522.** If the Court sees no cause to remit the award or Judgment to be accord- any of the matters referred to arbitration ing to award. for reconsideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to give judgment according to the award,

or if the award has been submitted to it in the form of a special case, according to its own opinion on such case.

Upon the judgment so given a decree shall follow, and shall be enforced in manner provided in this Code for the execution of decrees Decree to follow. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

#### Notes.

This section applies to Provincial Small Cause Courts.

No appeal lies against an order disallowing an application to file an award under sec. 327 of Act VIII of 1859.—I. L. R., (A. C.) 184.

An application was made under sec. 327 of Act VIII of 1859 to file an arbitration-award; and the Court, after calling on the opposite party to show cause why it should not be filed, rejected the application. *Held* that the case did not come within the meaning of sec. 325, and that the order, being simply one "rejecting an application to file an award." was final.—2 B. L. R., App. 20; 11 W. R., 57.

No appeal lies from an order rejecting an application to file an award (*Mitter, J. dubitante*). Where the application was considered as a regular,

suit, the Judge was right in decreeing costs as in a regular suit.—2 B. L. R., (A. C.) 249 ; S. C. 11 W. R., 104 ; B. L. R., Sup. Vol., 505 ; 2 Ind. Jur., N. S., 1 ; 6 W. R., Mis., 83.

In an arbitration-case between a mahajan and his gomasta, an award was made to the effect that Rs. 725 were outstanding and due to the kuti, of which Rs. 483 were due to the mahajan, and Rs. 241 to the gomasta ; that the gomasta should point out the persons owing the Rs. 483, or in default make good the amount. The mahajan applied to the Subordinate Judge of Bhagulpore, under Act VIII of 1859, sec. 327, to file the award. The Subordinate Judge held that it was not proved that the gomasta had done as required by the award, and ordered him to pay the deficit. The gomasta appealed to the Judge, who held that no appeal lay from the judgment of the Subordinate Judge enforcing the award. *Held* on special appeal that the Subordinate Judge's judgment decided a question of fact not determined by the award, and that an appeal would lie.—2 B. L. R., (A. C.) 260 ; 11 W. R., 140.

On the application of one party to a reference to arbitration, without the intervention of a Court, to have the award filed, and for judgment thereon, an objection of the other party, that the award had been come to after the arbitrators' authority had been repudiated, was over-ruled, and judgment was passed by the Munsif in accordance with the award. *Held* (PAUL, J., dissenting) an appeal lay from the decision of the Munsif. In another case the question was referred to a Full Bench whether, when an award has been ordered to be filed, and judgment has been given in accordance with it under sec. 327 of Act VIII of 1859, is such judgment open to appeal ? The answer given (PAUL, J., dissenting) was : It is open to an appellant to show that the paper which has been filed is not an award. If it is an award, and judgment is given in accordance with such award, such judgment is final. *Per* PAUL, J., the judgment is final.—8 B. L. R., 315 ; 15 W. R., (F. B.) 9 ; 2 C. L. R., 362.

Plaintiff sued for confirmation of an award delivered by arbitrators appointed by agreement of parties to decide upon his claim to a share of ancestral property. Defendant objected that the award was illegal principally upon the grounds that he had cancelled his submission some time before the award was passed. The District Judge ordered the award to be filed on the authority of *Pestonjee v. Maneckjee* (3 M. H. C. R., 183, affirmed in 12 Moo. 112). The defendant appealed. *Held* that no appeal lay.—7 M. H. C. R., 257.

An appeal lies from an order made in execution of an arbitration-award filed under the provisions of sec. 327 of the Civil Procedure Code.—5 Bom. H. C. R., (A. C.) 129 ; 13 W. R., 62.

An order disallowing an application under sec. 326 of the Code of Civil Procedure is unappealable.—5 N. W. P. H. C. R., 179.

An appeal will lie from a decree which varies an award by containing a direction for payment by instalments which is not contained in the award. The plaintiff in the suit, which was one on accounts stated, agreed to refer to arbitration the question whether the accounts were correct or not. It was unnecessary for the arbitrators to determine whether the account stated was proved. The decree was passed on the very day the award was filed. The plaintiff was not estopped from taking objections to the award by reason of his silence when the decree was pronounced. The award was held invalid, among other reasons, because it purported to

be the award of four persons, whereas the order of reference was addressed only to three.—7 N. W. P. H. C. R., 367.

On appeal from a decree setting aside an award, the District Judge reversed the decree of the first Court, and made a decree in accordance with the award. *Held* that sec. 522 of the Civil Procedure Code did not take away the right of second appeal against the latter decree.—12 C. L. R., 564.

*Held* by the majority of the Court (PEARSON, J., *dissentiente*) that no appeal lies from an order passed under sec. 327, Act VIII of 1859, whether granting or refusing the application.—3 Agra H. C. R., 353; S. C. Agra H. C. R., (F. B.) Ed. 1874, 156.

An appeal lies from a judgment given on an arbitration-award, on the ground that the judgment is contrary to the award.—3. W. R., 168.

An appeal, on the allegation of want of consent of parties, lies from the order of a lower Court, under sec. 327, Code of Civil Procedure, directing a private award of arbitration to be filed and enforced.—6 W. R., 60.

An order refusing to enforce an obviously illegal award of arbitrators under sec. 327, Act VIII of 1859, is not a decree, and therefore not appealable.—7 W. R., 401.

The question whether, under sec. 522 of the Code of Civil Procedure, an appeal will lie against a decree given in accordance with an award, depends upon whether the award upon which the decree is based is a valid and legal award. A plaintiff and some of the defendants to a suit applied to refer the suit to arbitration (certain other of the defendants not having joined in the application); an award was passed and a decree made in accordance with such award. The plaintiffs objected the validity of the award on the ground that all the parties to the suit had not joined in referring the suit to arbitration; the objection was dismissed, and judgment given in accordance with the award. *Held* that an appeal would lie from a decree dismissing the objection and confirming the award; but that under the special circumstances of the case justice was so clearly in favour of the view that the award was good, that the Court, although not entirely approving of certain decisions of the High Court (*Shitianah Bisvas v. Kishen Mohun Mookerjee*, (5 W. R., 120); *Ram Soonder Mookerjee v. Ram Shurun Mookerjee* (6 W. R., 25); *Doorga Churn Thakoor v. Kally Doss Hazrah* (10 W. R., 463); *Bishoka Dasia v. Anunto Lall Pain* (4 C. L. R., 65), which laid down that such an award is good, notwithstanding that some of the parties to the suit may not have joined in the reference to arbitration, did not think fit to differ from those decisions on that occasion.—I. L. R., 11 Cal. 37.

An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award. Two widows of a deceased Hindu referred generally to arbitrators the question of their rights, respectively, in the estate of their deceased husband, including the matter whether there was, or was not, any cause disentitling the widow, who afterwards brought this suit for her share in the estate against the other who had obtained possession of the whole. The arbitrators declared her to be disentitled to succeed to any portion of the estate, and awarded her maintenance only:—*Held*, that, in the absence of mistake, or misconduct, on the part of the arbitrators, the award was binding on the parties.—11 Cal. 386.

The power to file an award includes the power to inquire if there was a submission to arbitration, and this question is concluded by the decree, which is final under secs. 522 & 526 of the Code of Civil Procedure.—4 Madr. 319.

After issues had been framed in a suit to wind up a partnership, the matter was referred to an arbitrator, who made his award, and with regard to certain property, not part of the partnership property, he referred the parties to a separate suit. A decree was passed in accordance with the award:—*Held*, that an appeal lies against a decree passed on an award, on the ground that the award was not legal; but that the award was not illegal by reason of its comprising the reference of the parties to a separate suit.—15 Madr. 348.

A case was referred to the arbitration of five persons, with a proviso that, in the event of any two of the arbitrators being absent, the arbitration should be continued by the other three. Two of the arbitrators named were the pleaders on either side, and these two, with the consent of the parties, ceased to act as arbitrators, but argued the matter before the other arbitrators. *Held* that the award made by the other three arbitrators named was a valid award.—9 Cal. 905; 12 C. L. R., 525.

*Held* that an appeal lies from a decree passed in accordance with an award, when such decree is impugned on the ground that there is no award in law or in fact, upon which judgment and decree could follow under sec. 522, Civil Procedure Code. *Joymungal Singh v. Mohun Ram* (23 W.R., 429) and *Bhagirath v. Ram Ghulam* (I. L. R., 4 Al. 283) observed on.—6 Al. 174.

When an award has been filed in Court, as provided by sec. 525 of the Code of Civil Procedure, the judgment and decree based thereon must be drawn up specifically in terms of the award. If the decree merely decrees in general terms the claim of one party or of the other, it cannot be said that such decree is in accordance with the award, and being "not in accordance with the award" an appeal will lie therefrom.—13 Al. 366.

See I. L. R., 2 Bom. 553, noted under sec. 2; 6 Madr. 414, noted under sec. 507; 3 Al. 286, noted under sec. 2; 11 Madr. 85, noted under sec. 514; 10 Al. 8, noted under sec. 521.

**523.** When any persons agree in writing that any difference between them shall be referred to the arbitration of any person named in the agreement or to be appointed by any Court having jurisdiction in the matter to which the agreement relates, the parties thereto, or any of them, may apply that the agreement be filed in Court.

The application shall be in writing, and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application have been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement other than appli-

Agreement to refer to arbitration may be filed in Court.  
Application to be numbered and registered.  
Notice to show cause filing.

cants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

If no sufficient cause be shown, the Court may cause the agreement to be filed, and shall make an order of reference thereon, and may also nominate the arbitrator, when he is not named therein, and the parties cannot agree as to the nomination.

#### Notes.

This section applies to Provincial Small Cause Courts.

A submission to arbitration can only be revoked on good grounds. The claimant, in a reference to arbitration, is the person on whom, *cæteris paribus*, it is incumbent to promote the conduct of the proceedings; and when, therefore, there is a long and unreasonable delay unexplained by any act of the other party, either conducing to it or consenting to it or waiving it, the latter is, *prima facie*, entitled to decline to go on with the reference, and to revoke the agreement for submission. Where an agreement to refer has been duly revoked, the Court is incompetent to order it to be filed under sec. 523 of the Code of Civil Procedure. *Semble*:—Where no arbitrator has been named in an agreement, and the aid of the Court in the appointment of an arbitrator is invoked, the parties ought to have an opportunity of being heard upon the selection to be made. *Pestonjee Nusserwanjee v. Manockjee*, 12 Moore's I. A., 112, referred to.—I. L. R., 17 Cal. 200.

In an agreement to submit to arbitration, which was filed in Court under the provisions of sec. 523 of the Code of Civil Procedure, it was stipulated that the decision of the arbitrator should be accepted as final, and that no appeal therefrom should be made by either party. *Held* that this stipulation did not prevent the Court from setting aside the award on the ground of misconduct on the part of the arbitrator.—6 Madr. 368.

*Held* by the Full Bench (OLDFIELD, J., dissenting).—That an order refusing to file in Court an agreement to refer to arbitration is not appealable. *Per* OLDFIELD, J.—That such an order is appealable, and the Court-fee payable on the memorandum of appeal is an *ad-valorem* fee computed on the value of the subject-matter in dispute in the appeal. *Janki Tewari v. Gayan Tewari* (I. L. R., 3 Al. 427) distinguished by STUART, C. J., and followed by OLDFIELD, J.—5 Al. 333.

See I. L. R., 6 Cal. 251, noted under sec. 506; 3 Al. 286, noted under sec. 2.

**524.** The foregoing provisions of this chapter, so far as they are consistent with any agreement so filed, shall be applicable to all proceedings under an order of reference made by the Court under section 523, and to the award of arbitration and to the enforcement of the decree founded thereupon.

Provisions of chapter applicable of proceedings under order of reference.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where the partner of a firm in their partnership-deed agreed to refer



their disputes to arbitration, and the reference made in pursuance of this agreement gave the arbitrators a power to make partition, but omitted a power to sell, *held*, on the award being made a rule of Court, that the Court had no power, under sec. 326, Act VIII of 1859, to order the sale of certain property of which the arbitrators were unable to make partition, and the sale of which they recommended on that ground.— 3 C.L. R., 357.

See I. L. R., 6 Madr. 368, noted under sec. 523 ; 3 Al. 286, noted under sec. 2.

**525.** When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

Filing award in matter referred to arbitration without intervention of Court.

Application to be numbered and registered.

without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court.

The application shall be in writing, and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

Notice to parties to arbitration.

The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

#### Notes.

This section applies to Provincial Small Cause Courts.

When a matter has been referred to arbitration without the intervention of any Court, a Small Cause Court in the mofussil has jurisdiction to entertain an application under sec. 327 of Act VIII of 1859 to file the award, provided it relates to a debt not exceeding the amount cognizable by such Court, and that the defendant resides within its jurisdiction.—1 B. L. R., (A. C.) 43 ; 10 W. R., 85 ; 10 Bom. 54 ; 5 M. H. C. R., 128.

As proceedings taken to file and enforce an award under sec. 327 of the Civil Procedure Code are of the nature of a suit within the meaning of sec. 2 of Act XX of 1864, a minor must be represented in such proceedings by a person holding a certificate of administration.—9 Bom. H. C. R., (A. C.) 289.

Where an application was made to a Subordinate Judge to file an award, and an objection was taken that the arbitrators had made their award several months before the date of the one sought to be filed, thus impeaching the identity of the award, and the Subordinate Judge after an inquiry with regard to the several objections ordered the award to be filed :—*Held*, that the order of the Subordinate Judge should be set aside, or the award be deemed not to have been filed. The only objections which the Court can inquire into under secs. 525 & 526 are those which are specified in secs. 520 and 521, and those relate to cases in which the reference and the award are accepted facts ; but where the objection denies the *factum* of the particular award sought to be filed, and the objection does not seem to be frivolous, but one giving rise to inquiry into difficult questions of law

and fact, it is not competent for the Court to deal with that objection under secs. 525 and 526. In such a case the Court should leave the applicant to a regular suit on the award as the basis of his cause of action wherein the party urging the objection will have the advantage of being a defendant rather than a plaintiff, and of having an appeal open to him in the event of an unfavourable decision.—I. L. R., 9 Bom. 254.

The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such dispute, and that in case any such party should refuse or fail to nominate an arbitrator, then the one named by the other party should nominate another arbitrator, and should nominate a third person as umpire. Certain difference arisen among the three partners, two of them called upon the executors or the third to nominate an arbitrator under the terms of the deed, but they

first mentioned partners then nominated an arbitrator,  
another, and these having appointed an umpire,  
instance the matter in dis-

sec.  
was

verified petitions disclosing grounds of objection under sec. 520 or sec. 521 of the Code:—*Held* that the word “parties” as used in sec. 525 should not be confined to persons who are actually before the arbitrators; that if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances, may be adopted *in invitum*, they should, for the purposes of sec. 525, be regarded as parties to that arbitration; and that there was sufficient reason to show that the defendants in the present case were *prima facie* bound by the arbitration so as to bring them within the terms of sec. 525 as parties to the arbitration. Cause why the award should not be set aside. *Hetherington* referred to.

is open to any of the objections mentioned in sec. 520 or sec. 521, and it is not sufficient, when it is sought to make the award a rule of Court, for the defeated party to come and merely say upon a verified petition that this or that ground referred to in secs. 520 and 521 existed against the filing. *Sree Ram Chowdhry v. Denobundhoo Chowdhry and Ichemoyee Chowdhrahee* Chowdhry dissented from *Dutto Singh v. Dosad Bahadur Singh*, referred to.—8 Al. 340.

A document, although headed as an “award,” and signed by the arbitrator, which merely recommends a solution of the questions referred to arbitration, will not be treated by the Court as an award on an application made under sec. 525 of the Code of Civil Procedure.—11 Cal. 356.

was decided by the Full Bench in *Lala Ishuri Pershad v. Her Bhanjan* (15 W. R., 9 F. B.) that the question of the existence of a legal award, when the award is not a rule of Court, is a question of fact, and the existence of the award, when the award is a rule of Court, is a question of law.

with the award, then there is

.—2 Cal.

Matters in dispute were referred to arbitration without the intervention of the Court. An award was made, and upon an application under sec. 525 of the Civil Procedure Code to file the award, one of the parties showed cause why the award should not be filed, and the Subordinate Judge held the objection to be good. *Held* that no appeal lay.—7 Cal. 490.

A Subordinate Judge, although invested with the jurisdiction of a Small Cause Court Judge, does not, on that account, become a Small Cause Court Judge, nor his Court such a Court within the meaning of Act X of 1877. He therefore, has power, within the limits of his ordinary pecuniary jurisdiction, to receive and file awards of arbitrators under sec. 525 of that Act.—3 Bom. 219.

By the amendment of the plaintiff, a case under sec. 525 of Act X of 1877 was taken out of the scope of ch. XXXVII of that Act. *Held* that, this being so, the decree of the Court of first instance was appealable. *Held* also, where a private award determined a matter not referred to arbitration, that a claim under sec. 525 of Act X of 1877, that such award should be filed in Court, was properly dismissed.—3 Al. 541.

Where an arbitration-bond provides that the matters in dispute referred to the arbitrators may be taken up and dealt with *seriatim*, and the award delivered bit by bit (*khurd khurd*), it is not necessary under sec. 327 of Act VIII of 1859 (corresponding with secs. 525, 526, Act XIV of 1882) that all the matters referred to should have been decided before the first portion of the award dealing with some only of the subjects in dispute can be filed.—4 Cal. 92.

Where an application is made under sec. 525 of the Code of Civil Procedure to have an award filed in Court, and it appears to the Court, on cause shown why the award should not be filed, that there is a reasonable dispute between the parties on any of the grounds mentioned in sec. 520 or 521, the application should be dismissed. Under sec. 525 of the Code of Civil Procedure, sufficient cause may be shown by affidavit or verified petition, *Sree Ram Chowdhry v. Denobnudhoo Chowdhry* (I. L. R., 7 Cal. 490); and *Sashti Charan Chatterjee v. Tarak Chandra Chatterjee* (8 B. L. R., 315) referred to.—9 Cal. 557.

When a Court has refused to file an award upon an application under sec. 525, Civil Procedure Code, no appeal lies against such decision, which is an order, and not a decree; but the High Court can interfere under sec. 622. An award made under sec. 525, which is partly within and partly exceeds the terms of the submission to arbitration, cannot be enforced by summary procedure under sec. 526 as to such portion as does not exceed those terms. To refer to arbitration questions arising on the construction of the award and questions left undecided by it is a matter beyond the scope of an agreement to submit to a scheme for the future management of a *devasam* as regards conduct of suits, granting of demises, custody of property, collection of rents, appointment and removal of servants, and defrayment of current expenditure.—3 Madr. 68.

Where an award was made and signed by the arbitrators on the 5th of August 1881, but was not delivered to the parties till the 13th of September following, *semble*, that an application to file the award, made on the 25th February 1882, under the provisions of sec. 525 of the Code of Civil Procedure, was not barred by limitation. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award, under sec. 525 of the Code of Civil Procedure, from the time when he is in a position to enforce it. Under secs. 525 and 526 of

the Code of Civil Procedure, the Court has full power to enter into the question of the sufficiency of the cause shown against the filing in Court of an award. *Dandekar v. Dandekars* (I. L. R., 6 Bom. 663) followed; *Ichamoyee Chowdhranee v. Prosunno Nath Chowdhri* (I. L. R., 9 Cal. 557), dissented from. After an award has been made and handed to the parties the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision.—9 Cal. 575.

Where an award cannot be filed and a decree obtained upon it under Civil Procedure Code, sec. 525, a party is not precluded from suing upon it. Secondary evidence of the contents of the award is admissible on proof of its being lost.—15 Madr. 99.

The plaintiff lent money to two of the defendants, who were partners with the third defendant, for the purposes of the partnership and obtained promissory notes from them. Disputes which arose between them, were referred to arbitrators, who made an award. An application by the plaintiff to have the award made a rule of Court was opposed by defendant No. 1, and the plaintiff was referred to a regular suit. He now brought his suit in the alternative on the award and on the promissory notes. The award was found to be unenforceable. The plaintiff then declared himself satisfied to withdraw his suit as far as the award was concerned, and the Court passed a decree for plaintiff on the merits. Defendant No. 3 alone having appealed, the Court of first appeal held that the plaintiff must succeed or fail on the award, and that the withdrawal of the prayer for a decree on the award altered the nature of the suit; and finding that there was no evidence of misconduct on the part of the arbitrators, he passed a decree in the terms of the award. On a second appeal preferred by defendant No. 1:—*Held*, that this procedure was right.—15 Madr. 474.

Where a matter has been referred to arbitration, without the intervention of a Court of justice, by parties one of whom is an agriculturist, and an award has been made thereon, any person interested in the award may, without obtaining the conciliator's certificate, apply for the filing of the award under sec. 525 of the Code of Civil Procedure, the provisions of which are not superseded by sec. 47 of the Dekkhan Agriculturists' Relief Act, 1879.—8 Bom. 20.

*Held* (Oldfield, J., dissenting) that an appeal does not lie from an order disallowing an application to file an award under sec. 525 of the Civil Procedure Code. *Janki Tewari v. Gayan Tewari* distinguished by Stuart, C. J. The same case followed by Oldfield, J.—6 Al. 186.

No appeal lies from an order upon an application to file an award under sec. 525 of the Civil Procedure Code. Upon an application to file an award under sec. 525 of the Civil Procedure Code, the Court to which the application is made has no jurisdiction to enquire whether the defendant has agreed to the terms of the instrument referring the matter to arbitration, or whether the terms were obtained by fraud. When such objections are made, it is the duty of the Court to reject the application under sec. 525, and refer the parties to a regular suit. The proper Court-fee upon an application to file an award under sec. 525 is the Court-fee prescribed for applications, and not the Court-fee upon a plaint.—10 Cal. 11.

See I. L. R., 18 Cal. 414, noted under sec. 13; 10 Cal. 74, noted under sec. 520; 3 Al. 427, noted under sec. 2; 6 Cal. 251, noted under sec. 506; 13 Al. 366, noted under sec. 522.

**526.** If no ground, such as is mentioned or referred to in section 520 or section 521, be shown against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter.

**Notes.**

This section applies to Provincial Small Cause Courts.

No appeal lies from an order rejecting an application to file an award (Mitter, J., *dubitante*). Where the application was considered as a regular suit, the Judge was right in decreeing costs as in a regular suit.—2 B. L. R., (A. C.) 249.

*Held* by Melvill and Pinhey, JJ.—Before effect can be given to an award by execution-proceedings, there must be judgment according to the award, and a decree following thereon. A judgment-debt or, against whom an order for execution has been obtained behind his back, is not estopped from afterwards contending that there exists no decree which can be executed.—I. L. R., 7 Bom. 316.

The term “to show cause” in secs. 525 and 526 of the Code of Civil Procedure, Act X of 1877, does not mean merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. Matters in dispute between the parties were referred to seven arbitrators without the intervention of a Court. The arbitrators, or so many of them as could be got together, held sittings extending over some months, and at each sitting they came to a decision, either unanimously, or by a majority, on different questions submitted to them. These decisions were entered on the minutes of their proceedings; and, at their last sitting, the arbitrators all agreed, and informed the parties, that the decisions so arrived at constituted the final award, and gave directions for embodying those decisions in the shape of a formal document, which was drawn up on a subsequent day, but was signed by four only out of the seven arbitrators. The remaining arbitrators not being asked to sign it, they never did sign it. *Held* that the actual award was an oral award made by all the arbitrators on the last day of their joint sitting, and the drawing up of the formal award was a purely ministerial act to give effect to the previously completed judicial act. The omission to take the signatures of the minority of the arbitrators to the document which formed the record of the award was not fatal to the award. Amongst other matters, the arbitrators were asked to make a division of certain fields to which the parties were equally entitled. The arbitrators decided the other matters but, as regards the fields, said that it was inconvenient to do so in consequence of the rains, and ordered the parties “to receive the profits half and half, and to pay the assessment half and half.” *Held* that the award left undetermined one of the principal subjects of dispute; and, as the Court had no power to remit the award to the arbitrators, the applicant was entitled to a judgment, setting aside the order for filing the award.—6 Bom. 663.

See I. L. R., 3 Al. 427; 2 Bom. 553, noted under sec. 2; 9 Cal. 557; 3 Madr. Cal. 68 & 9 Cal. 575, noted under sec. 525; 4 Madr. 319, noted under sec. 522.

## CHAPTER XXXVIII.

## OF PROCEEDINGS ON AGREEMENT OF PARTIES.

**527.** Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing, stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,

(a) a sum of money fixed by the parties, or to be determined by the Court, shall be paid by one of the parties to the other of them ; or

(b) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

Every case stated under this section shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the question raised thereby.

NOTE.—This section applies to Provincial Small Cause Courts.

**528.** If the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

NOTE.—This section applies to Provincial Small Cause Courts.

**529.** The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested, as plaintiff or plaintiffs, and the other or others of them as defendant or defendants ; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

NOTE.—This section applies to Provincial Small Cause Courts.



**530.** When the agreement has been filed, the parties to  
Parties to be subject to its jurisdiction. it shall be subject to the jurisdiction of  
 the Court, and shall be bound by the  
 statements contained therein.

NOTE.—This section applies to Provincial Small Cause Courts.

**531.** The case shall be set down for hearing as a suit  
Hearing and disposal of case. instituted under Chapter V., the provi-  
 sions of which shall apply to such suit so  
 far as the same are applicable.

If the Court is satisfied, after an examination of the par-  
 ties, or after taking such evidence as it thinks fit,

(a) that the agreement was duly executed by them, and  
 (b) that they have a *bona fide* interest in the question sta-  
 ted therein, and

(c) that the same is fit to be decided,  
 it shall proceed to pronounce judgment thereon, in the  
 same way as in an ordinary suit, and upon the judgment so  
 given a decree shall follow, and shall be enforced in the man-  
 ner provided in this Code for the execution of decrees.

#### Notes.

This section applies to Provincial Small Cause Courts.  
 See I. L. R., 2 Bom. 553, noted under sec. 2.

### CHAPTER XXXXI.

#### OF SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

**532.** In any Court to which this section applies, all  
Institution of summary suits upon bills of exchange, &c. suits upon bills of exchange,  
 or promissory notes, may, in case the  
 plaintiff desires to proceed under this  
 chapter, be instituted by presenting a plaint in the form pres-  
 cribed by this Code; but the summons shall be in the form  
 contained in the fourth schedule hereto annexed, No. 172, or  
 in such other form as the High Court may, from time to time,  
 prescribe.

In any case in which the plaint and summons are in such  
 forms respectively, the defendant shall not appear or defend  
 the suit, unless he obtains leave from a Judge, as hereinafter  
 mentioned, so to appear and defend;

and in default of his obtaining such leave, or of appear-  
 ance and defence in pursuance thereof, the plaintiff shall be

entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by a rule of the High Court, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be enforced forthwith.

The defendant shall not be required to pay into Court the sum mentioned in the summons, or to give security therefor, unless the Court thinks his defence not to be *prima facie* sustainable, or feels reasonable doubt as to its good faith.

Payment into Court of sum mentioned in summons.

*Explanation.*—This section is not confined to cases in which the bill, hundi, or note sued upon, together with mere lapse of time, is sufficient to establish a *prima facie* right to recover.

#### Notes.

Where, in a suit under Act V. of 1867, the defendant is at such a distance as would make it impossible for him to put in an appearance within the seven days allowed by the Act, the Court will stay execution for a time long enough to allow him to appear. Suits can be brought under this Act against persons resident out of the jurisdiction.—3 B. L. R., (O. C.) 83.

In a suit under the Bills of Exchange Act, to recover Rs. 1,200 on a promissory note the Court gave a decree for Rs. 700 only, that being shown to have been the full consideration received for the note. There is nothing illegal in the true holder of a promissory note endorsing it to another person, with the express object of allowing him to sue upon it. *Held*, by PEACOCK, C. J., that the suit, being between two Hindus, must be decided by Hindu law. By Hindu law, a promissory note does not import consideration, and therefore, where it was proved that the defendant actually received only Rs. 700, that sum was all the plaintiff was allowed to recover. Act XXVIII of 1855 did not repeal the Hindu laws as to the rate of interest. Such rate is governed by the strict rules of Hindu law as originally laid down by Menu and other law-givers.—3 B. L. R., (O. C.) 130; 12 W. R., (O. C.) 9.

A plaint was presented by the endorsees of a promissory note in a suit under Act V of 1866. The note was endorsed as follows: "Received for the Chartered Mercantile Bank, J. M. Reid, Agent;" but the note had not been paid when it was presented, and the endorsement was struck out. PHEAR J.: "I cannot admit the plaint, unless evidence is given that the bill has not been paid, and to explain why the endorsement has been struck out. As under Act V. of 1866 evidence cannot be taken, the plaint cannot be admitted."—3 B. L. R., (O. C.) 146.

The Court will give leave to a defendant to appear and defend in suit under Act V of 1866, where he shows a defence apparently real; but if there is a doubt as to the *bona fides* of the defence, payment of money into Court will be ordered, or security directed to be given. If the Court has, in giving leave to defend, a discretion to order security for costs, not only where

it doubts the *bona fides* of the defence, but also if it considers the matter of defence raised is unnecessary, though allowable. If the plaintiff has not been heard at first against the defendant's application, the Court will always allow him to come in afterwards, and show that the leave ought not to have been granted, or, if granted at all, on more stringent terms.—6 B. L. R., App. 64.

In an undefended suit under Act V of 1866 on a promissory note for Rs. 342-15-6, which did not bear interest, the petition did not show that the suit could not have been brought in the Small Cause Court. The Court gave a decree for the amount sued for with costs on scale No. 1.—8 B. L. R., App. 10.

The defendant agreed with the plaintiff to take the plaintiff's mare "Bridesmaid" on "racing terms"—all winnings to be divided equally between them, and the plaintiff to have the option of claiming a one-fourth share of any lottery in which she might be brought by or on account of the defendant; the plaintiff to keep and train "Bridesmaid" for Rs. 60 a month. Subsequently the plaintiff agreed to keep and train, for a like sum for each horse, five horses belonging to the defendant. The defendant having been posted as a defaulter, the plaintiff at the defendant's request advanced certain sums to the Secretary of the Calcutta Races to enable the defendant's horses to run. As security for the repayment of such advances, and of a sum of Rs. 4,456-6 which had become due to the plaintiff, and which included an item of Rs. 1,149 for "balance of bets and lotteries" and a smaller sum in respect of certain tickets in the "Secundra Raffle," the defendant gave to the plaintiff a letter of hypothecation of his five horses, whereby it was agreed that, in case of the defendant's default, the plaintiff should be at liberty to sell the horses. The defendant made default, and the plaintiff advertised the horses for sale. On the same day the defendant wrote and gave to the plaintiff a letter, stating that, in consideration of the plaintiff's withdrawing the advertisement, and withdrawing the sale for a certain period, he would give the plaintiff a promissory note for the balance of his claim. A note for Rs. 7,000 was accordingly given by the defendant to the plaintiff. In the account delivered by the plaintiff to the defendant, he had by mistake over-credited the defendant with Rs. 744 in an item headed "cash received from the Secretary of the Calcutta Races, balance of racing account," and under which was included the following item: "I. O. U., deducted from lottery account, Rs. 480." On receiving information of the error, the defendant gave the plaintiff another promissory note for Rs. 744. In an action on the notes brought under Act V of 1866, the plaintiff obtained a decree, which was set aside on the defendant's application, and leave was given to him to appear and defend. Written statements were then filed on the plaintiff's application. *Held* by MACPHERSON, J., that the two promissory notes were given as a security for the whole of the plaintiff's claim; that the items for "balance of bets and lotteries" and for the "Secundra Raffle" being rendered illegal by the Lottery Act (V of 1844), part of the consideration for the notes was illegal, and no action was maintainable upon them. His Lordship, therefore, dismissed the plaintiff's suit. On appeal, *held* by COUCH, C. J., that the promissory note for Rs. 7,000 was not vitiated by the Rs. 1,149 being part of the consideration for it: although that portion of the latter sum which was won by lotteries was obtained by an illegal transaction, it was not illegal for the defendant to receive the money, and, having done so, to pay the plaintiff his share, or to promise to do so. But the money paid in respect of the "Secundra Raffle," being money paid in execution of an

illegal purpose, was an illegal consideration, which disentitled the plaintiff to recover on the note. *Held* further that the note for Rs. 744 was given upon good consideration. All the facts of the case being stated in the plaintiff's written statement, the Court might allow the plaint to be amended, and framed an issue as to what amount was due to the plaintiff in respect of the consideration for the note for Rs. 7,000. *Held* by MARKBY, J., that both notes were good, inasmuch as the promise contained in them did not spring from, nor was it the creature of, the original illegal agreement, but was a separate agreement.—9 B. L. R., 441 ; 18 W. R., 424.

Under the summary procedure in Bills of Exchange Act (V of 1866), the plaintiff is entitled to claim by his summons, and obtain by his decree, whatever sum, principal, and interest, is, on the legal construction of the instrument, demandable.—6. M. H. C. R., 257.

In a suit under Act V of 1866, the summons should be returned in the usual way ; and after the expiration of the required time, an order of the Court or a decree should be obtained.—1 Ind. Jur., N. S., 283.

Although Act V of 1866, sec. 3, only gives the defendant seven days to get leave to come in and defend an action on a bill, note, &c., the Court must be satisfied before granting a decree that the defendant has had a full opportunity to obtain leave to defend.—1 Ind. Jur., N. S., 395.

The High Court has power to extend the time within which a defendant in a suit brought under chap. xxxix, (summary procedure on negotiable instruments) of the Civil Procedure Code can come in and obtain leave to defend : therefore, in a suit in which it appeared that the defendant resided at Peshawar, the time for the defendant to obtain leave from the Court to appear and defend was extended to 28 days.—I. L. R., 3 Cal. 539.

See I. L. R., 16 Cal. 804, noted under sec. 35 of the Negotiable Instruments Act.

**533.** The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon the defendant paying into Court the sum mentioned in the summons, or upon affidavits satisfactory to the Court, which disclose a defence or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application, and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit.

**534.** After decree, the Court may, under special circumstances, set aside the decree, and, if necessary, stay or set aside execution, and may give leave to appear to the summons and to defend the suit, if it seem reasonable to the Court so to do, and on such terms as the Court thinks fit.

#### Note.

No appeal lies under Act X of 1877 from an order made under that Act rejecting an application for an order setting aside a decree made *ex parte* against a defendant.—I. L. R., 1 Al. (F. B.) 748.

**535.** In any proceeding under this chapter the Court may order the bill, hundi, or note on which the suit is founded, to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Power to order bill, &c., to be deposited with officer of Court.

NOTE.—See I. L. R., 6 Al. 284, noted under sec. 30.

**536.** The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this chapter for the recovery of the amount of such bill or note.

Recovery of cost of noting non-acceptance of dishonoured bill or note.

**537.** Except as provided by sections 532 to 536 (both inclusive), the procedure in suits under this chapter shall be the same as the procedure in suits instituted under Chapter V.

Procedure in suits under chapter.

Application of chapter.

**538.** Sections 532 to 537 (both inclusive) apply only to—

(a) the High Courts of Judicature at Fort William, Madras, and Bombay ;

(b) the Court of the Recorder of Rangoon ;

(c) the Courts of Small Cause in Calcutta, Madras, and Bombay ;

(d) the Court of the Judge of Karachi ; and

(e) any other Court having ordinary original civil jurisdiction, to which the Local Government may, by notification in the official Gazette, apply them.

In case of such application the Local Government may direct by whom any of the powers and duties incident to the provisions so applied shall be exercised and performed, and make any rules which it thinks requisite for carrying into operation the provisions so applied.

Within one month after such notification has been published, such provisions shall apply accordingly, and the rules so made shall have the force of law.

The Local Government may, from time to time, alter or cancel any such notification.

**Note.**

A plaintiff suing on a bill of exchange the drawer, acceptor, and endorser, where the endorsement has been made before maturity and without restriction, is entitled to a decree against all three defendants; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal.—I. L. R., 16 Cal. 804.

**CHAPTER XL.****OF SUITS RELATING TO PUBLIC CHARITIES.**

**539.** In case of any alleged breach of any express or constructive trusts created for public charitable or religious purposes, or when—

When suits relating to public charities may be brought.

ever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex officio*, or two more persons "having an interest"\* in the trust, and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) appointing new trustees under the trust ;
  - (b) vesting any property in the trustees under the trust ;
  - (c) declaring the proportions in which its objects are entitled ;
  - (d) authorizing the whole or any part of its property to be let, sold, mortgaged, or exchanged ;
  - (e) settling a scheme for its management ;
- or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appointed in this behalf.

**Notes.**

The plaintiffs, having an interest as the managers of a temple in seeing to the due performance of the religious part of the administration of a certain charity endowed for the sustenance of Brahmans and connected with the temple, and being further interested in its administration as Brahmans entitled under certain circumstances to share in the benefits of the charity, sued under sec. 539 of the Code of Civil Procedure to remove defendant

\* The words quoted have been substituted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 44, for the words, "having a direct interest."



from the trusteeship of the charity on the ground of fraudulent mismanagement. *Held* that the plaintiffs' interest did not support the suit. *Quære*.—Whether a suit for the removal of a trustee will lie under the above section. I. L. R., 12 Madr. 157.

In a suit under Civil Procedure Code, sec. 539, in the District Court to remove the hereditary trustee of a public trust for breach of trust, the District Judge held that he had no jurisdiction to pass the decree prayed for. The plaintiff appealed and the appeal came on before two Judges, who differed in opinion. The appeal was thereupon referred under Civil Pro. Code, sec. 575, and was heard by a Bench of three Judges, including the Judges who first heard the appeal:—*Held*, by BEST and WEIR, J.J. (MUTTUSAMI AYYAR, J., dissentiente) that the District Judge had jurisdiction to remove the trustee hostilely for breach of trust in a suit under Civil Procedure Code, sec. 539. *Narasimha v. Ayyan* (I. L. R., 12 Madr. 157) considered.—14 Madr. 186.

A trust for a Hindu idol and temple is to be regarded in India as one created "for public charitable purposes" within the meaning of sec. 539 of the Code of Civil Procedure (Act X of 1877). The Hindu law recognizes, not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons or subjects called foundations. A Hindu who wishes to establish a religious or charitable institution may, according to his law, express his purpose and endow it, and the ruler will give effect to the bounty, or at least protect it. A trust is not required for this purpose as it is by English law. Those who take charge of gifts made to a religious or charitable institution—whether such gifts consists of cash, jewels, or land—incur thereby a responsibility for their due application to the purposes of the institution. They are answerable as trustees would be, even though they have not consciously accepted a trust; and a remedy may be sought against them for maladministration by a suit open to any one interested as under the Roman system in a like case by means of a *popularis actio*. The plaintiffs, as relators, filed this suit, under sec. 539 of the Code of Civil Procedure (Act X. of 1877), against the defendants as trustees of the temple of Shri Ranchhod Raiji at Dakor. The plaintiffs were five in number. The first plaintiff was the hereditary manager of the temple and its appendant villages. The other plaintiffs were priests residing at Dakor, who ordinarily took charge of pilgrims visiting the shrine, and performed worship of the idol on their behalf. The defendants were the *shevaks* or ministers of the idol—about one hundred and fifty in number—who took office by hereditary descent. The remained in constant attendance on the idol, performed the daily services at the temple, collected all the offerings made at the shrine, and kept them in a *bhandar* or store-room. The god Shri Ranchhod Raiji was held in great veneration by the followers of the Vaishnava religion throughout Western India. Every full moon, thousands of pilgrims resorted to the shrine, and made offerings to the deity, of cash, ornaments, clothes, and other articles, amounting in value to about a lakh of rupees in the course of a year. Besides these offerings the temple enjoyed a grant, in perpetuity, of the revenues of several *inam* villages, of which Dakor and Kanjri yielded the largest income. The plaintiffs sued as persons interested in the maintenance of this public religious and charitable institution, and prayed that the Court would make the defendants, as recipients of the offerings at the idol's shrine, accountable, as trustees, for the right disposal of the property thus acquired. The plaintiffs alleged that the income of the temple had largely increased, and had been wrongly appropriated by the defen-

dants to their personal purposes. They, therefore, prayed for an account, for the appointment of a receiver, for the removal of the *shevaks* from their office, and for the settlement of a scheme of future management. The defendants answered (*inter alia*) that the plaintiffs had not such a direct interest in the institution as to entitle them to sue under sec. 539 of Act X of 1877; that they themselves were owners of the idol and of the idol's property, and that, as such, they were not liable to render an account of the offerings they had collected at the shrine. They also contended that they were not liable to be removed from their offices, which they and their ancestors had held for several centuries past. The District Judge dismissed the suit, on the preliminary ground that, except the first plaintiff, who was a hereditary manager of the temple, the other plaintiffs had not such a direct interest in the charity as to entitle them to sue under sec. 539 of the Code of Civil Procedure (Act X of 1877). *Held*, reversing the decision of the District Judge, the plaintiffs Nos. 2—5, as priests residing at Dakor, and taking part in the worship of the idol, were directly interested in its due performance and its maintenance. Though they might not be trustees, they were clearly among those who, in practice, benefited by the execution of the trust. They had thus an undeniable *locus standi* as relators, and the suit could proceed at their instance. *Held*, further, that the *sevaks* were not the owners of the offerings made to the idol. As recipients of those offerings they were responsible for their due application to the purposes of the foundation. They were liable, as trustees, to render an account of their management. The Court accordingly directed the District Judge (1) to take steps either by appointing a receiver, or otherwise, in his discretion, for guarding the property of the temple; (2) to take an account of the property and of the receipts and disbursements of the temple; (3) to make the requisite orders for recovering property appropriated by the *shevaks*; and (4) to draw up a scheme for the future management of the temple and its funds, regard being had to the established practice of the institution and to the position of the *shevaks* and of other persons connected with it. The jurisdiction of the Civil Courts in matters of this kind discussed. The plaintiffs had applied, during the hearing of the case in the Court of first instance, for the production of certain books of account of the defendants. The defendants resisted the application, and the Court refused to order the books to be produced. The suit having been dismissed, the plaintiffs appealed, and in the Court of appeal the defendants applied to be permitted to put in evidence the books which they had refused to produce. *Held* that the evidence could not be admitted.—12 Bom. 247.

Sec. 539 of the Code Civil Procedure (Act XIV of 1882) has no application to a suit brought by the trustees of a religious endowment to eject persons in wrongful possession of the trust property. The plaintiffs sued, as trustees of a temple, to recover certain trust property from defendants, who were alleged to be in wrongful possession. The defendants pleaded that they were owners of the property in dispute and applied the income thereof for the purposes of the temple. They disputed the plaintiffs' title to the management or possession of the same. The Subordinate Judge, who tried the case in the first instance, held that the defendants were trustees with respect to the property in their possession, and that the suit was one of the nature contemplated by sec. 539 of the Code of Civil Procedure (Act XIV of 1882). He, therefore, returned the plaint for presentation to the District Judge. This order was confirmed on appeal. *Held*, that Subordinate Judge had jurisdiction to entertain the suit. *Held*, also, the High Court had power, under sec. 622 of the Code of Civil Pro-

cedure, to interfere in this case, the Subordinate Judge having failed to exercise a jurisdiction vested in him by law. *Held*, also, that the suit was not one falling under sec. 539 of the Code of Civil Procedure.—15 Bom. 148.

R instituted a suit with the Collector's sanction to compel the performance of a charitable trust; D was subsequently joined as plaintiff, having also obtained the Collector's sanction to institute the suit:—*Held*, that the sanction obtained by D related back to the institution of the suit.—10 Madr. 185.

A church at Palayur and the property appertaining to it were in the possession of certain of the yogakars or parishioners, who had been elected kaikars or church-wardens, but whose election had since been superseded in favour of three other persons who now sued to recover possession. The plaintiffs were Roman Catholics; and with the three persons above referred to were joined as plaintiffs the Vicar Apostolic, the Vicar appointed to the church by him, and two other persons representing the Roman Catholic yogakars. The defendants were Syro-Chaldean Christians, and with the two persons above referred to were joined the Chor Equisopa, the Vicar appointed to the church by him, and four persons representing the other yogakars. The plaint was framed under Civil Procedure Code, sec. 539, and contained, besides a prayer for possession, prayers for a declaration that the church, &c., was held on trust for worship according to the faith and discipline of the Church of Rome, and for injunctions against the defendants. The suit was tried by the District Judge in whose Court it was instituted, although the defendants pleaded to his jurisdiction on the ground that Civil Procedure Code, sec. 539, was inapplicable. He passed a decree for the plaintiffs, holding that the church, &c., was dedicated to the trust above stated, although it had been diverted from the purposes of that trust for a time. In coming to this conclusion, he referred to a Portuguese work dated 1606, "*India Orientalis Christiana*" published in 1794, and Hough's "*History of Christianity in India*" published in 1839:—*Held*, (1) that the suit not being one brought by beneficiaries against trustees, or for any of the purposes mentioned in Civil Procedure Code, sec. 539, that section had no application; (2) that, although the suit should accordingly have been brought in the Subordinate Court, the District Judge had jurisdiction to try it; (3) that the District Judge was justified in referring to the books above mentioned; (4) that the decree was right, on its appearing that the church, &c., had been held on the above trust from 1599 to 1882 with a doubtful interruption for one year, although the original trust may have been different.—15 Madr. 241.

Sec. 539 of the Civil Procedure Code, 1877, does not apply to the case of an endowment for purposes religious as well as charitable.—5 Madr. 383.

Two out of five trustees appointed by a will to administer a public charitable trust brought this suit against the remaining three trustees praying (i) that the first defendant might be ordered to account for a specific sum of money of which it was alleged he had committed a breach of trust, (ii) that the first defendant might be removed from the office of trustee and some other person appointed in his stead, and (iii) for such other or further relief as the nature of the case might require. The consent in writing of the Advocate-General to the institution of the suit under sec. 539 of the Civil Procedure Code (XIV of 1882) had not been obtained. *Held*, that the suit was one which fell within the purview of sec. 539, and consequently, in the absence of such consent, was not maintainable.—16 Bom. 626.

Worshippers or devotees of an idol are entitled to bring a suit, com

plaining of a breach of trust, with reference to the funds or property belonging to the idol or appendant to its temple. *Quære*.—Whether, if the suit had been brought after Act X of 1877 came into force, sec. 539 of that Act could be held applicable to the *devasthan* of an idol or temple, dedicated merely to the purposes of such idol or temple?—3 Bom. 27.

The plaintiffs sued as relators, under section 539 of the Code of Civil Procedure (Act XIV of 1882), to have the defendants removed from the management of a religious endowment, called the “Chinchvad *savasthan*,” on the ground that they had mismanaged and misappropriated the trust funds in their hands. The plaintiffs also prayed for the appointment of new trustees, and for the settlement of a new scheme of management under the direction of the Court. The plaintiffs and defendant were the descendants of Shri Morya Gosavi, the original founder of the *savasthan*. Shri Morya Gosavi was a devotee of the deity Shri Mangal Marti. He dedicated a temple to the deity at the village of Chinchvad, and established an *annachhatra* and *sadavart* for feeding the poor and the destitute. He buried himself alive, and over his tomb a temple was built to perpetuate his memory. The Raja of Satara conferred on his descendants from time to time grants of lands, villages and *varshasans* for the maintenance of the shrine and of the charities connected with it. Votaries of the god Shri Mangal Murti visited the shrine in large numbers and took part in the annual festivals and celebrations held in honour of the founder of the *savasthan*. In course of time the Chinchvad *savasthan* became one of the most popular sacerdotal institutions of the Deccan. In 1744 the Peshwa made a *tahinama* (or award) by which he set apart one-half of the *savasthan* property exclusively for religious and charitable purposes, and distributed the other half among the descendants of the founder, to provide for their temporal wants. Subsequently to the date of this award, fresh grants were made to the manager of the *savasthan* by the ruling authorities of the day. In 1774 and 1776 A. D. the new acquisitions were divided on the principle adopted in the Peshwa’s award—one-half being reserved exclusively for the *savasthan*, the other half distributed among the heirs of the grantee. In 1874 the defendant No. 1 succeeded to the office of manager and trustee of the *savasthan*. Within a few years after entering upon his office, the defendant No. 1 in conjunction with his son, defendant No. 2, incurred heavy debts, mortgaged several villages belonging to the *savasthan*, and dealt with the *savasthan* income as if it was his own absolute property. The plaintiffs filed the present suit with the consent of the Advocate-General in 1883. The defendants pleaded (*inter alia*) that the property in suit was not burdened with a public religious or charitable trust; that they were not trustees, but owners, of the *savasthan*; and that the plaintiffs had not such direct interest in the property as to entitle them to sue under sec. 539 of the Civil Procedure (Act XIV of 1882). The district Judge, who tried the case, found that the *savasthan* was a public religious and charitable institution; that the defendants were trustees in charge of the *savasthan* property, and that they were guilty of such gross misconduct as to make them unfit to act as trustees in future. He, therefore, passed a decree, directing the defendants to be removed from their office as trustees, appointed a new trustee in their place and framed a scheme for the future management of the *savasthan*. *Held*, on the evidence, that the management of the Chinchvad *savasthan*—consisting of the sacred shrines at the villages of Chinchvad, Moregav, Theur and Sidhatek, with their endowments—constituted a public religious and charitable trust within the contemplation of section 539 of the Code of Civil Procedure. *Held*, also, that the plain-

tiffs, being worshippers and devotees of the god Shri Mangal Murti, and being also descendants of the original founder of the endowment, had a direct interest in the trust, entitling them to sue under section 539 of the Code of Civil Procedure. *Held*, further, that the defendants' assertion of their right to treat the trust property as their private estate, and to apply the trust funds to their private purposes, was sufficient to justify their removal from the trust. *Held*, further, upon the construction of the Peshwa's *tahanama* (or award), that it was the intention of the governing power in 1744 A. D. that thenceforth the Chinchvad *savasthan*—consisting of the shrines at Chinchvad, Moregav, Theur and Sidhatek—should constitute a public *devasthan*, and that in setting apart a moiety of the property for the *savasthan*, the object was to provide a fund for the support of the four shrines and the expenses of the customary festivals, as well as of the *anna-chhatra* established at Chinchvad.—15 Bom. 612.

Certain Mahomedans sued to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejectment of the purchaser. *Held* that the plaintiffs, as Mahomedans entitled to frequent the mosque and to use the other religious buildings connected with the endowment, could maintain the suit, and sec. 539 of the Civil Procedure Code had no application to the case, the endowment being a religious institution, within the meaning of sec. 24 of Act VI of 1871, and therefore governed by Mahomedan Law.—5 Al. 497.

See I. L. R., 8 Cal. 32 & 11, Al. 18, noted under sec. 30 ; 14 Madr. 1, noted under sec. 14 of the Religious Endowments Act.

## PART VI. OF APPEALS.

### CHAPTER XLI.

#### OF APPEALS FROM ORIGINAL DECREES.

**540.** Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts.

Appeal to lie from all original decrees, except when expressly prohibited.

An appeal may lie under this section from an original decree passed *ex parte*.

#### Notes.

In this case the two following points were discussed : 1. What will be considered "sufficient cause" for delay in filing an appeal which is too late under sec. 333 of Act VIII. of 1859 ? What powers the Appellate Court has to reject an appeal as out of time after having already admitted it ?—4 B. L. R., App. 84 ; 13 W. R., 245.



In calculating the ninety days allowed for an appeal by Act VIII. of 1859, sec. 333, the period between the date on which judgment was pronounced and that on which the decree was signed by the Judge was allowed to be deducted, as coming within the words, "exclusive of such time as may be requisite for obtaining a copy of the decree" in that section.—18 W. R., 512.

An order made under sec. 37, Bengal Rent Act (Beng. Act VIII of 1869), is a decree within the meaning of the definition contained in the Civil Procedure Code (Act X of 1877), and an appeal lies therefrom under the provisions of sec. 540.—I. L. R., 7 Cal. 684.

An appellant, who has obtained a decree setting aside the decision of the Court of first instance, is not entitled to a further appeal to the High Court, on the ground that he is dissatisfied with some of the findings recorded in the judgment of the Lower Appellate Court, an appeal from an appellate decree under sec. 584 being strictly restricted to matters contained in the decree alone.—6 Cal. 206.

Applications for the extension of the period for the submission of an award and orders thereon should be made in writing and recorded. When a party has been prejudiced by having the time allowed for taking objections to an award curtailed by the Court, no appeal lies, but a review should be granted by the Court of first instance.—3 Madr. 59.

Nothing remained to be done in a suit except to her arguments, for which a time had been appointed. Neither the plaintiff nor his pleader appeared at the appointed time. The Court consequently dismissed the suit. *Held* that its decree was appealable under sec. 540 of Act X of 1877, and the lower Appellate Court should have entertained the appeal and disposed of it with reference to the provisions of sec. 565, and secs. 102 and 103 were not applicable to the circumstances.—3 Al. 292.

Where the Court of first instance held that the land sued for was not included in the defendant's garden, and they were not the owners of it; but that they could not be ejected from it, as they were in possession under a lease which had not expired, and that the question whether such land was included, in the defendant's garden, and that they were the owners of it, was not *res-judicata*; and the Court made a decree dismissing the suit in these terms, "Ordered that the plaintiff's claim as it stands at present be dismissed." *Held* that the defendants were entitled, under Act X of 1877, sec. 540, to appeal from such decree.—2 Al. (F. B.) 497.

Where a Judge, after the defendant's written statement was put in, framed certain preliminary issues, and decided them, directing part of plaintiff's claim to be dismissed, and part to be tried on the merits (which trial might necessitate the taking of an account from defendant). *Held* that no appeal lies from such an order either on the part of the plaintiff because the Civil Procedure Code only allows an appeal against a portion of the decision when there has been a decision relating to the disposal of the entire suit, or on the part of defendant inasmuch as there had been no final order to take an account.—3 Madr. 13.

At the hearing of a suit, a party, though he had sufficient warning of what was necessary, did not take the proper steps to cause the production of the documentary, and only admissible, evidence of a material fact which had to be proved by him; and the decision was against him. The record of another proceeding would, it was said, have supplied this evidence; and an application had been previously made on which the order of the Judge was that "the matter would be decided when the case was tried, and



the record would be sent for, if necessary." No further application to the Court was made, and no attempt to supply this evidence. *Held* that if there had been, as there might have been, an oversight by the party in not calling the attention of the Judge to the above order, and in not tendering the evidence, there had been no omission on the Judge's part affording ground for appeal.—9 Cal. 260.

The plaintiffs, the widow and son respectively of N, deceased, claimed immoveable property inherited from his father by N, and also immoveable property which had devolved upon N from his brother, who had predeceased him, and mesne-profits of such properties. The Court of first instance, finding that the claim to the former property was admitted, and that to the latter was not denied, but resisted as barred by sec. 13 of Act X of 1877, and holding it not to be so barred, made a decree returning the plaint to the plaintiffs that they might, after correcting it, file it either in the Revenue Court in regard to the profits of the former property, or in the Civil Court for possession of the latter property. *Held* that, although the claim of the plaintiffs was not either decreed or dismissed, yet as the right and title asserted by them to such properties was implicitly recognised by such decree, the defendants were entitled to appeal from it.—3 Al. 75.

M sued K and J to enforce a right of pre-emption in respect of property which he alleged K had sold to J. K denied that she had sold such property to J. J set up as a defence that M had waived his right of pre-emption. The Court of first instance dismissed the suit on the ground that the alleged sale had not taken place. J appealed, making M and K respondents. The lower Appellate Court dismissed the appeal, also holding that the alleged sale had not taken place. J then appealed to the High Court, making K the respondent. *Held* that neither the appeal from the original decree in suit, nor the appeal from the appellate decree therein, was admissible. *Held* also that the finding as to the alleged sale was one between the plaintiff and defendants in the suit, and not between the defendant-vendor and the defendant-vendee who were litigating, and would not bar adjudication of the matter in issue between them in a suit brought by the latter for the establishment of the sale.—3 Al. (F. B.) 152.

The lower Appellate Court (Subordinate Judge) decided on appeal by the defendant from the decree of the Court of first instance (Munsiff) that the Court of first instance had no jurisdiction to entertain the suit, as the value of the subject-matter of the suit exceeded the pecuniary limits of its jurisdiction; and ordered that "the appellant's appeal be decreed, the decision of the Munsif be reversed, and the record of the case be sent to the Munsif to return the plaint to the plaintiff for presentation to the proper Court." The plaintiff appealed to the High Court from such order as an order returning a plaint to be presented to the proper Court. *Held* that such order could not be regarded as one to which art. 6 of sec. 588, Act X of 1877, was applicable. That relates to orders returning plaints for amendment or to be presented to the proper Court passed by a Court of first instance, and not to an order by an Appellate Court upon an appeal to it from the decree of a Court of first instance of general grounds. The plaintiffs proper course was to have preferred a second appeal.—3 Al. 456.

See I. L. R., 3 Al. 382, 3 Al. 427 and 13 Al. 290, noted under sec. 2; 3 Madr. 264 and 4 Al. 387, noted under sec. 108; 16 Bom. 676, noted under sec. 220; 5 Bom. 45, noted under sec. 244; 13 Al. 569, noted under sec. 293; 16 Cal. 250, noted under Art. 179 of the Limitation Act.

**541.** The appeal shall be made in the form of a memorandum in writing presented by the appellant, and shall be accompanied by a

Form of appeal.

What to accompany memorandum.

copy of the decree appealed against and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

Such memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed against, without any argument or narrative ; and such grounds shall be numbered consecutively.

Contents of memorandum.

NOTE.—See I. L. R., 4 Bom. 414, noted under sec. 409.

**542.** The appellant shall not, without the leave of the

Appellant confined to grounds set out.

Court, urge or be heard in support of any other ground of objection ; but the Court, in deciding the appeal, shall not be confined to the grounds set forth by the appellant :

Provided that the Court shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of contesting the case on that ground.

#### Notes

*Held* by PEARSON, J., and STRAIGHT, J. SPANKIE, J, dissenting), as follows : That, in disposing of a second appeal, the High Court is competent under sec. 542 of Act X of 1877, to consider the question whether the plaintiff has any cause of action or not, although such question has not been raised by the defendant-appellant in the Courts below or in his memorandum of second appeal, but is raised for the first time at the hearing of such appeal. That the cause of action of a person claiming the right of pre-emption in the case of a conditional sale arise, when the conditional sale takes place, and not when it becomes absolute ; and therefore, where a conditional sale took place in 1867, and after it had become absolute a person sued to enforce his right of pre-emption in respect of the property sold, basing his claim upon a special agreement made in the interval between the date of the conditional sale and the date that it became absolute, and alleging that his cause of action arose on the latter date, that the suit was not maintainable, the plaintiff having no right of pre-emption at the time of the conditional sale.—I. L. R., 2 Al. 884.

Section 542 of the Code of Civil Procedure was intended to confer upon the Court a power exerciseable by it alone ; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice.—13 Al. 381.

See I. L. R., 4 Al. 69, noted under sec. 13.

**543.** If the memorandum of appeal be not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the

Rejection or amendment of memorandum.

appellant for the purpose of being amended within a time to be fixed by the Court, or be amended then and there.

When the Court rejects under this section any memorandum, it shall record the reasons for such rejection.

When a memorandum of appeal is amended under this section, the Judge, or such officer as he appoints in this behalf, shall attest the amendment by his signature.

#### Notes.

Whenever a memorandum of appeal is rejected under the discretionary power vested in the Court, a judicial order to that effect, and the reasons for the same, ought to be recorded.—1 Ind. Jur., (O. S.), 121.

An appeal is not admissible against an order passed under sec. 336, Act VIII. of 1859.—11 W. R., 556.

**544.** Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal against the whole decree, and thereupon the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants, as the case may be.

#### Notes.

In a suit for recovery of Rs. 300 due on a bond, the defendants denied the execution of the bond and the receipt of the consideration. The Court of first instance decreed the suit, which, on appeal by one of the defendants, was dismissed. *Held* that, under sec. 337, Act VIII. of 1859, the Judge had no power on appeal by one defendant to set aside a decree against the other.—3 B. L. R., App. 41; 11 W. R., 449; Marshall's Rep., 106; 1 Hay's Rep., 183.

Power of the Court of Appeal, under sec. 337 of Act VIII. of 1859, to reverse the whole of the decree of the Court below upon the appeal of one only of the parties against whom the decree was passed.—7 B. L. R., App. 28; 9 W. R., 499.

D. C. S., the zemindar, brought a suit against B, a ryot, for recovery of arrears of rent valued below Rs. 100. B set up in defence that the rent was not payable to D. C. S., but to N. C. A., the mokurraridar. N. C. A., who claimed under a mokurrari title, and alleged that he was in receipt of the rents from the ryots, was made a party under sec. 73, Act VIII. of 1859. The Munsif passed a decree in favour of the plaintiff. On appeal by N. C. A., which was heard and decided by the Subordinate Judge on reference by the District Judge, the decree of the first Court was reversed, and the suit dismissed. On appeal to the High Court, *held* that N. C. A. was properly made a defendant to the suit, and that he could prefer an appeal from the decree of the Court of first instance, and that the Court of Appeal could, on his appeal, set aside the whole decree. A special appeal lay to the High Court; the words "District Judge" in sec. 102 of Act VIII. of 1869 (B. G.) do not include a Subordinate Judge to whom, under Act XVI. of 1868, or

Act VI. of 1871, the District Judge may make over appeals filed in his Court. The only issue to be tried was whether the relation of landlord and tenant subsisted between D. C. S. and B.—8 B. L. R., 180; 16 W. R., 235.

The plaintiff sued on a mortgage-bond executed by the first defendant. The second defendant, who claimed the property under a mortgage from the first defendant, was admitted a defendant on his own application, but afterwards excluded from the suit. Before this was done, he had incurred certain costs which, by the Munsif's decree, he was ordered to bear himself. Upon appeal by the first defendant, the Civil Judge found that the mortgage-bond sued upon was not proved, dismissed the suit, and ordered the plaintiff to pay all costs, those of the second defendant included. *Held* that, under sec. 337 of the Civil Procedure Code, it was competent to the Civil Judge so to modify the Munsif's decree, as the main ground of the whole decision, *vis.*, the validity of the mortgage-bond, affected all the defendants in common, and the appeal of the first defendant, and the decision of the Appellate Court, had reference to that common ground.—4 M. H. C. R., 26.

Where a suit at the time of institution within the jurisdiction of the Court in which it is brought has undergone a substantial change, and become a suit which by law requires the order of a superior tribunal for its hearing in the original Court, and such order has not been obtained, plaintiff cannot subsequently on appeal be allowed to revert to the original form of the suit for the purpose of upholding the lower Court's judgment as far as regards the original defendants.—3 N.-W. P. H. C. R., 199.

N sued S and others for partition of a share of certain land and claimed mesne-profits from other defendants, who were tenants of the land. S obtained a decree by consent for her share, and a sum of 99 Rupees was decreed to her against the tenants for mesne profits. Against this decree the tenants appealed. The Subordinate Judge, finding that the subject matter of the suit, the land of which partition was claimed, exceeded the jurisdiction of the Munsif, reversed the decree of the Munsif, and directed the plaint to be returned for presentation in the proper Court. It was contended, on appeal to the High Court, that the Subordinate Judge could not set aside the decree against the tenants for mesne-profits. *Held* that, as the Munsif's Court had no jurisdiction to entertain the suit for partition, it could make no decree for mesne-profits.—I. L. R., 11 Madr. 197.

S, having mortgaged land to K as security for a debt, sold it to V, who undertook to pay the debt. K, alleging that C had undertaken either to make V pay the debt or to execute a mortgage of his own land to secure its repayment, and that V had dispossessed him, sued S, V, and C to recover the debt by sale of the land mortgaged, mesne-profits from V, and costs from S, V, and C. The district Munsif decreed payment against S; mesne-profits, and in default of payment by S, a sale of the land against V; and costs against S, V, and C. V, and C. appealed against this decree. The Subordinate Judge found that the debt had been paid, and held that, even if the debt had not been paid, K had no cause of action against V. or S, but, if at all, against C, and dismissed the suit as against V. The Subordinate Judge also held that he had no jurisdiction to interfere with the decree against S, and saw no reason to interfere with the decree against C. S. appealed against this decree:—*Held* that, even if S was not entitled to appeal in order to have the decree against him set aside, the error of the Subordinate Judge could be corrected under sec. 622 of the Code of Civil Procedure by a direction to exercise the discretionary power given by sec. 544 of the said Code.—8 Madr. 192.

A and B brought a suit against C, and obtained a decree awarding a part of their claim. B appealed, and the Appellate Court reversed the decree, and rejected the plaintiff's claim altogether. Subsequently A, who had not joined in the appeal, applied for execution of the original decree. *Held*, that although A had not been a party to the appeal, he was bound by the decision of the Appellate Court, and was not entitled to take out execution. —11 Bom. 596.

The Court of Appeal has power under Act VIII of 1859, sec. 337 (corresponding with Act X of 1877, sec. 544), to draw up what would be a fair decree as regards all the parties to a suit, although some of them may not have appealed.—3 Cal. 738. But see 2 P. C. R., 766; 11 B. L. R., 375; L. R., I. A. Sup., 135.

*Of Staying and Executing Decrees under Appeal.*

**545.** Execution of a decree shall not be stayed by rea-

Execution of decree not stayed solely by reason of appeal.

son only of an appeal having been preferred against the decree; but the Appellate Court may, for sufficient cause,

order the execution to be stayed.

If an application be made for stay of execution of an ap-

Stay of execution of appealable decree before time for appealing has expired.

pealable decree before the expiry of the time allowed for appealing therefrom, the Court which passed the decree may,

for sufficient cause, order the execution to be stayed:

Provided that no order shall be made under this section unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

**Notes.**

A party applying to stay execution of a decree under sec. 338 on giving security is bound to show sufficient grounds to the Court for staying it, whether the decree is in respect of moveable or immoveable property.—B. L. R., Sup. Vol., 1007; 9 W. R., 448.

When an appellate Court reverses a decree in favour of the plaintiff in a suit, it ought not to stay execution of its own decree under sec. 338 of Act VIII. of 1859. Order of District Court stying execution under such circumstances set aside.—10 Bom. H. C. R. (A. C.) 411.

The Court which passed a certain decree ordered execution thereof to be stayed pending appeal, on the debtor's furnishing security to the amount of Rs. 70,000, under the provisions of sec. 545 of the Code of Civil Procedure. The debtor objected to the amount of security required, and appealed to the High Court on that ground. The decree-holder contended that

no appeal lay. *Held* that the order was appealable. *Held* also on the facts that the security required was excessive.—I. L. R., 12 Cal. 624.

A brought a suit and obtained a decree against B on a mortgage bond in the Court of a Subordinate Judge, which decree was confirmed by the High Court on appeal. A then applied for execution. In the execution proceedings the sons of B intervened claiming a portion of the properties attached; this claim was dismissed, and the sons of B brought a regular suit before the same Subordinate Judge to have their rights to the property declared, and obtained an interim injunction restraining A from executing his decree pending the decision of their suit. This suit was dismissed, and the sons of B appealed to the High Court. A again applied for execution of his mortgage decree, whereupon the sons of B applied for a further injunction restraining A from executing his decree pending their appeal to the High Court, this application was granted :—*Held*, that the Subordinate Judge had no right to restrain the decree-holder from executing his decree, merely on the possibility of the appellate Court reversing his decision.—11 Cal. 146.

An order by a District Judge, under sec. 545 of the Civil Procedure Code (Act XIV of 1882), refusing to stay execution, is a decree as defined in sec. 2, and is therefore appealable.—12 Bom. 279.

A final order for staying the execution of a decree should not be made without giving the decree-holder notice of the judgment-debtor's application. The application should be supported by an affidavit.—15 Bom. 536.

The present applicant having taken out execution of a decree held by him, and the judgment-debtor having appealed to the District Court, the two opponents became sureties under sec. 338 of Act VIII of 1859, that the judgment-debtor would "obey and fulfil all such orders and decrees as should be given against him in appeal," and, in default of his so doing, they bound themselves, "to pay jointly and severally, at the order of the Court, all such sums as the Court should, to the extent of Rs. 812-8-0, adjudge." *Held* that the obligation of the sureties to fulfil the decree of the Appellate Court was not confined to the first decree of that Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal.—2 Bom. 654.

See I. L. R., 6 Madr. 98, noted under sec. 280.

**546.** If an order is made for the execution of a decree against which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be given for the restitution of any property which may be taken in execution of the decree, or for the payment of the value of such property, and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may, for like cause, direct the Court which passed the decree to take such security.

And when an order has been passed for the sale of immoveable property in execution of a decree for money, and an appeal is pending against such decree, the sale shall, on the application of the judgment-debtor, be stayed until the

Security in case of order for execution of decree appealed against.



appeal is disposed of, on such terms as to giving security or otherwise as the Court which passed the decree thinks fit.

**Notes.**

*After property the subject of litigation has been given over in execution of a decree to the plaintiff, it is not within the scope of sec. 36 of Act XXIII. of 1861 to exact security from the plaintiff for the restitution of such property in the event of a successful appeal.*—7 Bom. H. C. R., (A.C.) 122.

A surety who executes a security-bond (in Form No. 82 of the High Court Circulars) under sec. 36 of Act XXIII. of 1861 is liable for the fulfilment of the decree, not only of the Court of regular, but also of that of the Court of special appeal.—10 Bom. H. C. R., (A. C.) 1.

See I. L. R., 8 Cal. 477, noted under section 2; 13 Madr. 1, noted under section 253.

**547.** No such security as is mentioned in sections 545 and 546 shall be required from the Secretary of State for India in Council, or (when Government has undertaken the defence of the suit) from any public officer sued in respect of an act alleged to be done by him in his official capacity.

No such security to be required from Government or public officers.

*Of Procedure in Appeal from Decrees.*

**548.** When a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal.

Register of Appeals.

Such book shall be called the Register of Appeals.

**Note.**

The registration of a petition of appeal under sec. 341, Act VIII. of 1859, is a proceeding of a purely ministerial character. When a petition of appeal has been registered after lapse of the time allowed by law, the Judge has power, on discovery thereof, to reject or to remove it from his file.—4 B. L. R., App. 103; 13 W. R., 351.

**549.** The Appellate Court may, at its discretion, either before the respondent is called upon to appear and answer, or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Appellate Court may require appellant to give security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immoveable property within British

When appellant resides out of British India.

India independent of the property (if any) to which the appeal relates.

If such security be not furnished within such time as the Court orders, the Court shall reject the appeal.

If such security be furnished, any costs for which a surety may have rendered himself liable may be recovered from him in execution of the decree of the Appellate Court in the same manner as if he were the appellant.\*

**Notes.**

A plaintiff who resided out of India paid a sum of money into Court as security for costs under sec. 34 of Act VIII. of 1859. He subsequently obtained a decree against the defendant, and the defendant appealed against that decree. *Held* that the defendant was not entitled to an order detaining in Court, pending the appeal, the money which had been paid in under sec. 34.—B. L. R., (O. C.) 92. See 3 B. L. R., (F. B.) 45; S. C., 12 W. R., (F. B.) 16.

Sec 342 of Act VIII. of 1859 does not apply to appeals from the orders of a Judge sitting as a Commissioner of the Insolvent Court. The right of appeal is given by sec. 73 of the Indian Insolvent Act, and the Court cannot impose on the appellant a condition that he shall give security for the costs of such an appeal.—5 B. L. R., 179.

A single Judge has full power to make an order for security for the costs of an appeal.—Bourke's Rep., (O. C.) 40. Affirmed on Appeal, Bourke's Rep., A. O. C., 119.

On a rule *nisi* for security for the costs of an appeal to be given by a defendant, five twenty-fourths of the property in dispute having been decreed to him, but subsequently attached under a prohibitory order, cause was shown that the Court had not jurisdiction, and that no reason for the application had been given. *Held* that a single Judge is vested with all the powers of an Appellate Court with reference to the costs of an appeal; that when an appellant resides within the jurisdiction of the Court he is amenable to its orders as to the costs of an appeal; and that an appellant who has no available property must, if required, give security for the costs of an appeal before proceeding with it.—Bourke's Rep., (O. C.) 110.

Sec. 549 of the Civil Procedure Code applies to all appeals, including appeals in *forma pauperis*.—4 Ind. Jur. 507.

*Quære*.—Whether in a case in which the appellant is not residing out of the British territories in India, the High Court has authority to demand security for costs from the appellant after the issue of summons.—i. e., notice of the appeal.—6 W. R., Mis., 123.

Under sec. 342, Act VIII. of 1859, the High Court had discretion to demand security for costs from an appellant, if it saw fit to do so, at any time before the hearing of the appeal. Where an assignee, who had been substituted for the plaintiff under sec. 106, declined to furnish security for the costs within such reasonable time as the Court ordered, it was held that the defendant might, within eight days after such neglect or refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit.—13 W. R., 431.

\* This clause has been added by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 46.

Sec. 549 of the Code of Civil Procedure being imperative, the time cannot be extended after the expiry of the period fixed in the order directing the appellant to find security for the costs of an appeal. *Haidri Bai v. East Indian Railway Company* (I. L. R., 1 Al. 687) followed.—I. L. R., 11 Madr. 190.

An appeal, although it may have been rejected by the Appellate Court under sec. 549 of the Code of Civil Procedure, upon failure by the appellant to furnish security demanded under that section, may be restored, on sufficient grounds, at the Court's discretion. The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable, and could not be considered, *held* by the Judicial Committee that restoration was within the Court's discretion, and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix.—8 Al. 315.

The proper construction of sec. 549 of the Civil Procedure Code is that, where an appellant has been ordered to furnish security within a certain time, and that order has not been complied with, and no application has been made to extend the time within the period allowed, the Court is bound to reject the appeal.—11 Cal. 716.

Sec. 549 of the Code of Civil Procedure was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance, and an application should not be granted under that section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal, if it should be dismissed. *Maneckri Limji Mancherji v. Goolbai* followed. *Ross v. Jaques*, *Seshayyengar v. Jainulavadin*, and *Jogendro Deb Roykut v. Funindro Deb Roykut* referred to.—7 Al. 542.

A petition was made under sec. 549 praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, no one appeared to support it or to show cause against it, and it was accordingly rejected. An application was subsequently made on behalf of the petitioner praying that the case might be restored to the register, on the ground that counsel for the petitioner was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause, the petition should have been granted, and the absence of petitioner's counsel was immaterial. *Held* that the matter was dealt with by sec. 98, and that sec. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made sec. 99 the rule by which the Court was to be guided:—*Held* also that although on general rule could be laid down that the absence of counsel when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular suit, or an appeal, or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances, in the present case, taking the circumstances into consideration, an absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition to the register.—7 Al. 542.

Sec. 549 of the Civil Procedure Code contemplates an order by which some ascertained amount of security is required. The last paragraph of the section seems to contemplate that, on failure to furnish security within the time fixed, an order for rejecting the appeal should be obtained from the Court that gave the order to furnish security. Upon the application of the respondent in a second appeal pending before the High Court, an order was passed requiring the appellant to furnish security for the costs of the appeal, and to lodge a such security at any time before the hearing. This order purported to be made under sec. 549 of the Civil Procedure Code, but neither the application nor the order stated the amount of the security required. At the hearing of the appeal, no security having been lodged, the respondent objected that, with reference to the terms of sec. 549, the Court had no option but to dismiss the appeal. *Held* that the objection had no force, no such order as was contemplated by sec. 549 having been made. *Held* also that the proper course was to have applied to the Judge who passed the order for security, at any time before the case came on for hearing for the rejection of the appeal, and that it was too late at the hearing to ask the Court to reject the appeal.—9 Al. 164.

Where the High Court, under sec. 549, Civil Procedure Code, has demanded security from an appellant, it has power to extend the time for complying with this order on application made, as well after as before the time first fixed has expired; and may nevertheless reject the appeal, under that section, if the security is not in the end furnished. *Haidri Bai v. The East Indian Railway Company, I. L. R., 1 Al. 687*, overruled. In this case, the Registrar was directed to allow only the costs applicable to the question argued and decided.—17 Cal. 512.

The security for the respondents' costs which the High Court had demanded under sec. 549 not having been furnished within the time fixed, and the Court, in the exercise of its discretion, having refused to extend the time, the appeal was rejected under that section. *Held*, that this was not a case for interference.—17 Cal. 516.

An original Court rejected, as insufficient, security offered for the purpose of conforming to an order of the High Court under sec. 549, Civil Procedure Code; and refused to receive other security offered, in lieu, after the time fixed by the order had expired. This was affirmed by the High Court: *Held*, that as the High Court had a discretion to enlarge the time allowed for finding security, and to accept other security in lieu of that rejected, or to refuse to do either, it had, under the circumstances, judicially exercised that discretion in refusing.—17 Cal. 1.

Sec. 549 of the Civil Procedure Code applies to all appeals, including appeals *in forma pauperis*.—4 Ind. Jur., 507.

Where the Appellate Court demands from an appellant security for costs, the Court may extend the time within which it orders such security to be furnished; but if no application is made for such extension of time, and such security is not paid within the time entered, it is imperative on the Court, under Act X of 1877, sec. 549, to reject the appeal.—1 Al. 687.

A suitor *in forma pauperis* may be called on to give security for costs under sec. 549 of the Civil Procedure Code, but very special grounds must be shown to support such an application.—*Nusseeruddeen Bis was v. Ujjal Biswas* (17 Suth. W. R., 68) dissented from.—3 Madr. 66.

See I. L. R., 5 Al. 380, noted under sec. 2.

**550.** When the memorandum of appeal is registered, the Appellate Court shall send notice of the appeal to the Court against whose decree the appeal is made.

Appellate Court to give notice to Court, whose decree appealed against.

If the appeal be from a Court the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send, with all practicable despatch, all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Transmission of papers to Appellate Court.

Either party may apply in writing to the Court against whose decree the appeal is made, specifying any of such papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of the applicant, and shall be deposited accordingly.

Copies of exhibits in Court whose decree appealed against.

**551\*.** (1) The Appellate Court, if it thinks fit, may, after fixing a day for hearing the appellant or his pleader, and hearing him accordingly if he appears on that day, dismiss the appeal without sending notice of the appeal to the Court against whose decree the appeal is made, and without serving notice on the respondent or his pleader.

Power to dismiss appeal without sending notice to lower Court.

(2) If on the day fixed under sub-section (1) or any other day to which the hearing may be adjourned the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default.

(3) The dismissal of an appeal under this section shall be notified to the Court against whose decree the appeal is made.

#### Notes.

The order of adjudication made under sec. 551 of the Civil Procedure Code is a decree, and the procedure authorized under that section does not dispense with the necessity of drawing up a judgment.—I. L. R., 3 Madr. 1.

The plaintiff sued to recover possession of certain immoveable property sold to him by the first defendant, a Hindu widow. The second defendant answered that his father and the first defendant's husband were undivided brothers, and that, as a childless widow, she has no right to sell the property. Both the lower Courts upheld the sale as absolute, on the ground that she was competent to make it as widow of a separate Hindu. The District Judge heard the appeal *ex parte* under Act X of 1877, sec. 551. *Held* that the decrees of the Lower Courts were unsustainable, as they did not contain the limitation pointed out above; and

\* This section has been substituted for the original by the Civil Procedure Code Amendment Act (VII of 1888), sec. 47.

remanded the case for the trial of the issue whether there were any such special circumstances as would justify the absolute sale by the first defendant to the plaintiff; and that the District Judge ought not to have disposed of the appeal *ex parte* under Act X of 1877, sec. 551.—4 Bom. 462.

On an appeal from a decision, in a civil suit, of the Assistant Commissioner of Ajmere to the Commissioner of Ajmere, the latter, feeling doubtful on a question of the nature specified in sec. 17 of the Ajmere Court's Reg. I of 1877, referred such question, under sec. 36 of that Regulation, to the Chief Commissioner of Ajmere and Mairwara. The Chief Commissioner dealt with the case as prescribed in sec. 37 of that Regulation, and returned it to the Commissioner, who dismissed the suit in accordance with the Chief Commissioner's judgment. The plaintiff preferred an appeal to the Chief Commissioner from the Commissioner's decision. The Chief Commissioner did not make any order on the memorandum of appeal admitting it, or directing that it should be registered, or that the respondent should be summoned, or that the appellant should appear on a certain day under sec. 551, Act X of 1877, but issued a notice to the appellant's counsel to appear on a certain day. The appellant's counsel appeared on that day, and the Chief Commissioner intimated that he was acting under Act X of 1877, sec. 551. The appellant's Counsel then proceeded to address the Chief Commissioner, and was heard for some time, and then stopped, in consequence of the Chief Commissioner resolving to refer to the High Court the question whether the appeal from the Commissioner's decision lay to him or to Her Majesty in Council. The Chief Commissioner subsequently referred such a question to the High Court. *Held* by the Full Bench, on a reference by a Division Bench before which the Chief Commissioner's reference came, that such question arose "in the trial of an appeal" within the meaning of the Ajmere Court's Reg. I of 1877, sec. 21, and was properly referred to the High Court. *Held* by the Division Bench that the appeal from the Commissioner's decision lay, in this particular case, not to the Chief Commissioner, but to Her Majesty in Council.—2 Al. (F. B.) 819.

**552.** Unless the Appellate Court dismissed the appeal under the last foregoing section, it shall  
 Day for hearing appeal. fix a day for hearing the appeal.\*

Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

**553.** Notice of the day so fixed shall be stuck up in the  
 Publication and service of notice of day for hearing appeal. appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court against whose decree the appeal is made, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided in Chapter VI for the service on a defendant of a summons to appear and answer; and all rules applicable to such summons,

\* This clause has been substituted for the original by the Civil Procedure Code Amendment Act (VII of 1888), sec. 47.



and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Instead of sending the notice to the Court against whose decree the appeal is made, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the rules above referred to.

Appellate Court may itself cause notice to be served.

**554.** The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Contents of notice.

#### *Procedure on Hearing.*

**555.** On the day so fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal. The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

Right to begin.

**556.** If, on the day so fixed, or any other day to which the hearing may be adjourned, the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default.

Dismissal of appeal for appellant's default.

If the appellant attends, and the respondent does not attend, the appeal shall be heard *ex parte* in his absence.

Hearing appeal *ex parte*.

#### **Notes.**

A special appeal lies to the High Court from an order passed under sec. 346 of the Civil Procedure Code, dismissing the appellant's regular appeal for non-appearance of the appellant in person or his pleader. *Devappa Setti v. Ramanadha Bhutt* (3 M. H. C. R., 109) commented on.—6 M. H. C. R., 1.

Where both parties make default in appearing at the hearing of an appeal, the Court must dismiss the appeal and not go into the merits and reverse the decree.—*Marshall's Rep.*, 5; 1 Ind. Jur., (O. S.) 36.

Where the appellant himself does not appear, and the pleader appears and states he is not instructed, a judgment of dismissal for default is a proper judgment.—21 W. R., 65.

Objections which might have been but were not made under sec. 567 of the Civil Procedure Code in a Lower Appellate Court to the findings on remand of the Court of first instance, cannot be raised for the first time as grounds of second appeal from the Lower Appellate Court's decree.—I. L. R., 10 Al. 28.

No appeal under sec. 10 of the Letters Patent will lie from an order under sec. 256 of the Code of Civil Procedure dismissing an appeal for

default the appellant not having had recourse to the procedure provided by sec. 568 of the said Code.—14 Al. 361.

Where, when an appeal is called on, the pleader is not absent, but is unprepared to go on with the case, the dismissal is a dismissal for default within sec. 556 of Act XV of 1882, and the appeal can therefore be re-admitted under sec. 558. *Baldeo Misser v. Ahmed Hossein*, (15 W. R., 143, followed.—12 Cal. 605.

In an appeal before an Appellate Court, the appellant did not attend in person or by pleader, and the Court, instead of dismissing the appeal for default, tried and dismissed it upon the merits. Subsequently, the appellant applied to the Court, under sec. 558 of the Civil Procedure Code, to re-admit the appeal, explaining her absence when the appeal was called on for hearing. The Court rejected the application, on the ground that the appeal had been decided on the merits, and reasons had been recorded for its dismissal which there were no apparent grounds for setting aside:—*Held* that the Court should have dismissed the appeal for default, and it was illegal to try it on the merits, and the judgment was consequently a nullity, the existence of which was no bar to the re-admission of the appeal.—8 Al. 277.

When an appeal is dismissed, under Act X of 1877, sec. 556, for the appellant's default, the order dismissing it is not appealable.—2 Al. 216.

An Appellate Court, the appellant not attending in person or by his pleader, instead of dismissing the appeal for default, as provided by sec. 556 of Act X of 1877, proceeded, in contravention of the provisions of that law, to dispose of the appeal on the merits, and dismissed it. The appellant preferred a second appeal to the High Court, contending that the Appellate Court had acted contrary to law. *Held* that the Appellate Court had so acted, and its decision could only be treated as a dismissal for default and that, so treating it, the proper and only course open to the appellant was to have applied under sec. 558 for the re-admission of his appeal, and under these circumstances the second appeal would not lie. *Nond Ram v. Muhammad Baksh* (I. L. R., 2 Al. 616) followed.—3 Al. 519.

See I. L. R., 3 Al. 382 and 16 Bom. 23, noted under sec. 2 ; 4 Cal. 825, noted under sec. 3.

**557.** If, on the day so fixed, or any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed by the Court, the sum required to defray the cost of issuing the notice, the Court may order that the appeal be dismissed :

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit cost.

Provided that no such order shall be passed, although the notice has not been served upon the respondent, if on the day fixed for hearing the appeal the respondent appears in person, or by a pleader, or by a duly authorized agent.

Proviso.

**558.** If an appeal be dismissed under "section 551, sub-section (2),"\* section 556, or section 557, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, if it be proved that he was prevented by any sufficient cause from attending when the appeal was called on for hearing or from depositing the sum so required, the Court may be re-admit the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.

**Notes.**

On an application under sec. 588 of the Code of Civil Procedure for the re-admission of an appeal which had been decided *ex parte* against the applicant, it appeared that he had been misled by reason of the appeal having been transferred from the file of one Court to another, no notice of the transfer having been given to him by the pleaders in the case. *Held* that, under the circumstances, the applicant was entitled to have the appeal re-admitted.—8 C. L. R., 350.

See I. L. R., 3 Al. 382, noted under sec. 2; 4 Cal. 825, noted under sec. 3; 3 Al. 519 and 14 Al. 361, noted under sec. 556.

**559.** If it appear to the Court at the hearing that any person who was a party to the suit in the Court against whose decree the appeal party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court, and direct that such person be made a respondent.

**Notes.**

The discretionary power of directing a person to be made a respondent, conferred on the Appellate Court by sec. 559 of the Civil Procedure Code, is not limited by any provision in the Limitation Act (XV of 1877).—I. L. R., 9 Cal. 355.

In 1877 the plaintiff executed a deed of hypothecation to one of two partners to secure a loan obtained from them jointly. In 1881 the plaintiff sold *inter alia*, the hypothecated property to defendants Nos. 2 to 4 and it was arranged that the secured debt should be paid off by the vendees. They failed to do this, but in 1882 they executed a mortgage for the amount due in favour of the other of the two partners, and he thereupon gave a written discharge to the plaintiff, who was found to have been acting in collusion with him to the disadvantage of his partner, the holder of the hypothecation bond. The latter brought a suit in 1885 upon the hypothecation bond and obtained a personal decree against the present plaintiff who was *ex-parte*, the amount of the decree being declared to be charged on the land in the possession of defendants Nos. 2 to 4. Meanwhile, defendant No. 1, who was the assignee of the mortgage of 1882, had obtained a decree upon it against defendant No. 4. This decree not having been executed, he subsequently sued upon the mortgage again and obtained a decree against defendants Nos. 2 to 4. The

\* The words quoted have been inserted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 47.

plaintiff now sued to have the last mentioned decree set aside and recover the balance of the purchase money from defendants Nos. 2 to 4. The Court of First Instance passed a decree for the amount claimed and declared it to be charged on the land. Defendant No. 1 preferred an appeal in which defendants Nos. 2 to 4 were joined by the Court of First Appeal. The decree of this Court dismissed the suit:—*Held*, (1) that defendants Nos. 2 to 4 were rightly joined as respondents by the Court under Civil Procedure Code sec. 559; (2) that plaintiff, having allowed a decree to be passed against him *ex-parte* in the suit of the holder of the hypothecation bond, and having obtained a collusive discharge from the other partner, was not entitled to recover against the defendants.—15 Madr. 362.

The Court of first instance gave the plaintiff in a suit for money a decree against the defendant B, exempting the defendants A and H. B appealed, making the plaintiff the respondent to the appeal. The plaintiff did not appeal from the decree of the Court of first instance in respect of the exemption of A and H. The Appellate Court made A a respondent to the appeal under sec. 559 of the Civil Procedure Code, and, exempting B, gave the plaintiff a decree against A. *Held* that, inasmuch as sec. 559 does not empower an Appellate Court virtually to make an appeal for an appellant, who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in his petition of appeal, and it could not be said that A was “interested in the result of the appeal,” as, having the unappealed decree of the Court of first instance behind him, his position was secure, the Appellate Court had improperly made A a respondent to the appeal and given a decree against him.—5 Al. 266.

The power of an Appellate Court to make a person a respondent, under sec. 559 of the Civil Procedure Code, is not affected by the Limitation Act (XV of 1877). In exercising its powers under sec. 559 of the Civil Procedure Code, an appellate Court is competent to make a person a respondent who, in the original suit, was arrayed on the same side with the appellant.—13 Al. 78.

*Held* by the Full Bench that it is competent to a Court sitting under sec. 559 of the Code of Civil Procedure to add a person as respondent in an appeal, though the time within which an appeal might have been preferred as against such person has expired.—14 Al. 154

**560.** When an appeal is heard *ex-parte* in the absence of the respondent, and judgment is given against him, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to costs or otherwise as the Court thinks fit to impose upon him.

Re-hearing on application of respondent against whom *ex-parte* decree made.

#### Notes.

When an appeal has been heard *ex parte*, a re-hearing cannot be granted by the Court on an application under sec. 560 of the Civil Procedure Code, except upon legal evidence produced by the respondent of the facts necessary to entitle him to such re-hearing.—8 C. L. R., 112.

Sec. 560 of the Civil Procedure Code applies to a case in which the respondent has been prevented by sufficient cause from attending when the appeal was called on, whether appearance has been entered for him or not.—11 C. L. R., 164.

An applicant, presenting a petition for the re-hearing of an appeal, decided *ex-parte*, must, at the time of making such application, be prepared to satisfy the Court that the notice of appeal was not duly served upon him, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing.—1. L. R., 6 Cal. 548.

An appeal was heard *ex-parte* in the absence of the respondent (defendant), and the judgment was given against him. He applied to the Appellate Court to re-hear the appeal, and the Appellate Court refused to re-hear it. He then appealed, not from the order refusing to re-hear the appeal, but from the decree of the Appellate Court. *Held* that he was not debarred, by reason that he had not appealed from the order refusing to re-hear the appeal, from appealing from the decree of the Appellate Court.—2 Al. 567.

**561.** Any respondent, though he may not have appealed against any part of the decree, may,

Upon hearing, respondent may object to decree as if he had preferred separate appeal.

ed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take

any objection to the decree which he could have taken by way of appeal; “provided he has filed the objection in the Appellate Court within one month from the date of the service on him or his pleader under section 553 of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.”\*

Such objection shall be in the form of a memorandum,

Form of notice, and provisions applicable thereto.

and the provisions of section 541, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto. Unless the respondent files with the objection a written acknowledgment from the appellant or his pleader of having received a copy thereof, the Appellate Court shall cause such a copy to be served, as soon as may be after the filing of the objection, on the appellant or his pleader, at the expense of the respondent.†,

The provisions of Chapter XLIV shall, so far as they can be made applicable, apply to an objection under this section.†

#### Notes.

A respondent may file a notice with the Registrar, specifying therein the objections which he intends to take on the hearing of the appeal.—B. L. R., Sup. Vol., 587; 6 W. R., Mis., 102.

\* This proviso has been substituted for the original by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 48.

† These two paragraphs have been added by the same Act and section.

Suit by a widow to recover her husband's share, whom she alleged to be a divided member of a Hindu family, under an agreement to the following, effect : " When we lived together, a disagreement arising amongst females, we have divided. Thus, we shall from this date divide and enjoy the income of the lands. When the moiety of lands belonging to our uncle, S, in the said three villages, shall be equally divided, we shall also share our moiety equally, and obtain separate pattas. We hold no pecuniary concern." *Held* (following the judgment reported in 3 M. H. C. R., 40, and that of the Privy Council in Appu Ayyar v. Ramasubha Ayyar, 11 Moore's Ind. App. 75) that when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, each member has thenceforth a definite and certain share in the estate which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually divided.—3 M. H. C. R., 289.

Where, in the course of the hearing of an appeal, the appellant desired to withdraw in order to void the decision of a question raised by the respondent at the hearing, *held* that, under sec. 348 of the Civil Procedure Code, the respondent was entitled to have the question heard and determined.—3 M. H. C. R., 302.

A respondent, in taking advantage of the provisions of sec. 348 of the Civil Procedure Code, can only take such objections as have reference to the party appealing. If he wishes to raise objections against parties who do not appeal, he must do so by independent appeal.—6 Bom. H. C. R., (A. C.) 244.

Where, in the lower Appellate Court, no objection to the decree of the Court of first instance was urged by the plaintiff, it is not competent to such Court to disturb the decree, by giving plaintiff a larger sum than that awarded by the Court of first instance.—2 N.-W. P. H. C. R., 44.

*Held* that objections under sec. 348, Act VIII of 1859, can only be heard when the opposite party being appellant prosecutes his appeal, and not when he withdraws from it.—1 Agra H. C. R., 23 ; 14 W. R., 210.

The word " objection " used in sec. 348 of Act VIII of 1859 was not limited to written objections simply, but comprehended also verbal objections.—2 Hay's Rep., 79.

Where a respondent in order to save the costs of copying the judgment of the Court below, the decree and other documents in the case, delayed sending instructions to counsel to draw objections to the decree until the paper books had been received from the appellant, at which date the period allowed for filing objections had expired, the Court refused to extend the time, or permit the objections to be filed.—1 L. R., 14 Bom. 111.

An appeal cannot definitely be posted until the Court has ascertained that notice of the appeal has been served on the respondent and a date must then be fixed not less than one month from the date of service.—13 Madr. 492.

The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title, or defeat the title of any other person. The Collector's book is kept for purposes of revenue, not for purposes of title. Where a decree is in favour of the respondent, the Appellate Court is not entitled to accept the facts found by the Court of first instance as incontestably proved, merely because the respondent has not filed any cross-objections to the decree under sec. 561 of the Code of Civil Procedure (Act XIV of 1882)—13 Bom. 75.



The plaintiffs sued for the redemption of certain mortgaged property. On the 1st March 1886, a decree was passed declaring the plaintiffs entitled to redeem on payment by them to the defendants of Rs. 649-11-0 within three months from the date of the decree. Against this decree the defendants (the mortgagees) appealed on the ground that a much larger sum than Rs. 649-11-0 was due to them on the mortgage. The plaintiff also filed objections to this decree under sec. 561 of the Civil Procedure Code (XIV of 1882), on the ground that the mortgage-debt had been long ago paid off and that now a large sum was due to them from the mortgagees who had been in receipt of the profits of the property. Under these circumstances the plaintiffs did not pay the Rs. 649-11-0 within three months as ordered by the decree. On the 12th October 1886, they presented an application for execution, and paid into Court the Rs. 649 11-0. The lower Court granted their application, and ordered possession of the property to be given to them. The defendant appealed to the High Court. *Held*, reversing the order of the Court below, that the Court in executing the decree had no power to alter the language of the decree, which it would virtually do if it enlarged the time mentioned in it by accepting the Rs. 649-11-0 paid into Court by the plaintiffs on the 12th October 1886. *Held*, also, that, even if the Court had power to enlarge time in the course of execution, the mere fact that the plaintiff had lodged an appeal would afford no special ground for enlarging the time.—13 Bom. 106.

The entertainment of objections under sec. 561 of the Civil Procedure Code is contingent and dependent upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed without being disposed of upon the merits, the objections cannot be entertained either.—10 Al. 587.

Where an appeal was dismissed upon the application of the appellant himself made before the hearing :—*Held* that the respondents, who had filed objections to the decree of the Court of first instance under sec. 561, had no claim to have their objections heard, notwithstanding the dismissal of the appeal. *Coomer Puresh Narain Roy v. Watson and Co.*, and *Dhondi Juganath v. The Collector of Salt Revenue*, referred to.—8 Al. 551.

A plaintiff who has obtained leave to sue in *forma pauperis* and has been successful in obtaining a decree for a portion of his claim, but has failed as to the other portion, is not entitled, on an appeal by the defendant, to be heard in *forma pauperis* on cross appeal as to the portion of his claim decided against him in the lower Court.—11 Cal. 735.

An appellant finding, after the hearing had commenced, that his appeal was hopeless claimed the right of withdrawing the appeal, in order to prevent the objections, filed, under sec. 561 of the Civil Procedure Code (Act XIV of 1882), by the respondent against the decree from being heard. *Held* that after the hearing of an appeal has commenced, the Appeal Court is seized of the respondent's objections and that the appeal cannot be withdrawn so as to prevent the objections from being heard and determined.—9 Bom. 28.

Whether under sec. 561 of the Code of Civil Procedure objections to the decree by the respondent must necessarily be filed seven days before the date originally fixed for hearing the appeal, or whether it is not sufficient if they are filed seven days before the day on which the appeal is actually heard, and whether the decision of the Bombay High Court in *Rangildas v. Bai Girja*, I. L. R., 8 Bom., 559 to that effect is not correct, and the

decisions of the Calcutta High Court to the contrary are not erroneous.—14 Cal. 610.

A filed a plaint on 28th June 1882 for a declaration of his title as karnam of a village and for arrears of dues payable to him as such, including those for fasli 1288, which accrued due on 1st July 1879. His family had held the office and discharged its duties for three generations, but there was no evidence of any formal appointment of A or his ancestors. *Held*, that the plaintiff was entitled to the dues as *de facto* karnam, and his claim was not barred in respect of any of the arrears claimed *Per cur.*—The preliminary objection taken by the respondent that no second appeal lies from so much of the decree of the Subordinate Judge as disallowed the objections filed by the appellant under sec. 561 of the Code of Civil Procedure is without weight.—10 Madr. 292.

The expression “the day fixed for the hearing,” used in sec. 561 of the Civil Procedure Code (Act XIV of 1882), means the day on which the hearing actually commences, and includes both that day and the day to which the hearing may be adjourned. The purpose of the section is to give the appellant timely intimation of the proposed objections. Accordingly a cross-objection filed by the respondent on the day mentioned as the day fixed for hearing the appeal in the notice to the respondent was *held* not too late.—11 Bom. 698.

The notice of objections referred to in sec. 561 of the Civil Procedure Code 1877, must be filed not less than seven days before the date (in any) fixed for the hearing in the summonses issued to the parties.—4 Also 9 Cal. 631.

The plaintiff sued the defendants for compensation for the wrongful taking of the fruit on a tree which he alleged belonged to him. The defendants set up as a defence that the fruit on such tree had not been removed, and that such tree belonged to them. The Court of first instance dismissed the suit on the ground that the fruit on such tree had not been removed, but found incidentally that such tree belonged to the plaintiff. The plaintiff appealed from the decree of the Court of first instance; and the defendants objected to the decree, contending that such tree belonged to them. *Held* that, inasmuch as the Court of first instance did not, in deciding that such tree belonged to the plaintiff, decide a question substantially in issue, it did not decide in this matter “against the defendants,” within the meaning of sec. 561, of the Civil Procedure Code, and, as the decree was limited to dismissing the suit, the defendants as respondents were not qualified to take an objection which they could not have taken by way of appeal, and therefore the Appellate Court was not warranted by law in entertaining the objection taken by the defendants.—4 Al. 421.

Where the time for filing objections under sec. 561 of the Civil Procedure Code expired on a day when the Court was closed, and objections were filed on the day the Court re-opened, *held* that such objections were filed within time.—4 Al. 430.

On the 16th March 1874, L gave M a mortgage on certain land for Rs. 24,000 for a term of ten years, by which it was provided, *inter alia*, that the mortgagee should take the profits of the land in lieu of interest; that the mortgagee should grant a lease of the land to the mortgagor, the latter paying the former the profits of the land every harvest in lieu of interest; that, if the mortgagor failed to pay the mortgagee the profits of the land by the end of any year, he should pay interest on the principal amount of the mortgage, at the rate of one per cent. calculated from the date of the

mortgage, and in such case the mortgagee should have no claim to the profits; and that, if the mortgagor failed to pay the mortgagee the profits by the end of any year, the mortgagee should be at liberty to cancel the lease, and to enter on the land, and collect the rents thereof, and apply the same to payment of interest. On the 21st March 1874, M gave L a lease of the land, under which Rs. 1,980 was the sum agreed to be payable annually as profits in lieu of interest. In 1879, M, who had not been paid any profits, sought to enforce in the Revenue Courts the condition as to entry on the land, but was successfully resisted by L's widow. On the 16th January 1880, M sued L's widow for interest on the principal amount of the mortgage at the rate of one per cent. calculated from the date of the mortgage to the date of the suit, claiming the same by virtue of the provisions of the mortgage, on the ground that he had not been paid any profits. *Held* that the mortgage and lease-transactions must be regarded as one and indivisible, and the questions at issue between the parties be dealt with *qua* mortgagor and mortgagee; that so regarding such transactions and dealing with such questions, M and L did not stand in the position of "land holder," and "tenant," and the proceedings of 1879 in the Revenue Courts were had without jurisdiction; also that, although, looking at the terms of the contract of mortgage, it was the intention of the parties that, on the mortgagor failing to pay the mortgagee the profits by the end of any year, the latter should, in the first place, seek possession of the land, yet as M had never obtained possession, but on the contrary had been resisted when he ought to obtain it, his present claim for interest was maintainable. The Court directed that so much of the interest as was due at L's death should be recoverable from such property of his as had come into his widow's hands; and as to the rest, which related to the period during which the widow had been in possession and in receipt of the profits, that it should be recoverable from her personally.—4 Al. 430.

A obtained a decree for possession of land against B and for costs against B, C, D, and others, defendants in the suit. C and other defendants appealed against this decree so far as it awarded costs against them, making A and D respondents to the appeal. Under section 561 D objected to that part of the decree which awarded possession of the land to A. *Held*, on appeal, that it was open to D although improperly made a party to the appeal by C against A, to take objection to the rest of the decree.—7 Madr. 215.

The Court of first instance found for the defendants on the merits, and passed a decree in their favour without costs. The defendants appealed against that part of the decree which disallowed them their costs. The plaintiff filed a notice of objections to the decree on the merits as required by section 561 of the Code of Civil Procedure (Act XIV of 1882). The lower Court of Appeal varied the decree by allowing the defendants their costs of suit, and held that the plaintiff was not entitled to file any objections. *Held* that the Court of Appeal was in error in holding that the plaintiff's objections could not be entertained. Section 561 of the Code gives the respondent the power of taking any objection to the decree at the hearing of an appeal which he could have taken by way of appeal, provided he has filed a notice of his objections not less than seven days before the date fixed for the hearing of the appeal; and this power is independent of whether an appeal lies on a mere question of costs. *Held* also that a finding, unaccompanied by the reasons for it, as required by sec. 204 of the Code, is not a conclusive finding of fact binding on a Court of second appeal.—8 Bom. 368.

Objections to a decree under sec. 561 of the Civil Procedure Code (Act XIV of 1882) need not necessarily be filed seven days before the day originally fixed for hearing the appeal. When the hearing is postponed, it is sufficient if the objections are filed seven days before the day fixed for the postponed hearing, the object of section 561 being merely to give the appellant timely intimation of proposed objections.—8 Bom. 559.

See I. L. R., 10 Al. 162, noted under sec. 566.

**562.** If the Court against whose decree the appeal is made has disposed of the suit upon a preliminary point, “so as to exclude any evidence of fact which appears to the Appellate Court essential to the determination of the rights of the parties,”\* and the decree upon such preliminary point is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, together with a copy of the order in appeal, to the Court against whose decree the appeal is made, with directions to re-admit the suit under its original number in the register, and proceed to “determine” the suit on the merits.

The Appellate Court may, if it thinks fit, direct that issue or issues shall be tried in any case so remanded.

#### Notes.

The lower Appellate Court has no power to remand a case, which has come before it on appeal, to the Court of first instance for a second trial, except where the first Court has decided the case upon a preliminary issue in such a way as to cause an absence of material evidence bearing upon the issues on the merits between the parties.—20 W. R., 148.

Where a suit was remanded by the lower Appellate Court for a “re-trial,” the intention of the order of remand was held to be that the whole case was to be gone into *de novo*, the plaintiff being allowed to prove her case in any way she could.—21 W. R., 7.

Where a Court of first instance decided a case on the merits, and the Appellate Court did not find that the lower Court omitted to try an issue or to determine a question of fact which the Appellate Court thought essential to the right determination of the suit upon the merits, or that further evidence was necessary, it was held that the Appellate Court was wrong in remanding the case under sec. 552 for a fresh trial.—2 B. L. R., S. N., 14 ; 10 W. R., 388.

In a suit on a bond executed under a mukhtarnama, which was not produced, the Court of first instance admitted secondary evidence of it, and decreed the suit. In special appeal, the High Court was of opinion that the secondary evidence had been improperly admitted, and therefore the decree in the plaintiff’s favour could not stand. Upon this it was contended that the suit should be dismissed, as the Court, hearing a case in special appeal, had no power, under such circumstances, either to remand the case or to call for additional evidence. *Held* that, though the powers conferred by secs. 351, 354, and 355 of Act VIII of 1859 on the Court of regular appeal are not directly given to the Court of special appeal, yet

\* The word “determine” has been substituted for the word “investigate” by the same Act and section.

the Court, when it found the order of a Lower Appellate Court was wrong, could point out the error, and direct the lower Appellate Court to make such order as would rectify the error.—2 B. L. R., (A. C.) 315.

The question of jurisdiction cannot be raised in appeal for the first time, unless it appear upon the face of the pleadings or the admission of the parties, or upon the evidence, that the suit will not lie. Bastu land (land used for sites of houses) situated in a town cannot form the subject of suits under Act X. of 1859 for enhancement. Bastu land, which is the site of a house occupied by a ryot engaged in cultivating the surrounding lands, does fall under the provision of Act X. of 1859. When it did not appear on the face of the pleadings, or on the evidence, under what kind of bastu the land in dispute falls, and no plea to the jurisdiction of the Court under Act X. of 1859 had been taken in the Courts below, the High Court will not remand the case to enquire under which class of bastu land the subject-matter of suit falls, or entertain the point of jurisdiction in appeal.—3 B. L. R., (A. C.) 283 : S. C. Nymooddee Joardar v. Moncrieff, 12 W. R. 140.

The grantor of a patni-tenure, who subsequently purchases the lands granted by him in patni at the sale of the patni-tenure, does not revert *ipso facto* to the position he formerly held as proprietor, and is not entitled to recover rent from the tenants at the rate he was receiving when he granted the patni, without reference to the rents realized by the patniholder in the *interim*. A lower Appellate Court is not competent to remand a case for a second decision except as provided by sec. 351, Act VIII. of 1859, and therefore has no power to remand a case when a Court of first instance has investigated the merits of the case, and passed its judgment upon the evidence. The objection, that a case has been improperly remanded by the lower Appellate Court, can be taken in special appeal from the decree passed upon the remand, although a special appeal might have been preferred from the order of remand, but the appellants were held not entitled to their costs.—13 B. L. R., 198 ; 21 W. R., 326 ; 13 B. L. R., 200 note ; 13 W. R., 107.

The plaintiff sued to recover rent for several years for 13 bighas and 4 katas at rupees 29-11-5 a year on a jamabandi, which, he said, was signed by all the ryots on the estate when he came into possession. The defendant denied the Jamabandi. He admitted that he held some lands of the plaintiff, but said that it only amounted to 3 bighas and a fraction ; with an annual rent of Rs. 4-13, and that the only balance due by him to the plaintiff was Rs. 5-15. The plaintiff could not prove the jamabandi. *Held* that the first Court should not have dismissed the suit altogether, but should have given the plaintiff a decree for the sum which was admitted to be due by the defendant, though that sum was due on a different cause of action than that set forth in the plaint. Where the defendant applied to the first Court that a witness should be examined, but the Court made no order on the subject, and the Appellate Court, on the case coming before it on appeal, remanded the case, on its being informed of the omission, to the lower Court to entertain the application, *held* that there was nothing irregular in such a course, although there was nothing which provided specially for it in the Code of Civil Procedure. In an application for the examination of a witness, sec. 162 does not require that any special formalities shall be observed ; it simply directs that an application shall be made, and points out the proper manner of disposing of that application. Where a summons has not being legally served upon the plaintiff, a Court



cannot take advantage of sec. 170, and, on the ground of that party's non-attendance alone, dismiss the suit against him; but where the Court is satisfied that the plaintiff must have known that his attendance in Court was desired, the Court is perfectly justified in taking the circumstance of his neglect into consideration when deciding the case upon the facts.—13 B. L. R., 247 note; 12 W. R., 317.

An appellate Court can remand a case a second time on account of error, defect, or irregularity of procedure in passing a decree or order, provided the error, defect, or irregularity, be such as to affect the merits of the case, or the jurisdiction of the Court. When a suit has been regularly heard and determined, and on appeal the decree is reversed, the Appellate Court has the discretionary power to remand the case only if the decree should have been upon a preliminary point, and have the effect of excluding the consideration of evidence essential to the rights of the parties.—5 M. H. C. R., 313.

In a suit to recover possession of miras land, the Court of original jurisdiction decreed for the plaintiff on the evidence, but on appeal its decision was reversed, on the ground that the claim had not been properly valued, and the plaintiff was permitted to bring a fresh action. At the trial of the second action, the Munsif recorded his previous decree, and some additional evidence, which the District Judge in appeal considered to be insufficient. *Held* that, under the peculiar circumstances of the case, the Judge, if not satisfied with the evidence taken at the second trial, should have allowed the plaintiff to give again the evidence adduced at the former trial. The Lower Court's decree was, therefore, reversed, and the suit remanded in order that this might be done.—1 Bom. H. C. R., (A. C.) 166.

The High Court will not, in a special appeal, remand the case where there has been a distinct finding by the District Judge on the only issue framed by him, although he may have omitted to find on another issue raised before the Munsif, but not called for by either party in appeal.—2 Bom. H. C. R., (A. C.) 34; 2nd Ed. 32.

The District Judge not having come to any positive finding on the point for decision laid down by himself in an appeal, the High Court reversed his decree, and remanded the suit for a re-trial on the merits.—2 Bom. H. C. R., (A. C.) 186; 2nd Ed. 178.

An Acting District Judge, having made a decree reversing the decree of the Munsif who threw out the plaintiff's claim, omitted to pass a decree himself in favour of the plaintiff, which his finding showed he intended to do; the case was remanded on special appeal by the High Court to the District Court, with an order that a decree should be passed; but the District Judge (who had meanwhile returned to his appointment) re-opened the whole case, and passed a decree, directly opposed to that of his predecessor, in which he confirmed the Munsif's decree. *Held* that the decree of the Judge should be reversed, and the suit again remanded, in order that he might pass a decree for the plaintiff, in accordance with the view of the case expressed by the Acting Judge, with which the High Court saw no ground upon the special appeal before it to interfere.—3 Bom. H. C. R., (A. C.) 60.

Where the defendants, under-writers of a policy of insurance on goods on board a vessel bound from Bombay to Calcutta, were Hindus, but no principle of Hindu law was applicable, the parties having selected the English language for the expression of their contract, *held* that the case was to be determined in accordance with the principles of English law. A valu-



ation of salt based on the loss which the owner may possibly incur on account of the bonds in respect of the salt passed by him to the Government, though greatly in excess of the real value of the salt, is not such an over-valuation as amounts to proof of fraud. Where, in a valued policy of insurance, the goods insured were valued at an amount greatly in excess of their real value, which amount was intended to include the amount in which the insured was liable to Government on account of bonds executed by him in respect of the goods insured and after loss of the goods, Government elected not to enforce the bonds, *held*, that the under-writers were entitled to be subrogated in the amount of the bonds, and were liable to the insured only for the real value of the goods together with a fair profit. The Appellate Court will not remand a case for retrial on a point not raised in the Court below if the evidence already recorded is sufficient to enable the Appellate Court itself to decide that point. But where the appellants succeeded on a point taken by them for the first time in the Appellate Court, they were ordered to pay the respondent's costs of appeal.—12 Bom. H. C. R., (O. C.) 23.

In a suit to recover damages for the non-acceptance of shares, where the vendor had contracted to execute proper transfers, and do all other things necessary on his part to transfer the shares, and to bear the expense of such transfer, *held* on the issue—whether the plaintiff was ready and willing to perform his part of the contract—that it was sufficient to show that he had in his possession at the time fixed for the performance of the contract on his part such certificates of the shares contracted to be sold as were required by the law, and that he tendered the same with a deed of transfer to the purchaser; and that it was not necessary for the vendor, before handing over the documents to the purchaser, to effect the transfer, but that it was the duty of the purchaser himself in such case, having accepted the shares, to have the transfer made into his name in the books of the Company. The finding of the Court below on the first issue being therefore reversed, the suit was remanded for trial of the issue whether the contract was a wagering one—the Judge having omitted to determine that, and the defendant not having given evidence upon it in consequence on the first issue being found for him on the evidence given by the plaintiff.—3 Bom. H. C. R., (O. C.) 79.

Where, in a suit to make absolute a conditional sale, and to obtain a share in a certain village mortgaged to plaintiffs (the usual year of grace having been given, and money been paid into Court in satisfaction considerably after the term allowed by law), there is no issue respecting the minority of some of the mortgagors, the case will not be sent back to the Appellate Court for inquiry whether certain of the mortgagors were minors, or whether the others mortgaged for such purposes as should bind the minors, notwithstanding one of the lower Courts has found the fact of the minority of one of the mortgagors.—2 N.-W. P. H. C. R., 23.

Where no issues have been settled in a suit, the High Court will remand the case for re-trial.—2 N.-W. P. H. C. R., 183.

Where the Appellate Court remanded a case to the lower Court, and, under the provisions of sec. 354 of Act VIII. of 1859, allowed the parties a week's time within which to file objections, *held* that the terms of the section were merely permissive, and that, though no objections had been taken within the time specified, there was nothing in the law to the effect that an objection taken after the time fixed shall not be listened to.—4 N.-W. P. H. C. R., 72.

On appeal as to costs only, the Appellate Court had no jurisdiction to return the case for trial on its merits.—5 N.-W. P. H. C. R., 20.

M, a Hindu widow, executed a deed of usufructuary mortgage in J's favour, the property hypothecated being the separate property of her husband, in which she only had a life-interest. On the latter applying for mutation of names, B objected that he was in proprietary possession under a deed of gift executed by M, and the objection was allowed. In virtue of a clause in the deed of mortgage—that, in case any demand was made in respect of the property within the mortgage-term, the mortgagor was entitled to sue for the mortgage-money, notwithstanding the term had not expired—J sued to recover the money by the sale of the hypothecated property. B, in addition to an objection to the validity of the mortgage based on the deed of gift, pleaded that it was invalid under Hindu law, as against him, the next reversioner to the property, there being no legal necessity for the alienation. The lower Appellate Court held that the mortgage was valid as against the deed of gift, but invalid as against the next reversioner. Finding that B was not the next reversioner, it remanded the case to the Court of first instance, with instructions to make certain persons, who had applied to that Court to be made parties to the suit, on the ground that they were the nearest heirs to M's deceased husband, but whose application that Court had rejected, defendants in the suit, as also any other persons who might claim to be near heirs, and to determine as between them who was the next reversioner, and to further determine, whether such next reversioner had relinquished his rights in favour of B, and whether the validity of the mortgage could be questioned on the ground that M, having only a limited interest, had alienated for an indefinite period. It was held that the suit was improperly remanded, and the Court decree J's claim in respect of the property. *Quære*—Whether, with reference to the ruling of the lower Appellate Court that the mortgage was valid as against the deed of gift, there was any such danger or weakness in J's title as to entitle him to enforce the mortgage-debt before the expiry of the term.—7 N.-W. P. H. C. R., 203.

When a case has been remanded under sec. 354, Act VIII of 1859, and a time fixed within which objections to the findings on remand are to be taken, the Appellate Court is not competent to alter such of the findings in respect of which no objection is preferred within the time fixed.—1 Agra H. C. R., 50. Nor will the parties be allowed to take objections filed after time.—5 N.-W. P. H. C. R., 114.

Where there is no sufficient evidence before the Appellate Court for the disposal of an issue which is material to the determination of the suit, the proper course to be followed is to remand the case under sec. 354, and not under sec. 351.—3 Agra H. C. R., 146.

The fact that the decision of the Court of first instance was passed on a day when the Court was closed does not necessitate the lower Appellate Court remanding the case.—1 Hay's Rep., 197.

Where there is a defect in the allegations in a plaint, and the subject-matter of the absent allegation has not been tried in the Court below, the proper course is for the Judge to frame an issue, and refer it to the lower Court for trial under Act VIII of 1859, sec. 354.—Marshall's Rep., 198; 1 Hay's Rep., 467.

When important evidence has not been carefully examined by the Judge in the lower Court, the Appellate Court will, on special appeal, remand the suit under sec. 372 of Act VIII of 1859.—1 Ind. Jur., N. S., 35.

Where the Appellate Court remands a case for a specific inquiry, it will not receive any statement on the part of the Zillah Judge as to what he considers the merits of the whole case.—1 Ind. Jur., N. S. 51.

A lower Appellate Court, in remanding a case a second time, ought to state what the main requirements of the first order were, and how the lower Court's decision shows that they have not been carried out.—W. R., 1864, Mis., 39.

An Appellate Court is not competent to remand a case for re-trial after a local investigation.—W. R., 1864, 363.

The lower Court found the suit barred by limitation, but also heard and dismissed the suit on its merits. *Held* that, though in appeal limitation be *held* not to bar the suit, there should be no remand for re-trial on the merits.—1 W. R., 32.

An appellate Court cannot remand a case for trial with instructions to frame new issues. It may refer any issues for trial by the lower Court, whose finding and evidence are to be returned to the Appellate Court for a final decision.—1 W. R., 69.

An order of remand to a lower Appellate Court implies a reversal of the first judgment of that Court.—7 W. R., 326.

When a suit has been dismissed upon a preliminary point, and the decision on that point has been reversed by the Appellate Court, and the case goes down with a view to trial on its merits, evidence may properly be received even from defendants who had appeared, and *a fortiori* from a defendant who had not appeared.—8 W. R., 285.

When a fresh issues are fixed by the Appellate Court, and remanded to the lower Court to be tried, the parties are entitled to have a day fixed for the reception of any further evidence which they may wish to adduce thereon.—9 W. R., 294.

In a case remanded for a finding as to whether a confirmatory pottah had been really given or not, it was held that, as the order of remand did not restrict the Judge to the evidence on the record, he was at liberty to examine the witnesses who were in Court.—9 W. R., 392.

Where a case is remanded with a view to some special evidence being taken, the Court receiving the order of remand is not at liberty to allow the parties to produce other additional evidence.—10 W. R., 303.

*Held* on appeal under the Letters Patent that the lower Appellate Court was competent, under the terms of the order of remand, to inquire into the question of possession.—11 W. R., 77.

Where a Full Bench ruling is brought to the notice of a Judge retrying a case on remand, he is bound, whether the ruling has been published or not, either to ask the pleader to produce the decision relied on, or to take other means for satisfying himself as to the ruling of the High Court, so as to apply the correct law to the case.—11 W. R., 227.

The effect of an order of remand for a new trial is entirely to nullify the first decision, and to re-open the whole case.—12 W. R., 112.

A case should not be remanded when the Appellate Court is of opinion that the lower Court cannot properly come to a different decision upon the evidence than that to which it has already come.—14 W. R., 60.

Where a pre-emption suit was valued at Rs. 31, though the consideration was Rs. 2,000, the High Court, in special appeal, refused to remand the case to enable plaintiff to make up the deficient stamp-duty.—14 W. R., 195.

An order of remand by a Subordinate Judge is final so far as the purpose of the remand goes, and cannot be set aside by his successor.—14 W. R., 285.

Where an Appellate Court finds that there is no evidence upon the record to enable it to decide a question at issue between the parties and remands the case under sec. 354 of the Code for additional evidence, it ought to require such evidence with the finding of the first Court to be sent up to it for decision.—15 W. R., 346.

Where all the evidence has been taken and the case decided on a preliminary point, no remand should be made.—22 W. R., 224.

Where a case is remanded to a lower Appellate Court under sec. 354 of the Civil Procedure Code, 1859, the Judge may, under sec. 355, admit additional evidence, provided he records his reasons for doing so on the proceedings of the Court.—24 W. R., 20.

Where a case is sent back for trial on its merits, the order of remand shuts out objections regarding limitation or *res judicata*.—24 W. R., 333.

An act done by a party with the view of defeating a claim made against him does not estop him from disputing afterwards the validity of that act.—24 W. R., 392.

Where the lower Courts have come to no decision on a point raised, the plaintiff in special appeal has a right to a remand for the point to be tried, even though very trifling.—25 W. R., 140.

Where a Court of first instance decided a suit, not upon a preliminary point so as to exclude any evidence of facts, but upon the merits, and upon all the evidence tendered and issues framed,—*held* by the Full Bench that, with reference to secs. 562, and 564 of the Civil Procedure Code, the lower Appellate Court had no jurisdiction to remand the case under the former section, and that both the remand order and all proceedings subsequent thereto were *ultra vires* and illegal. *Held* further that the legality of the remand order and the subsequent proceedings could under sec. 591 of the Code, be questioned in second appeal from the decree in the suit, though no appeal had been preferred against the order itself under sec. 588 (28).—I. L. R., 12 Al. 510.

In a suit for possession of property by right of inheritance, the Court framed six issues, four of which it tried and decided. With reference to its finding upon the principal of these issues, which related to the plaintiffs legitimacy, the Court dismissed the suit, observing that, in the view which it took of the case, the determination of the remaining issues was unnecessary. Some of the defendants had filed a statement of defence upon which no issues were framed, and no evidence taken, apparently in consequence of the attention of the Court being directed almost exclusively to the main issue as to the plaintiff's legitimacy. There was no formal order excluding evidence on any point. On appeal, the High Court reversed the first Court's finding on the issue with reference to which the suit had been dismissed below. *Held* by EDGE, C. J., and MAHMOOD, J. (STRAIGHT, J., dissenting), that sec. 562 of the Civil Procedure Code applied, not only to cases where the first Court had expressly excluded evidence, but also to cases where the parties were or might have been misled by the act of the Court as to the issues or the evidence necessary, and where, in consequence of the Court erroneously considering one issue only, the parties did not tender or bring forward their evidence; and that, as in the present case evidence had been excluded in this broad sense, sec. 562 (the operation of

which in such cases should be rather expanded than limited) was applicable, and the case should be remanded for trial of the remaining issues. *Held* by STRAIGHT, J., *contra*, that, with reference to secs. 562, 563, and 564, the case could not be remanded under sec. 562, because it had not been disposed of upon a preliminary point, so as to exclude evidence of fact, and the Court should therefore proceed to dispose of it upon the evidence on the record, if any; and that an issue should be remitted to the lower Court under sec. 566.—10 Al. 289.

A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The lower Appellate Court remanded the whole case to the first Court under sec. 562 of the Civil Procedure Code, the plaintiff not appealing under sec. 588 (28) from the order of remand. The first Court now dismissed the whole suit, and, on appeal by the plaintiff, the lower Appellate Court confirmed the decree. On a second appeal to the High Court, *held* (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specifically appealed against; (ii) that the order of remand was *ultra vires*, so far as it related to that part of the first Court's decree which was favourable to the plaintiff, the lower Appellate Court not having jurisdiction, in the absence of any appeal or objections by the defendant, to disturb that part of the decree; (iii) that the order of remand was not made valid by the subsequent appearance of the plaintiff before the first Court or by the appeal from the first Court's decree on the remand; and (iv) that the case was not covered by sec. 578 of the Code. *Per* MAHMOOD, J.—Sec. 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, and not to cases where either of two opposite parties appealed from a part of the decree upon a Court fee sufficient for an appeal from the whole. *Maharajah Moheshur Sing v. Bengal Government* (7 Moo. I. A. 283), *Forbes v. Ameeroonissa Begum* (10 Moo. I. A. 340), and *Shah Mukhun Lall v. Baboo Sree Kishen Singh* (12 Moo. I. A. 147), referred to.—11 Al. 35.

Sec. 562 of the Civil Procedure Code authorizes a remand only where the entire suit, and not merely a portion of it, has been disposed of by the Court below upon a preliminary point.—11 Al. 488.

Where a Court of first appeal remanded a case to the Court of first instance for the addition of all necessary parties, and at the same time decided an issue as to the merits, and it appeared that the Court of first instance had not disposed of the case "on a preliminary point, so as to exclude any evidence of fact which appeared to the Appellate Court essential to the determination of the rights of the parties," *held*, first, that, on an appeal from the order of remand, the decision on the merits on which the order of remand was not based, was not before the High Court on appeal; and, further, that the order of remand was unsustainable under sections 562 and 564 of the Civil Procedure Code (Act XIV of 1882), which are strictly binding on all Courts of first appeal. The proper course for the lower Appellate Court would have been to join the parties whom it found to be necessary, and then to raise the proper issues as between the plaintiff and those parties, and, if necessary, to refer the issues to the Court of first instance for trial under sec. 566.—10 Bom. 398.

The Court of first instance dismissed a suit as barred by limitation. In appeal, that decision was reversed, and the case was remanded under section 562 of the Civil Procedure Code (Act XIV of 1882). Against the order of remand the defendant appealed to the High Court under clause 28 of section 588 of the Civil Procedure Code. It was contended by the plaintiff that the High Court had no power to decide the point of limitation, but could only consider whether the order of remand satisfied the requirements of sec. 562 of the Civil Procedure Code. *Held* by the Full Bench that in an appeal against such an order of remand the power of the High Court is not confined to the question whether that order satisfies the requirements of section 562; but may also determine the correctness of the lower appellate Court's decision on the preliminary point on which the Court of first instance disposed of the case.—14 Bom. 14.

A District Munsif, having taken all the evidence offered on the issues in a suit, disposed of the suit upon his finding on one of the issues without deciding the rest. On appeal the District Judge reversed the decree, and remanded the suit for the trial of the issues left untried. *Held* that, under sec. 562 of the Code of Civil Procedure, the order of remand was illegal.—9 Madr. 355

In a case where neither of the parties desired to have a local investigation, though suggested by the Court, the lower Court dealt with the case on the materials before it, and made a decree. On appeal the Appellate Court remanded the case for the purpose of a local investigation being held at the cost, in the first instance, of the plaintiff. The lower Court thereupon made an order that the plaintiff should deposit the costs of the local investigation, and on default being made by the plaintiff, it dismissed the suit. The order of remand was found to be invalid as made without jurisdiction. *Held* that all proceedings taken by the Court of first instance, after the remand, and pending the hearing of the appeal against the remand order, were null and void, inasmuch as the jurisdiction of that Court to hear the case upon remand depended upon the validity of remand order. An appeal, therefore, lay from the order of remand, notwithstanding the Court of first instance had subsequently made what purported to be a final decree in the case.—12 Cal. 45.

Upon an appeal under cl. 28 of sec. 588 of the Civil Procedure Code, against an order of remand under sec. 562, the High Court is not restricted to the consideration of the form of the order, but may examine it on its merits. Where an Appellate Court passed an order under sec. 562, remanding a case which had been disposed of in the Court of First Instance upon points, which were not preliminary points, but points directed to the merits of the case, the High Court on appeal set aside the remand order, directing the lower Appellate Court to hear the appeal according to law.—17 Cal. 168.

A Subordinate Judge decided a suit on the grounds (1) that it was *res judicata*, (2) that it was barred by limitation. On appeal, the Assistant Judge upheld the decree on the first-mentioned ground without deciding the point of limitation. On second appeal, the High Court reversed the Assistant Judge's decision holding that the suit was not *res judicata*, and remanded the case to be tried on the merits. On receipt of the order of the High Court, the Assistant Judge reversed the decree of the Subordinate Judge without giving any decision on the point of limitation, and remanded the case to the Subordinate Judge to be tried on the merits. From this order the defendant appealed to the High Court. *Held* that the order of re-



mand by the Assistant Judge was unauthorized under sec. 562 of the Civil Procedure Code (Act XIV of 1882). When the High Court remanded the case to be tried on the merits, the whole case was left open to the Assistant Judge, and before he could reverse the Subordinate Judge's decree he was bound, under sec. 562 of the Code, to determine whether the decision of the Subordinate Judge on the question of limitation was right or not.—11 Bom. 663.

An Appellate Court has no power to remand a case except under the provisions of sec. 562 of the Code of Civil Procedure.—3 Cal. 923.

The right of appeal given by secs. 588 and 589 of Act X of 1877 from an order of remand, as contemplated by sec. 562, is not taken away by sec. 586. *Chaudhri Ranjit Singh v. Jafar Ali Khan* (I. L. R., 3 Al. 18) followed.—7 Bom. 292.

An appeal from an order on appeal remanding a suit for re-trial is not to be confined to the question whether the remand has been made contrary to the provisions of sec. 562 of Act X. of 1877 or not, but the question whether the decision of the Appellate Court on the preliminary point is correct or not may also be raised and determined in such an appeal.—3 Al. 675.

On an appeal from an order under sec. 562 of the Civil Procedure Code remanding the case, the High Court cannot consider the facts on which the lower Appellate Court passed the order of remand. All that it can do under sec. 588, cl. 28, is to consider whether, on the findings of fact by the lower Appellate Court, that Court was right in remanding the case.—8 Cal. 674.

By the amendment of the plaint a suit for the restoration of a pond, which it was alleged the defendants were wrongfully filling up, to its original condition, was altered into one for the protection of the plaintiffs from any infringement of, or for a declaration of, their right to a share in the produce, and the use of the water, by way of easement. *Held* that the alteration in the plaint was a material one; and that an Appellate Court is not empowered by Act X of 1877 to order or allow a plaint to be amended, or to remand a case under sec. 562 of that Act for the purpose of such amendment.—2 Al. 669.

As the Limitation Act (XV of 1877) shortens the period of limitation in the case of promissory notes payable on demand, the period of limitation in respect of such notes executed prior to 1st October 1877 is governed by the provisions of sec. 2 of the Act. When a Court of the first instance, after taking evidence, dismisses a suit upon a preliminary objection without giving a decision upon the merits of the case, and the decree is reversed on appeal, the Court of appeal, if it considers the evidence on record sufficient, may decide the case, and is not bound to remand it for trial under sec. 562 of the Civil Procedure Code.—3 Madr. 96.

A Court of first instance dismissed a suit upon a preliminary point. On appeal by the plaintiff against the decree of such Court, the then Judge of the Appellate Court, Mr. B, reversed the decree upon such preliminary point and remanded the suit under sec. 562 of Act X of 1877 for the trial of a certain issue. The Court of first instance tried such issue and made a decree in accordance with its finding thereon. On appeal against the decree of the Court of first instance, the defendant again raised such preliminary point. The then Judge of the Appellate Court, Mr. K, dismissed the suit upon such preliminary point. *Held* that, as, although Mr. B had irregularly remanded the suit under sec. 562 of Act X of 1877, his decision disposed

of such preliminary point, and only left open for trial the issue which he had directed to be tried, Mr. K was not competent to re-try and decide such preliminary point.—3 Al. 755.

Upon an appeal, under sec. 588, clause *w*, of the Civil Procedure Code, from an order of an Appellate Court under sec. 562, remanding a case which has been disposed of upon a preliminary point in the Court of first instance, the High Court may enter into the merits of the adjudication by the Court of first instance on the preliminary point, and may, if it finds the order of the lower Appellate Court defective, allow the party, who had the benefit of a decree in the first Court, to retain that benefit. The purchaser of the rights and interests of judgment-debtor who is a member of a joint family, at a sale in execution of a decree, does not acquire any title to the rights and interests of the other members of the family, unless it is clear that the judgment-debtor was sued in a representative capacity. *Muddun Thakur v. Kantoo Lall* (I. L. R., 2 Cal. 379), distinguished.—5 Cal. 144; 4 C. L. R. 465.

A Court in the exercise of Appellate Jurisdiction passed an order under sec. 562 of the Civil Procedure Code, remanding a case of the Small Cause Court class as described in sec. 586. *Held* that, under the express words of the second portion of sec. 589 of the Code, an appeal does lie to the High Court from such an order.—10 Cal. 523.

See I. L. R., 3 Al. 855, noted under sec. 57; 9 Al. 191, noted under sec. 25; 13 Al. 533, noted under sec. 203.

**“ 563.** When a case is remanded with directions to take any evidence so excluded, the Court to  
 When further evidence any evidence so excluded, the Court to  
 barred. which the case is remanded shall not take  
 any other evidence in the case, except evidence tendered to  
 contradict the evidence so taken.”\*

**564.** The Appellate Court shall not remand a case for  
 Limit to remand. a second decision, except as provided in  
 section 562.

#### Notes.

The judgment of a lower Appellate Court, after setting forth the claim, the defence, the nature of the decree of the first Court, and the effect of the pleas in appeal, concluded, with general observations, as follows :—  
 “ The point to be determined on appeal is whether or not the decision is consistent with the merits of the case. This Court, having considered the evidence on the record and the judgment of the Munsif, which is explicit enough, concurs with the lower Court...The finding arrived at by the Munsif, that the plaintiff's claim is established, is correct and consistent with the evidence. The pleas urged in appeal are therefore undeserving of consideration.” *Held* that this was in law no judgment at all, inasmuch as it did not satisfy the requirements of sec. 574 of the Civil Procedure Code, and that the decree of the lower Appellate Court must therefore be set aside, and the record returned to that Court for a proper adjudication, in accordance with the provisions of that section. *Mahadeo Prasad v. Sarju Prasad* (I. L. R., 8 Al. 614) referred to. Observations by Mahmood, J., upon the distinction between the duties of the Courts of first appeal and those of the Courts of second appeal in connection with the provisions of

\* See Repealing and Amending Act (XII of 1891)

secs. 574 and 578 of the Civil Procedure Code, and with the remand of cases for trial *de novo*. *Ram Narain v. Bhawanidin* (Weekly Notes, 1882, p. 104) and *Sheomber Singh v. Lallu Singh* (Weekly notes, 1882, p. 158) referred to.—I. L. R., 9 Al. 26.

See I. L. R., 9 Al. 36, noted under sec. 623 ; 9 Al. 191, noted under sec. 25 ; 12 Al. 510, noted under sec. 562.

**565.** When the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court "may,"\* after re-settling the issues, if necessary, finally determine the case, notwithstanding that the judgment of the Court against whose decree the appeal is made has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

When evidence on record sufficient, Appellate Court may determine case finally.

#### Notes.

Sec. 565 of Act X of 1877 does not enable an Appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court.—I. L. R., 12 Cal. 239.

*Held* by the Full Bench that sec. 587 of the Civil Procedure Code does not make secs. 565 and 566 applicable to second appeals, so as to enable the High Court, in cases where the lower Appellate Court has omitted to frame or try any issue or to determine any essential question of fact, to itself determine the same upon the evidence on the record ; but the High Court in such cases must remit issues for trial to the lower Appellate Court. *Balkishen v. Jasoda Kuar* and *Deekishen v. Bansi* overruled on this point.—9 Al. 147.

Where a Court of first appeal omits to determine a material issue of fact, the High Court as a Court of second appeal is not competent, under sec. 565 of the Civil Procedure Code, to determine such issue itself, but should refer it for determination to the Court of first appeal.—5 Al. 14.

A District Court on appeal having reversed the decree of a District Munsif's Court and dismissed the suit upon a preliminary point of law, the High Court, on appeal from the District Court's decree, reversed it and directed the District Court to submit its finding to the High Court upon an issue of fact which had been framed and tried by the District Munsif, but had not been decided by the District Court. Upon the return of the finding upon this issue to the High Court, a memorandum of objections to the finding was presented under sec. 567 of the Code of Civil Procedure :—*Held*, that, as the words "as far as may be" in sec. 587 (by which the provisions of Chapter XLI are made applicable to appellate decrees) must be taken to mean "as far as is consistent with the principles on which appeals from appellate decrees are admitted and determined," no objections could be taken to the finding of the District Court under sec. 567 of the Code of Civil Procedure.—7 Madr, 52.

See I. L. R., 9 Al. 26, noted under sec. 564 ; 9 Al. 36, noted under sec. 623.

\* This word has been substituted for the word "shall" by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 51.

**566.** If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, “and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issues or question,”\* the Appellate Court may frame issues for trial, and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required ; and such Court shall proceed to try such issues, and shall return to the Appellate Court its finding thereon, together with the evidence.

#### Notes.

In a second appeal by the defendant in which the plaintiff filed objections to the decree under sec. 561 of the Civil Procedure Code, the High Court, without giving judgment on the appeal, stated (giving reasons) the opinion that the appellant would be entitled to succeed, and at the same time remitted an issue under sec. 566 of the Code with reference to the plaintiff's objections. At that time the appeal was apparently not argued out, and the true meaning of the facts as found was obviously not present to the mind of the Court. *Held* that, upon the return of the findings on remand, the Court could not treat the appeal as already decided, and the objections the sole matter for consideration, but must consider both appeal and objections, and decide the whole case. *Held*, however, that where Judges have heard arguments on some of the issues, and have expressed their views thereon, and have remitted another issue or issues under sec. 566, they are not bound, on the return of findings, to hear the case *de novo*, but may confine counsel to argument upon the findings.—I. L. R., 10 Al. 162.

When a case is remanded under sec. 566 of the Code of Civil Procedure to the lower Appellate Court for findings on certain issues, it is not competent to that Court to delegate the decision of those issues to a Court subordinate thereto.—14 Al. 23.

If, on second appeal, it is found that certain material facts, having an important bearing upon a question at issue in the suit, have been omitted to be considered by the lower Appellate Court, the High Court will interfere with the decision of the lower Appellate Court, even though it be on a question of fact.—11 Cal. 499.

In the Court of first instance the appellant, upon the title of a sister's son was one of the plaintiffs who obtained a decree for an inheritance, the suit having been heard at the same time with another, in which relations of the deceased owner, alleging themselves to be of the same *gotra* with him, also obtained a decree as his heirs. Evidence in the latter suit was received in that of the appellant by consent of parties, both suits having been brought against the same defendant, whose title, as widow of a son alleged to have been adopted by the last owner, was set up in both but was not proved. Appeals having been filed in both suits, in that brought by the

\* See Act XII of 1891 (Repealing and Amending Act).

sister's son a new issue was framed by the appellate Court, under sec. 566 Civil Procedure Code as to whether he was entitled as nearest of kin, or was excluded by the other claimants, whose suit was, at that time, compromised. *Held*, that, after what had taken place in regard to both suits the appellate Court could frame this issue, although it was new, and had not been raised by the defendant's written answer. With reference to the evidence in the one suit having been imported as a whole into the other at the first hearing; and the admission of evidence upon the trial of the new issue; it was held, that the parties intended that the evidence should be admitted and that no irregularity had taken place materially affecting the decree of the High Court, which dismissed the suit of the sister's son on return made under sec. 567.—14 Al. 366.

A Court of first instance to which issues have been remitted under sec. 566 of the Civil Procedure Code by the Appellate Court has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference of the case to arbitration, which is only within the jurisdiction of the Appellate Court. *Gossain Dowlut Geer v. Bissessur Geer*, 22 W. R., 207, referred to. When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and, above all, at the last meeting when the final act of arbitration is done, is essential to the validity of the award. Where a case was referred by a Court to the arbitration of three persons, and the parties to the reference agreed to be bound as to the matters in dispute by the decision of a majority of the arbitrators, and one of the arbitrators subsequently refused to act, and withdrew from the arbitration, *held* that the Court could not pass a decree on the award of the remaining arbitrators, and could only, under sec. 510 of the Civil Procedure Code, appoint a new arbitrator or supersede the arbitration and proceed with the suit. *Kazee Syud Nasir Ali v. Musammat Tinoo Dossia* (6 W. R., 95) and *Rohilkhand and Kumaun Bank v. Row* (I. L. R., 6 Al. 468) referred to.—7 Al. 523.

Where a lower Appellate Court, instead of remanding a suit under sec. 566 of the Civil Procedure Code, erroneously remands it under sec. 562, and the party aggrieved by its order appeals to the High Court, under clause (28), sec. 588, the High Court cannot deal with the case as if it were a first appeal from a decree. All that the High Court can do is to rectify the procedure of the lower Appellate Court, and to direct that it decide the case itself on the merits. *Badam v. Imrat* (I. L. R., 3 Al. 675) distinguished. *Ramnarain v. Bhawanidin* (2 Weekly Notes, 1882, p. 104) and *Sheomber Singh v. Lallu Singh* (Weekly Notes, 1882, p. 158) referred to.—7 Al. 136.

Assuming that an Appellate Court, in deciding a case in a manner inconsistent with, and opposed to, the finding returned to it by the Court of first instance under Act X of 1877, sec. 566, in the absence of objections, acted irregularly, its decree could not be reversed or the case remanded on account of such irregularity, such irregularity not affecting the merits of the case or the jurisdiction of the Court.—2 Al. 908.

Where an Appellate Court, under Act VIII of 1859, sec. 354, refers to a lower Court issues for trial, and fixes a time within which, after the return of the finding, either party to the appeal may file a memorandum of objections to the same, neither party is entitled, without the leave of the Court, to take any objection to the finding, orally or otherwise, after the expiry of the period so fixed, without his having filed such memorandum.—1 Al. 165.

In a suit for negligence, where it is possible that the Court may take one or more different views as to the proper measure of damages,

tiff must come prepared with evidence as to the amount of damages according to whichever view the Court may adopt, and if the evidence produced is applicable to one view only, the Court cannot give the plaintiff a re-trial, and allow him to remodel his case with fresh evidence under sec. 566 of the Civil Procedure Code. That section is intended to provide for cases where some point has come to light in the Appellate Court, which has not been raised, or of the importance of which has not occurred to the parties or to the Judge in the Court below.—5 Cal. 283 : 4 C. L. R., 473.

H sued B for arrears of rent, alleging that the annual rent payable by the latter was Rs. 212-1-0. The Court of first instance gave H a decree based on the finding that the annual rent payable by B was Rs. 94. H appealed, and the lower Appellate Court gave him a decree based on the finding that the annual rent payable by B was Rs. 128-12-0 B. appealed to the High Court from the lower Appellate Court's decree. H did not appeal from that decree, neither did he take any objections thereto under sec. 561 of Act X of 1877. STUART, C. J., and OLDFIELD, J., before whom such appeal came on for hearing, remanded the case to the lower Appellate Court for a fresh determination of the question as to the amount of the annual rent payable by B. The lower Appellate Court then found that the annual rent payable by B was Rs. 212-1-0. *Held* by STUART, C. J., (OLDFIELD, J., dissenting), that such second finding of the lower Appellate Court should be accepted, and the amount awarded by its decree be enlarged accordingly, notwithstanding H had not appealed from that decree, or preferred objections thereto.—3 Al. 643.

See I.L.R., 7 Madr. 52, noted under sec. 565 ; 10 Cal. 932, noted under sec. 574 ; 3 Madr. 96, noted under sec. 562.

**567.** Such finding and evidence shall become part of the record in the suit ; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to the finding.

Finding and evidence to be put on record.  
Objections to finding.

After the expiration of the period fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

Determination of appeal.

#### Notes.

Where a first Appellate Court has remanded a case to the Court of first instance for the trial of issues, and where, on the return of the findings on these issues, no (objections have been preferred) under sec. 567 of the Civil Procedure Code, the Appellate Court, after the period fixed for presenting objections, may, at its discretion, receive or decline to receive any written objection, but is, in any case, bound to consider the findings of the lower Court on the merits, and is not precluded from hearing arguments for and against the findings at the hearing of the appeal. *Abkari Begam v. Wilayat Ali* (I. L. R., 2 Al. 908) followed. The imperative provisions of sec. 574 of the Civil Procedure Code apply alike to cases remanded by the first Appellate Court for the trial of issues and to those in which no such remand has taken place.—I. L. R., 6 Al. 383.

See I. L. R., 10 Al. 28, noted under sec. 556 ; 7 Madr. 52, noted under sec. 565 ; 14 Al. 366, noted under sec. 566.



**568.** The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

Production of additional evidence in Appellate Court.

(a) the Court against whose decree the appeal is made refuses to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced for any witness to be examined to enable it to pronounce judgment; or for any other substantial cause,

the Appellate Court may allow such evidence to be produced, or document to be received, or witness to be examined.

Whenever additional evidence is admitted by an Appellate Court, the Court shall record on its proceedings the reason for such admission.

#### Notes.

The High Court decided a case, irrespective of certain documents brought forward by a party at the hearing of the appeal, and afterwards rejected an application for a review of that judgment. In an application to the Privy Council for special leave to bring in those documents, *held* that further evidence ought not to be admitted under sec. 355, Act VIII. of 1859; that there was great danger in the Court of ultimate appeal lightly introducing evidence which had not been under the consideration of the Courts below, and which the parties had had no means of testing.—3 B. L. R., (P. C.) 25.

It is irregular for an appellate Court to receive, without very substantial reason, evidence, however material and important, which was not produced in the lower Court. The High Court, however, declined to set aside a decision on the ground of such irregularity.—5 B. L. R., App. 54.

Where the evidence upon the record is not sufficient to enable the Appellate Court to pronounce a judgment upon a regular appeal, it may require the Court against whose decree the appeal is made to take additional evidence, defining the points to which such evidence is to be confined, in order to enable the Appellate Court finally to determine the case. The grandson of a Hindu is bound to pay the debt of his grandfather, independent of assets, but without interest, according to the doctrine of the Maharashtra school. But see now the alteration made in the law by the Hindu Heir's Relief Act of 1866.—2 Bom. H. C. R., (A. C.) 64; 2nd Ed. 61.

In a suit brought against a Collector to compel him to refrain from preventing the plaintiff executing his decree against certain land—the only issue being, whether the land was the private property of the judgment-debtors, or Government service land—the plaintiff alleged that the land had been granted in free *inam* by a *sanad* which he petitioned the mamlatdar of the pargana to search for, and send to the Collector; and on a reference by the High Court, the District Judge found that “the Collector did destroy the document that purported to be a copy of a *sanad* such as the plaintiff petitioned the mamlatdar to search for.” *Held* that it was not competent for the defendant to say that the document was not such a one as could be legally admitted in evidence; and that the case came within the rule *omnia psræumuntur contra spoliatorem*.—3 Bom. H. C. R., (A. C.) 116, at p. 123.

Where a Munsif, without framing issues, or examining the plaintiff, passed a decree in his favour upon an admission made by the defendant and upon inspection of a document that was upon the record of a former suit, but the Judge, on appeal, reversed the decree of the Munsif on account of the insufficiency of evidence, the document, in his opinion, not being admissible, it was *held* that the Judge ought not to have reversed the Munsif's decree without first exercising his power of taking fresh evidence under sec. 355 of the Code of Civil Procedure.—6 Bom. H. C. R., (A. C.) 88.

Circumstances under which an Appellate Court will *not* allow additional evidence to be produced, at the hearing of an appeal, under sec. 568 of the Civil Procedure Code.—I. L. R., 15 Cal. 765.

Where the lower Appellate Court allows additional evidence to be taken, though it is not satisfied that the evidence is necessary under clause (a) or clause (b) of sec. 568 of the Code of Civil Procedure, the High Court will interfere, but where this does not appear to be the case, and there is simply an omission on the part of the Appellate Court to record its reasons for allowing additional evidence to be taken, the High Court will not interfere.—11 Cal. 139.

The provision in sec. 568 as to an appellate Court recording its reasons for admitting additional evidence is directory merely, and not imperative. Where the first Court of Appeal has admitted additional evidence, the hearing in the second Court of Appeal will not be treated as a first appeal, so as to allow the pleaders to go into the facts.—12 Cal. 37.

An appellant who had ample opportunity of giving evidence in the Court below, and elected not to do so, but to rest his case on the evidence as it stood, ought not be allowed at the stage of appeal to give evidence which he could have given below.—9 Al. 366.

See I. L. R., 18 Cal. 201, noted under sec. 141; 16 Bom. 676, noted under sec. 220.

**569.** Whenever additional evidence is allowed to be received, the Appellate Court may either take such evidence, or direct the Court against whose decree the appeal is made, or any other subordinate Court, to take such evidence, and to send it, when taken, to the Appellate Court.

**570.** In all cases where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

#### *Of the Judgment in Appeal.*

**571.** The Appellate Court, after hearing the parties or when and their pleaders, and referring to any part pronounced, of the proceedings, whether on appeal or in the Court against whose decree the appeal is made, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders.

**572.** The judgment shall be written in English ; provided that, if English is not the mother-tongue of the Judge, and he is not able to write an intelligible judgment in English, the judgment shall be written in his mother-tongue or in the language of the Court.

**573.** When the language in which the judgment is written is not the language of the Court, the judgment shall, if any party so require, be translated into such language, and the translation, after it has been ascertained to be correct, shall be signed by the Judge or such officer as he appoints in this behalf.

**574** The judgment of the Appellate Court shall state—

- (a) the points for determination ;  
 (b) the decision thereupon ;  
 (c) the reasons for the decision ; and,  
 (d) when the decree appealed against is reversed or varied, the relief to which the appellant is entitled ;
- and shall, at the time that it is pronounced, be signed and dated by the Judge or by the Judges concurring therein.

Date and signature.

#### Notes.

An Appellate Court is not bound to discuss *seriatim* the arguments adduced by a lower Court in support of its judgment, but need only give its own reasons for its own judgment. In the present case, the Principal Sadr Amin confirmed the judgment of the first Court, and need not have given any special reason of his own at all.—*Per* LOCH and GLOVER, JJ., Special Appeal, No. 2966 of 1867.—1. B. L. R., S. N., 2.

An Appellate Court is bound to state its reasons for reversing the decision of a lower Court.—2 B. L. R., App. 20 ; 17 W. R., 358 ; 21 W. R., 284.

The reasons for their decisions must, in all cases, be recorded by the Judges of the High Courts in India. In a suit for maintenance, where the objection was taken on appeal to the Privy Council that no issues had been directed by the Courts below, *held* that an order of the High Court, referring the matter to the lower Court for enquiry “ to ascertain the amount of maintenance which might appear to be justly and properly payable with reference to the means of the defendants and the other facts of the case, and to proceed to decision in the manner indicated in sec. 351 of the Civil Procedure Code,” was equivalent to a direction of issues, and rendered any further issues unnecessary.—2 B. L. R., (P. C.) 72 ; 11 W. R., (P. C.) 33 ; 12 Moore’s I. A., 495.

The Judge of the lower Appellate Court not having recorded his judgments as required by sec. 359 of Act VIII. of 1859, the case was sent back to the lower Court for the Judge to state the points for decision, and

to give his decision upon those points consecutively.—7 B. L. R., App. 14 ; 13 W. R., 131.

It is the duty of Appellate Judges to act so far in conformity with the provisions of the Code of Civil Procedure as is sufficient to show that the Court has dealt with each ground of appeal, and more especially to record distinct findings on questions of fact.—4 M. H. C. R., App. 56.

Where the Civil Judge, confirming a decree of the District Munsif, stated by way of judgment that he was of opinion that the decision of the Munsif was fair and equitable, the High Court on special appeal sent back the case with directions to the Civil Judge to record a judgment in substantial conformity with the provisions of the Code of Civil Procedure.—4 M. H. C. R., App. 56 note.

A Judge may, at the close of the hearing of a suit, state at once orally the judgment which he intends to record and deliver.—5 M. H. C. R., App. 8.

The Civil Judge, in confirming a decision of the District Munsif, did not state the reasons upon which his judgment was founded, and the High Court remitted the case in order that the Civil Judge might record a judgment in accordance with the Civil Procedure Code. The Civil Judge had been appointed to another district, and when the case went down, the new Judge had the case re-argued before him, and reversed the decision of the Munsif. The High Court, under the circumstances, held that effect should be given to the first judgment, notwithstanding the irregularity.—5 M. H. C. R., 174.

A suit, instituted in the Court of the Principal Sadr Amin, was transferred under sec. 6. Act VIII. of 1859, to the Court of the Munsif, who took further evidence, and decreed in favour of the plaintiff. The defendant appealed to the District Court on the ground (amongst others) that part of the evidence had been taken by the Principal Sadr Amin and the District Judge reversed the Munsif's decree, not on this ground, but on the merits. The plaintiff then appealed to the High Court, objecting that the suit had been illegally decided by the Munsif upon evidence recorded by the Principal Sadr Amin; and that the *onus* of proving the *bona fides* of the transaction, which was the subject-matter of the suit, was thrown, by the District Judge, on the plaintiff, instead of on the defendant, who alleged the want of it. *Held* (1) that the Munsif's having used the evidence recorded by the Principal Sadr Amin was only an irregularity, which was waived by the plaintiff's not requiring the witnesses to be examined again, and proceeding with the suit, and producing other witnesses to be examined in support of his claim; and as this irregularity did not affect the merits of the case, the decree of the Munsif being in the plaintiff's favour, it was not a ground for reversing the decree on special appeal; (2) that the *onus* was not thrown by the Judge upon the plaintiff in its proper sense, and so as to be an error in law; as the Judge did not hold that the defendant was entitled to succeed without giving any evidence unless the plaintiff disproved the allegation of want of *bona fides*. The meaning of sec. 183, taken in connection with sec. 172, is that the judgment is to be given upon the examination of the witnesses by the Judge himself in the Court of first instance, and not upon a perusal of depositions, except those taken under sec. 173 and the subsequent sections, which are expressly allowed to be read in evidence at the hearing; and care should be taken, in the transfer of suits and in the disposal generally of the business of the lower Courts, to prevent the necessity of re-summoning witnesses.—4 Bom. H. C. R., (A. C.) 98.

Where the judgment of the lower Appellate Court dismissing an appeal was merely as follows: "The appeal is dismissed with Costs"—the High Court set aside the decree on the ground that the Court had not complied with the provisions of sec. 574 of the Civil Procedure Code.—11 C. L. R., 131.

A judge's decision not being in conformity with the provision of sec. 359, Act VIII. of 1859, was held to be illegal and defective.—1 Agra H. C. R., 73; 11 W. R., 558.

Where the Judge finally disposed of the case on the day fixed for the settlement of issues, without allowing the parties the opportunity to adduce evidence and fully ascertaining the facts, *held* that his judgment was illegal and defective.—2 Agra H. C. R., 30.

The intention of the Legislature as expressed in sec. 633 of the Civil Procedure Code was that the High Court might frame rules as to how its judgments should be given, whether orally or in writing, or according to any mode which might appear to it best in the interests of justice. The section does not merely give the High Court power to direct that judgments shall be recorded in a particular book, or with a particular seal. Rule 9 of the rules made under sec. 633 in March 1885 is therefore not *ultra vires* of the Court, and it modifies the provisions of sec. 576 in their application to judgment of the High Court. With reference to the terms of rule 9, it is not necessary, in a case where the High Court substantially adopts the whole judgments of the Court below, to go through the formality of re stating the points at issue, the decision upon each point, and the reasons for the decision. *Per* EDGE., C. J.—Apart from rule 9, it never was intended that sec. 574 of the Code should apply to cases where the High Court, having heard the judgment of the Court below and arguments thereon, comes to the conclusion that both the judgment and the reasons which it gives are completely satisfactory, and such as the High Court itself would have given. Assuming the provisions of sec. 574 to be applicable, a judgment of the High Court stating merely that the appeal must be dismissed with costs and the judgment of the first Court affirmed, and that it was unnecessary to say more than that the Court agreed with the Judge's reasons, is a substantial compliance with those provisions. The judgment of the High Court in a first appeal was as follows: "This appeal must, in my opinion, be dismissed with costs, and the judgment of the first Court affirmed; and I do not think it necessary to say more than that we agree with the Judges reasons." The appellant applied for leave to appeal to Her Majesty in Council on the ground that the requirements of sec. 574 of the Civil Procedure Code had not been complied with. *Held* by the Full Bench that the objection involved no substantial question of law, and that the application for leave to appeal must therefore be rejected.—I. L. R., 9Al. 93.

Where the lower Appellate Court omits to give reasons for its decision, the High Court will retain the case in second appeal, and either require the Judge to state his reasons, or, in the event of his absence, refer the questions to his successor for fresh trial.—10 Cal. 932.

The imperative provisions of sec. 574 of the Civil Procedure Code apply alike to cases remanded by the first appellate Court for the trial of issues, and to those in which no such remand has taken place.—6. Al. 383.

See I. L. R., 3 Madr. 1, noted under sec. 551; 9 Al. 26, noted under sec. 564; 9 Al. 36, noted under sec. 623.

**575.** When the appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

Decision when appeal heard by two or more Judges.

If there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed :

Provided that, if the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, the appeal may be referred to one or more of the other Judges of the same Court, and shall be decided according to the opinion of the majority (if any) of all the Judges who have heard the appeal, including those who first heard it.

When there is no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed.

The High Court may, from time to time, make rules consistent with this Code to regulate references under this section.

#### Notes.

Sec. 23 of Act XXIII of 1861 referred only to the late Sadr Court, and although this Act formed part of the Code of Civil Procedure, it is clear that sec. 23 could not apply to Judges sitting in appeal from the original civil jurisdiction for this reason, that all the Judges of the Court so sitting in appeal are supposed in law to be equal, whereas sec. 23 of Act XXIII of 1861 only contemplated an appeal from a Court of inferior jurisdiction to the late Sadr Court, and had nothing at all to do with the Court of Appeal from the original civil jurisdiction as that Court is now constituted.—Bourke's Rep., A. O. C., 139.

It was held under this section that, if the Judges differed in opinion on points of law, and did not state the points on which they differed, there was no determination of the case : so that, if the case were then referred to other Judges for final determination, they would have jurisdiction to go into the whole case.—6 W. R., 269.

Where a Bench of two Judges hearing an appeal and differing in opinion have delivered judgments on the appeal as judgments of the Court without any reservation, they are not competent to refer the appeal to other Judges of the Court under sec. 575 of the Civil Procedure Code.—I. L. R., 9 Al. 625.

The provisions of the Letters Patent of 1865, cl. 36, that when the Judges of a Division Bench are equally divided in opinion, the opinion of the Senior Judge shall prevail, has been superseded by Act X. of 1877, sec. 575 (which is extended to miscellaneous proceedings of the nature of



of appeals by sec. 647 of that Act), so far as regards cases to which sec. 575 is applicable.—3 Bom. (F. B.) 204.

Sec. 575 of Act XIV of 1882 does not take away the right of appeal which is given by clause 15 of the Letters Patent. When the judgment of a lower Court has been confirmed under sec. 575 of the Code of Civil Procedure by reason of one of the Judges of the Appeal Court agreeing upon the facts which the Court below, an appeal will lie against such judgment, notwithstanding the terms of sec. 575. *Appaji Bhivray v. Shiblal Khubchand*, (I. L. R., 3 Bom. 204), approved —10 Cal. 814.

The only Bench which can legally deal with an appeal which has been referred under the provisions of sec. 575 of the Civil Procedure Code is one which includes the Judges who first heard the appeal, and whose difference in opinion on a point of law necessitated the reference. *Khelut Chunder Ghose v. Tara Churn Koondo Chowdhry*, 6 W. R., 269, *Mahomed Akil v. Asad-un-nissa Bibi*, (5 Wyman's Rep., 69) and *Brand v. Hammersmith and City Railway Company* (36 L. J., Q. B., 137), referred to. The word "judgment" as used in Rule II of the Rules made by the High Court, North-Western Provinces, to regulate references under sec. 575 of the Civil Procedure Code, must not be understood in its strict sense, but merely as an expression of opinion containing reasons for a contemplated or proposed judgment.—6 Al. 468.

See I. L. R., 14 Madr. 186, noted under sec. 539.

**576.** When the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

**577.** The judgment may be for confirming, varying, or reversing the decree against which the appeal is made, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be passed in appeal, the Appellate Court may pass a decree or order accordingly.

#### Notes.

An Appellate Court has no power to reverse the judgment of a Court of first instance merely on the ground that the document on which the suit was based did not bear a stamp at all.—5 B. L. R., App. 10.

*Held* in special appeal that the lower Appellate Court was right in setting aside the proceedings of the Munsif, on the ground that the property in suit was valued at an amount beyond his jurisdiction, but the plaintiff was entitled to have the plaint returned to him that he might present it with the proper additional stamp before the proper Court.—5 B. L. R., App. 15.

The prohibition contained in sec. 30 of Act IV of 1862, which regulates the Bank of Bengal, against making loans and advances on the security of land, is no prohibition against the bank taking land as security for a past loan and an existing debt. Where title-deeds of land had been deposited by a debtor with the Bank of Bengal, and a letter was given authorizing the bank to sell the land and apply the proceeds in liquidation of a debt then existing and due to the bank, it was held that a valid

equitable mortgage was thereby created in favour of the bank as a security for the money due. The Court declined to entertain the question whether the document relied on was one requiring a stamp, as being a matter not affecting the merits of the case or the jurisdiction of the Court.—7 B. L. R., 653; 16 W. R., 203.

The decision of the Court of first instance as to the admissibility of a document, subject to the payment of stamp-duty, is final, and cannot be reviewed by the Appellate Court.—2 Madr. 321.

It is open to an Appellate Court to consider the question whether a document which the Court of first instance has declared to be liable to a stamp under Act X of 1862 is properly so liable.—3 M. H. C. R., 71.

Where the objection is taken for the first time in special appeal that a document which, according to Act X of 1862, ought to have been stamped, has been admitted by both the lower Courts unstamped, the High Court is bound to take notice of the objection (although not one of the grounds set forth in the petition of appeal), and to require payment of the stamp-duty and penalty, or to reject the document.—3 M. H. C. R., 297.

Sec. 32 of Act VIII of 1859 imposes upon the Court of first instance the duty of taking any legal objection apparent on the face of the plaint, and the fact that the portion of the claim is evidently barred by the law of limitation from which no ground of exemption is stated is an objection which ought to be noticed by the Court when receiving the plaint; or, if not taken notice of then, it may be at any subsequent stage of the suit. The Judge, in appeal, is bound to decree according to the law of limitation applicable to the case as stated by the plaintiff himself, although the objection may not be raised in the grounds of appeal, and his omitting to do so is an error or defect in the decision of the case on the merits, and a ground of special appeal.—2 Bom. H. C. R., (A. C.) 169; 2nd Ed. 162.

A Hindu, whose share in an ancestral estate had been alienated by a co-proprietor, instituted simultaneously three different actions against the co-proprietor and the persons to whom the alienations had respectively been made to recover several distinct parcels of lands which constituted his share. *Held* that, as the plaintiff had but one single cause of action against the co-proprietor, he ought to have brought but one suit against him, and either included all the alienees in this suit, or brought separate actions against the alienees for the several pieces of land in their possession, and caused the proceedings in these suits to be stayed till the suit against the co-proprietor was determined. The course of procedure last indicated is the more correct course. *Held* further that, as the separate suits against the co-proprietor were instituted simultaneously, the error in splitting up the claim against him did not affect the merits; and accordingly the decree was affirmed.—5 Bom. H. C. R., (A. C.) 30.

The misjoinder of plaintiffs, which does not produce error in the decision of the case on its merits, is not a ground for the reversal of a decree on special appeal. *Semble*—That such misjoinder is not a ground for the reversal of a decree in regular appeal. Where the widow of H, a Muhammadan, and his two daughters, brought a joint suit for their respective shares of the estate of H, which were awarded to them jointly, *held* that this was an error of procedure which did not affect the merits of the case. 6 Bom. H. C. R., (A. C.) 177.

A suit was brought against six defendants, the cause of action against five of them being unconnected with the cause of action against the sixth

The Assistant Judge, in whose Court the suit was brought, tried one of the causes of action over which he had jurisdiction, but refused to try the other over which he had no jurisdiction. In appeal, the District Judge refused to enter into the merits of either on the ground of the misjoinder of the causes of action. *Held* that the District Judge was bound to enter into the merits of the claim over which the Court of first instance had jurisdiction, it not being affected by the error in the misjoinder of the two claims.—7 Bom. H. C. R., (A. C.) 19. See 23 W. R., 408.

The plaintiff, as purchaser at a Court's sale, sued in 1871 for possession of certain immoveable property, and tendered in evidence a sale-certificate, dated 20th September 1865. The first Court decided against the plaintiff on the ground, among others, that the certificate was not registered, though registration of it was compulsory. On the 9th February 1875, the plaintiff filed an appeal in the High Court against that decree, and, on the 26th July 1875, applied to that Court for permission to give in evidence a new certificate of sale, issued on the 1st February 1875, regarding the same property as that to which the certificate of the 20th September 1865 related. *Held* by the High Court that, as the new certificate was issued after the first Court had made its decree, the High Court ought not to receive it or to suggest or facilitate any application to the lower Court for a review of its decree on documentary evidence, which had no existence when that Court made such decree. (Distinction pointed out between this case and *Mohidin v. Mahadaji*, S. A., 437 of 1872.) *Quære*.—Whether, under the circumstances of this case, the Subordinate Judge, who issued the new certificate of sale on the 1st February 1875, ought to have so issued it, in order that the plaintiff might register it, the plaintiff having already lost, by his own laches, the right to register the original certificate? *Quære*.—Whether the Court of first instance ought to have received the second certificate if it had been issued and tendered in evidence subsequently to the filing of the suit, but previously to the original hearing?—12 Bom. H. C. R., (A. C.) 247.

Sec. 51 of Act XI of 1865, did not authorize the Local Government permanently and unconditionally invest the Judge of a Small Cause Court with the powers of a Principal Sadr Amin. The section only contemplated an occasional investment of the powers, and one contingent on the state of the business of the Court. Where the proceedings and the decree passed by a lower Court were without jurisdiction, *held* (SPANKIE, J., dissenting) that sec. 350 of the Code of Civil Procedure did not apply, as the judgment of the High Court could not be for reversing or modifying the decree of the lower Court, there being no decree to reverse or modify. *Held*, (*per* STUART, C. J.) that, under sec. 15 of 24 & 25 Vic., c. 104, the power of superintendence to be exercised by the High Court is not merely administrative or ministerial, but also judicial.—5 N.-W. P. H. C. R., 55.

Where an application purporting to contain the terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so-called *sulahnamah* being sent down to the Lower Court for verification, it was found that the attendance of the parties for that purpose could not be procured,—*held* that the High Court was not justified in passing a decree under sec. 577 of the Code of Civil Procedure in accordance with the terms of the unverified *sulahnamah*.—14 Al. 350.

See I. L. R., 3 Al. (F. B.) 152, noted under sec. 540.

**578.** No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise, not affecting the merits of the case or the jurisdiction of the Court.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

#### Notes.

The refusal of a plaintiff-respondent to make good a deficiency in Court-fees in respect of his plaint when called upon to do so by the Appellate Court is not a ground upon which the Appellate Court should reverse the decree of the Court of first instance and dismiss the suit.—I. L. R., 2 Al. 889.

A suit was instituted and tried on the merits, in the Court of a Subordinate Judge without any objection being taken, either by the defendants or by the Court, that the plaint was insufficiently stamped. The defendants appealed on the merits, and the District Judge, being of opinion that the stamp on the plaint was inadequate, called upon the plaintiff to pay the additional fee which would have been payable had the objection been taken and the question rightly decided in the Court of first instance. *Held*, on second appeal, that the order of the Judge was properly made under sec. 12, cl. ii. of the Court Fees' Act, VII of 1870.—7 Cal. 348.

The plaintiffs in this suit, alleging that they were co-sharers of a certain village, that certain land situate in such village was the property of the co-sharers, and that such land had been improperly sold by the persons occupying it to one of the co-sharers, sued the vendors and the purchaser and the other co-sharers for possession of their share of such land and the setting aside of the sale so far as their share was concerned, and valued the suit according to their share. *Held* that the error in the frame and valuation of the suit, inasmuch as it did not affect the jurisdiction of the Court in which the suit was instituted or the merits of the case, was not, under sec. 578 of the Civil Procedure Code, a ground on which the Appellate Court should have reversed the decree of the Court of first instance. *Unnodo Persad Roy v. Erskine* (12 B. L. R., 370) distinguished.—4 Al. 289.

Suit by payee against drawer upon a hundi drawn in British India upon a person a Colombo. The hundi was not stamped when drawn. Objection taken to its admission in evidence by defendant was allowed by the Munsif, but plaintiff was permitted to sue for the amount due upon the original consideration. The suit was dismissed on the ground that no consideration was proved. Upon appeal the District Judge held that the hundi did not require a stamp as it was not intended to operate in British India, and admitted the hundi in evidence as a business letter admitting responsibility and found that there was consideration. *Held* upon second appeal that, the hundi having been admitted in evidence, though contrary to law, by the District Judge, no objection could be taken to the decree in second appeal upon that account.—5 Madr. 220.

In June 1875, L executed a bond in favour of S in which he mortgaged, amongst other property, a village called *Ohand Khera*, as security for the payment of certain moneys. He subsequently sold such village to A, concealing the fact that it had been mortgaged to S. On this fact coming to the knowledge of A, he threatened L with a criminal prosecution, where

upon L proposed to S, in writing, that the security of a share in a village called *Kelsa*, which he alleged was his property should be substituted for the security of *Chand Khera*. S accepted this proposed by a letter in which he referred to L's proposal in terms. It subsequently appeared that the share in *Kelsa* did not belong to L but to another person. S having sued upon his bond, claiming to enforce thereunder a lien upon *Chand Kera*, A set up as a defence to the suit that S had agreed to substitute *Kelsa* for *Chand Khera* in the bond, producing S's letter as evidence of the agreement. *Held* that such letter operated as a release and should therefore have been stamped and registered. *Held* also, that an objection may properly be taken in a Court of first appeal to an unstamped document, and such Court is bound to entertain the objection and may direct that the document be stamped and the penalty imposed. *Held* also, that L's fraud vitiated S's agreement to substitute the security of *Kelsa* for the security of *Chand Khera* in the bond, and S was entitled, notwithstanding A might have purchased the latter property in good faith, to the enforcement of the lien created thereon by the bond. *Mark Ridded Currie v. S. V. Muttu Ramen Chetty* (3 B. L. R., 126) discussed.—2 Al. 554.

The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received, as the bond recited they had at the time of its execution, the consideration for it. The Court of first instance, instead of calling on the defendants to establish the fact that they had not received the consideration for the bond, as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and that, if it had been paid at all, it had been paid at some subsequent time. The plaintiff did not give any further evidence to establish such payment, and the Court of first instance, without calling on the defendants to establish their defence, dismissed the suit. The lower Appellate Court held that the defendants should have been required to begin under the circumstances, and reserved the decree of the Court of first instance, and gave the plaintiff a decree. *Held* that, although the plaintiff ought not to have begun, yet as he had done so, and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent time, paid to the defendants the consideration for the bond. Also that it was doubtful, having regard to the provisions of sec. 578 of Act X. of 1877, whether it was competent for the lower Appellate Court to reverse the decision of the Court of first instance; but even if it were, the lower Appellate Court should not have ignored what had taken place, but should have dealt with the case in appeal in the shape it came before it.—3 Al. 824.

A Mahomedan residing at Zanzibar let a house situated there to the defendant, to be held by the latter as long as he pleased, under a lease in which he (the lessor) stipulated never to remove the lessee. The plaintiff, subsequently, with full knowledge of the lease, purchased the same house from the lessor, and as such purchaser sued to eject the defendant. The plaintiff tendered evidence to show that by the custom of Zanzibar the defendant's tenancy was determined upon the sale by the landlord. This evidence was refused. *Held* that the alleged custom, even if proved, was invalid. It was unreasonable, as enabling a man, after having granted a

lease, to deprive the lessee of the entire benefit of his lease. The exclusion of evidence in the lower Court is not sufficient ground for reversing that Court's decree, unless the Appeal Court comes to the conclusion that the evidence, refused, if it had been received, ought to have varied the decision.—8 Bom. 408.

See I. L. R., 4 Al. 163, noted under sec. 45 ; 10 Cal. 1061, noted under sec. 44 ; 9 Al. 26, noted under sec. 564 ; 14 Cal. 159, noted under sec. 440 ; 17 Cal. 155, noted under sec. 15.

*Of the Decree in Appeal.*

**579.** The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

Date and contents of decree.

The decree shall contain the number of the appeal, and the memorandum of appeal, including the names and description of the appellant and respondent, and shall, specify clearly the relief granted or other determination of the appeal.

The decree shall also state the amount of costs incurred in the appeal, and by what parties and in what proportions such costs and the costs in the suit are to be paid.

The decree shall be signed and dated by the Judge or Judges who passed it :

Provided that, where there are more Judges than one, if there be a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

Judge dissenting from judgment need not sign decree.

**Notes.**

A respondent having died, a conditional order was, on the application of the appellant, made substituting the name of his alleged representative on the record. That order was cancelled upon the application of another person, who satisfied the Court that he and not the person whose name had been conditionally substituted was the real representative, and who asked to have his name put on the record. *Held* that the Court had no power to substitute the name of the second applicant upon the record, and no further application having been made by the appellant to complete the regard, the appeal was ordered to abate.—12 C. L. R., 45.

When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree.—16 W. R., 266.

An Appellate Court finally determining a suit is bound to decide by which of the parties before it the costs shall be borne ; it is not at liberty to declare that the costs shall be borne by the unsuccessful party in a suit to be hereafter brought.—23 W. R., 89.

On second appeal the High Court awarded the plaintiff's claim with costs throughout ; but the claim, as stated in the paper-book of appeal,



differed from the claim as it had been stated in the plaint. *Held* that the award of the claim was to be understood as referring to the claim as stated in the plaint, and not as described in the paper book. Sections 579 and 587 of the Civil Procedure Code (Act XIV of 1882) do not require the claim to be stated in the decree, so as to make such statement a part of the decree itself.—I. L. R., 11 Bom. 177.

See I. L. R., 3 Madr. 1, noted under sec. 551 ; 11 Al. 267, noted under sec. 206.

Copies of judgment and decree to be furnished to parties.

**580.** Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Court and at their expense.

**581.** A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed against, and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

NOTE.—See I. L. R., 10 Al. 389, noted under sec. 235.

**582.** The Appellate Court shall have, in appeals under this chapter, the same powers, and shall perform, as nearly as may be, the same duties, as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted under Chapter V ; and in Chapter XXI, so far as may be, “the word ‘plaintiff’ shall be held to include a plaintiff-appellant or defendant appellant, the word ‘defendant’ a plaintiff-respondent or defendant-respondent, and the word ‘suit’ an appeal,”\* in proceedings arising out of the death, marriage or insolvency of parties to an appeal.

The provisions hereinbefore contained, “including those of section 372A,”† shall apply to appeals under this chapter, so far as such provisions are applicable.

#### Notes.

An Appellate Court has no power, even by consent of parties, to refer a case to arbitration under the arbitration-sections of Act VIII. of 1859, which apply only to Courts of original jurisdiction ; nor is such power conferred on an Appellate Court by sec. 37, Act XXIII. of 1861.—12 B. L. R., 269.

Where the special appellant died after the High Court had referred for trial, to the Court below, an issue based upon objections taken by the res-

\* The words quoted have been substituted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 58, for the words, “the words ‘plaintiff,’ ‘defendant,’ and ‘suit,’ shall be held to include an appellant, a respondent, and an appeal, respectively.”

† The words quoted have been inserted by the same Act and section.

pondent under sec. 348 of Act VIII of 1859, *held* that the appeal must abate, in accordance with sec. 102 of Act VIII. of 1859 and sec. 37 of Act XXIII. of 1861; and that the respondent cannot require that it should proceed, in order that he may have an opportunity of taking objections to the decree of the Court below. If the respondent desires to secure the right asking for a decision on his objections, he must file a separate appeal.—3 Bom. H. C. R., (A. C.) 81.

Procedure analogous to that laid down in sec. 368 of the Civil Procedure Code (Act X. of 1877) in respect of the death of a defendant must be applied in the case of the death of a respondent. Where, therefore, a respondent dies during the pendency of an appeal, it is for the appellant to take the initiative, and he is at liberty to select one or more persons to defend the appeal; and no person, other than the person so selected, has a right to force himself into the proceedings, and to claim to have his name entered as representative of the deceased respondent against the appellant's consent. Persons so introduced on the record may or may not be the real representatives of the deceased respondent; but the merits of their claim to be such, on the ground of any right or *status*, such as that of adoption, is immaterial to the determination of the appeal.—4 Bom. H. C. R., 654.

An error in the principle on which an account is taken is not the only ground on which a Court should inquire into the correctness of the report of a Commissioner appointed under sec. 181 of the Code of Civil Procedure. It is competent to an Appellate Court, under the powers conferred by sec. 37 of Act XXIII. of 1861, to examine the accounts, even if no exception has been taken to them in the Court appointing the Commissioner. Madras rulings dissented from.—6 Bom. H. C. R., (A. C.) 149.

Where application was made for leave to withdraw a suit, with leave to bring a fresh one, it being contended that the fact of a notarial protest on inland bill's and of their being in the hands of the holder without signature, was proof of dishonour; and, further, that, defendant being a Hindu, there was no necessity for notice of dishonour, the Appellate Court, reversing the decision of the Court below, granted the application under the power given by sec. 37, Act XXIII. of 1861.—Bourke's Rep., A. O. C., 99.

An Appellate Court has jurisdiction, under sec. 37, Act XXIII. of 1861, to separate misjoined suits, and to try them separately.—4 W. R., 109.

Under sec. 582 of the Civil Procedure Code, a Court of appeal has the power, with the consent of the parties, of referring to arbitration matters in dispute in an appeal. *Juggessur Dey v. Kritartho Moyee Dossee* (12 B. L. R., 266) dissented from.—I. L. R., 3 Madr. 78.

*Per MITTER, J. (GARTH, C. J., dubitante.)*—Notwithstanding that sec. 582, Civil Procedure Code, does not expressly direct that the word "plaintiff" occurring in sec. 366 shall be held to include an "appellant," yet the power conferred by sec. 366 on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff may, by analogy, be taken to be conferred on the Appellate Court. *Lakshmibai v. Balkrishna* (I. L. R., 4 Bom. 654) followed.—8 Cal. 440; 10 C. L. R., 437.

Under section 582 of the Civil Procedure Code an Appellate Court has power to refer a case before it to arbitration if the parties wish it to be referred. *In the re petition of Sangaralingam Pillai*, I. L. R., 3 Madr., 78, and *Bhugwan Das Marwari v. Nund Lal Sein*, I. L. R., 12 Calc., 173, followed.—18 Cal. 507.

See I. L. R., 9 Al. 447, noted under sec. 32; 11 Al. 408, noted under sec. 368; 14 Al. 226, noted under sec. 206.

**“582A.** If a memorandum of appeal or application for a review of judgment has been presented within the proper period of limitation, but is written upon paper insufficiently stamped and the insufficiency of the stamp was caused by a mistake on the part of the appellant or applicant as to the amount of the requisite stamp, the memorandum of appeal or application shall have the same effect and be as valid as if it had been properly stamped : Provided that such appeal or application shall be rejected unless the appellant or applicant supplies the requisite stamp within a reasonable time after the discovery of the mistake to be fixed by the Court.”\*

**583.** When a party entitled to any benefit (by any of Execution of decree of restitution or otherwise) under a decree Appellate Court. passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred ; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits.

#### Notes.

An application for execution of the decree of an Appellate Court should be made to the Court which passes the first decree in the suit, irrespective of any previous order referring the case for execution.—13 W. R., 27.

G obtained a decree against R for possession of a house, and in execution thereof obtained possession. On appeal, the decree was set aside by the High Court, whose decree did not direct that the appellant should be restored to possession and was silent as to mesne profits. *Held* that, with reference to sec. 583 of the Civil Procedure Code, R was entitled to recover possession of the property in execution of the High Court's decree, but that, with reference to the decision of the Full Bench of the Court in *Ram Ghulam v. Dwarka Rai* (I. L. R., 7 Al. 170), he could not, in execution of that decree, recover mesne-profits.—I. L. R., 7 Al. 197.

In a suit for redemption of a mortgage, a decree was passed for possession by redemption, on the plaintiff paying the sum of Rs. 43,625-7-0, the amount of the mortgage-debt. Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage, and the plaintiff paid the above-mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt, and obtained a decree by which the decree of the first Court was modified, and the amount payable on redemption was reduced to Rs. 22,155. The plaintiff then took out execution of the decree to recover from the defendant the difference between the two sums with interest:—*Held* that the effect of the Appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the Appellate

\* This section has been added by Act VI of 1892, sec. 3.

Court's decree, and that the question was clearly one for determination by the Court executing the decree and not by separate suit, being expressly provided for by sec. 583 :—*Held* also, that the decree-holder was entitled to restitution of the amount with interest. *Roger v. The Comptoir d'Escompte de Paris* (L. R., 3 P. C., 465) referred to. *Ram Ghulam v. Dwarka Rai* (I. L. R., 7 Al. 170) distinguished by MAHMOOD, J.—7 Al. 432.

A decree for pre-emption was passed conditionally upon payment by the decree-holder of Rs. 1,139, and in July 1880 the plaintiff paid this amount into Court, and it was drawn out by the defendant in Aug. 1881. Meanwhile, in July 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to Rs. 2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it and the decree for pre-emption thereupon became dead. In May 1883, the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted, and the defendant ordered to refund ; and this order was confirmed on appeal in January 1885, and by the High Court in second appeal in May 1885. Meanwhile the first Court had suspended execution of the order pending the result of the appeal, and in December 1884 removed the application temporarily from the " pending " list. In February 1885, the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant. This application was dismissed as barred by limitation. *Held* that this application was only a revival of the application of May 1883, which was within time. *Held* also that the plaintiff was, in the sense of sec. 583 " a party entitled to a benefit by way of restitution under the decree " of the High Court of July 1881 ; that it was necessary incident of that decree that he was entitled to restitution of the sum which he had paid as the sufficient price under the decree of the lower Appellate Court ; that he was competent under sec. 583 to remove the local Court to execute the appellate decree in this respect in his favour " according to the rules prescribed for the execution of decree in suits ; " that he did this in May 1883 by an application made according to law in the proper Court in the sense of art. 179 of the Limitation Act ; and that his present application to the same effect, being within three years from that application, was within time.—8 Al. 545.

See I. L. R., 10 Al. 400, noted under sec. 214 ; 10 Al. 389, noted under sec. 235.

## CHAPTER XLII.

### OF APPEALS FROM APPELLATE DECREES.

**584.** Unless when otherwise provided by this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court on any of the following grounds (namely) :—

(a) the decision being contrary to some specified law or usage having the force of law ;

(b) the decision having failed to determine some material issue of law or usage having the force of law ;

a substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits.

An appeal may lie under this section from an appellate decree passed *ex-parte*.\*

#### Notes.

Sec. 28 of Act XIX. of 1853 having been repealed by Act X. of 1861, a Judge has no jurisdiction under Act VIII. of 1859 to inflict a fine for the purpose of punishing a witness who absconds, or keeps out of the way, to avoid service of summons. By the words of sec. 365 of Act VIII of 1859, the Legislature must have intended to give the person aggrieved by any order of a Civil Court, imposing a fine on him as a punishment for keeping out of the way in order to avoid service of summons to attend as a witness, the right of appeal to the High Court, whether the order be strictly referable to sec. 160 of that Act or not.—1. B.L.R., (A. C.) 186 ; S. C. 10 W. R., 233.

In order to obtain relief under sec. 28 of Act X of 1859, the plaintiff must prove that the tenant holds under a grant made since 1st December 1790. By the word "decision" in sec. 372 of Act VIII of 1859 is meant the decree and judgment taken together, and not simply the decree unexplained by the judgment.—B. L. R., Sup. Vol., 1.

A special appeal will lie from an order passed on appeal in relation to the execution of a decree.—B. L. R., Sup. Vol. App. 1 ; Marshall's Rep. 296 ; W. R., (F. B.) 83 ; 2 Hay's Rep. 293.

No special appeal will lie from the decision affirming or reversing an order under sec. 257; Act VIII of 1859, confirming a sale.—B. L. R., Sup. Vol., 917 ; 9 W. R., 218 ; 6 W. R., Mis., 119.

Where a decree is passed *ex parte* in an original suit, the defendant has no right to a special appeal, even though his appeal may have been entertained by the Civil Court.—1 M. H. C. R., 189.

A defendant complained under sec. 257 of the Civil Procedure Code of irregularity in conducting the sale of his lands taken in execution of a decree against him. The sale was confirmed by the Court of first instance, and the order was affirmed on appeal by the Civil Judge. *Held* that a special appeal to the High Court did not lie.—5 M. H. C. R., 213.

A special appeal lies to the High Court from an order passed under sec. 346 of the Civil Procedure Code, dismissing the appellant's regular appeal for non-appearance of the appellant in person or his pleader. *Devappa Setti v. Ramanadha Bhatt* (3 M. H. C. R., 109) commented on.—6 M. H. C. R., 1.

A special appeal lies from the decision of the Political Agent of the Southern Maratha Country passed in regular appeal.—6 Bom. H. C. R., (A. C.) 75.

The High Court has no power to entertain a special appeal from an order passed in regular appeal by a Judge setting aside a sale in execution, and reversing the order of a Munsif confirming such a sale.—5 N.-W. P. H. C. R., 19.

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\* This clause has been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 54.

*The circumstance that property was sold in execution of a decree below its proper value, and that few persons attended the sale, is not sufficient to vitiate the sale.*—5 N.-W. P. H. C. R., 19.

A suit had been dismissed by a lower Appellate Court on the ground that the Court of first instance had no jurisdiction to entertain such suit. An Act was subsequently passed declaring that all suits which had been similarly entertained without jurisdiction should be deemed to have been duly preferred. The plaintiff, after the passing of the Act, filed a special appeal, in which he urged that the decision of the Court of first instance was no longer illegal, and that the suits should be heard by the lower Appellate Court on its merits. *Held* (per TURNER, J.) that, as at the time the lower Appellate Court gave the decision from which the special appeal was presented the Act had not been passed, it must be held that its judgment was correct, and that a new law passed since the decision could not make that decision wrong, which was and still is, with reference to the law then in force, right, and that the appeal should be dismissed. *Held* (per SPANKLE, J.) that a special appeal would lie, the decision being contrary to a law in force at the time that the special appeal was instituted, which law, Court was bound to enforce.—5 N.-W. P. H. C. R., 106.

A special appeal will lie from an order rejecting an application, under the provisions of sec. 347 of Act VIII of 1859, for the re-admission of an appeal dismissed for default of prosecution, if it appears that the Court below has not exercised the discretion which it possessed under the section. The lower Appellate Court, without enquiry, and without recording any reasons, summarily refused an application under sec. 347. The order of refusal was set aside in special appeal, and the application remanded for proper consideration and disposal.—6 N.-W. P. H. C. R., 222.

A special appeal will not lie against an order of the Judge refusing to admit a regular appeal presented after the expiration of the time provided for preferring appeals.—3 Agra H. C. R., 301.

A special appeal did not lie from an order of remand under sec. 354, Civil Procedure Code.—23 Agra H. C. R., 368 ; S. C. Agra H. C. R., (F. B.) Ed. 1874, 161.

Under secs. 584 and 585 of the Code of Civil Procedure, 1882, a second appeal is confined to matters of law, usage having the force of law, or substantial defect in procedure. On an appeal to the Judicial Commissioner from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the Original Court, the only questions were—(1) whether secondary evidence had been properly admitted on a case that had arisen for its admission ; and (2) whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document. *Held* that (no special leave to appeal from the judgment of the Commissioner, the first Appellate Court, having been applied for) the facts were not open to decision on this appeal ; this Committee could only do what the Judicial Commissioner on second appeal, under the above sections, could have done ; and that, as the case stood, they were bound by the findings of fact of the first Appellate Court.—I. L. R., 16 Cal. 753.

An order dismissing an appeal as being presented out of time under sec. 4 of the Limitation Act, 1877, is a “decree passed in appeal” within the meaning of sec. 584 of the Civil Procedure Code, 1882. A second appeal will therefore lie from such order.—12 Cal. 30.

The fact that the judgment of an Appellate Court is not drawn up in the manner prescribed by sec. 574 of the Code is no ground for a second



appeal under sec. 584 unless it can be shown that the judgment has failed to determine any material issue of law.—13 Cal. 199.

It is a question of law for the Court to decide on second appeal whether there is evidence before the Court, on which a Court could properly arrive at any given conclusion of fact.—12 Cal. 199.

When a question of costs is purely in the discretion of the lower Court no appeal will lie, but when a matter of principle is involved an appeal will lie. Where A was sued upon the allegation that he had instigated his co-defendant B to refuse to deliver up a document, for the recovery of which the suit was brought, and where no relief was prayed as against A, but the lower Courts awarded a decree in favour of the plaintiff directing A to pay half the costs of suits, *held* that the question was one of principle, and that a second appeal lay to the High Court against the decree directing A to pay such costs.—12 Cal. 179.

The Court of first instance dismissed the suit upon the ground that the right, which it was brought to establish, had been taken away by a compromise, entered into by a guardian on behalf of an infant party to former proceedings. This was reversed by the first Appellate Court, which decreed the claim, holding it unaffected by the compromise, on the ground that the latter was, in fact, contrary to the interests of the infant. The High Court, on a second appeal, set aside this finding there having been no proof that the compromise was to the infant's detriment, and affirmed the decree of the first Court. *Held*, that the High Court rightly reversed the decree of the first Appellate Court; the above finding, without any evidence to support it, being a substantial error in the proceedings, and good ground of second appeal within the meaning of sec. 584, sub-section (c), of the Civil Procedure Code.—17 Cal. 875.

*Held* by the Full Bench (PETHERAM, C. J.,) dissenting that, under sec. 584 (c), of the Civil Procedure Code it is competent for the High Court to entertain pleas in second appeals which impeach the findings of fact recorded by the lower Appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Where a lower Appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has stated no intelligible reasons for arriving at its findings of facts, the High Court may take notice of all such matters in second appeal. *Futtehma Begum v. Mahomed Ausur* (I. L. R., 9 Cal. 309). *Assanullah v. Hafiz Mahomed Ali* (I. L. R., 10 Cal. 193), and *Lal Mahomed Behari v. Shoila Bewa* (11 Cal. L. Rep., 104), referred to. *Per* PETHERAM, C. J.—The High Court is not at liberty in second appeal to look into the evidence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly, inasmuch as no question of fact is included in the grounds of appeal allowed by sec. 584 of the Civil Procedure Code, and it would seem that the intention of the Legislature was that in small causes the findings of the lower Courts on questions of fact should be absolutely final. By "specified law" in clause (a) of sec. 584 is meant the statute law, and by "usage having the force of law" the common or customary law of the country or community, and the clause is confined to cases in which the lower Appellate Courts have either misconstrued a statute or written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties. Clause (b) can only refer to mistakes in

law, and does not extend the operation of clause (a). The term "procedure" in clause (c) means the practice followed by the Courts in the trial of cases, and cannot be construed as including the mental process by which a Court comes to a conclusion upon a question of fact. *Per MAHMOOD J.* That the Legislature, by framing sec. 574 of the Civil Procedure Code, intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal, and a judgment of a Court of first appeal which falls short of due compliance with the various clauses of sec. 574 is essentially defective, and may properly be made the subject of complaint in second appeal under sec. 584. *Ramnarain v. Bhawanidin* (Weekly Notes, 1882, p. 104) and *Sheoamber Singh v. Lallu Singh* (Weekly Notes, 1882, p. 158) referred to. The word "procedure" in clause (c) of sec. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code or any other law regulating the investigation of cases by the Civil Courts. When the Court of first appeal, after having entered into the merits of the case, has considered the evidence, and adjudicated upon the merits in the manner required by sec. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and hearing of the case upon the merits. On the other hand, when the Court of first appeal, while adjudicating with due compliance with the provisions of sec. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the lower Appellate Court open to second appeal under cl. (c) of sec. 584, so long as the error was substantial enough to have possibly affected the justice of the case upon the merits.—7 Al. 649.

For the purposes of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed. Therefore where execution was applied for in the Munsif's Court in respect of a sum of Rs. 422-14-0, the value of the matter in dispute in the original suit (which of was the nature cognizable by a Court of Small Causes) having been above Rs. 500, and the Munsif's order having been upheld in appeal by the District Judge, revision of both orders was applied for in the High Court. *Held* that no proceedings by way of revision could be taken, because a second appeal would lie from the order of the District Judge.—12 Al. 581.

On second appeal by a landlord against a decree of a District Judge, who stated in his Judgment that, "though the tenant admitted the execution of the Muchalka, it was not shown that the dispensed with the patta," no objection was taken in the memorandum of appeal that the Muchalka, which contained a statement that no patta was necessary, had been neglected or misconstrued. The High Court ordered that the Judge be asked to take the postscript into his consideration and submit a revised finding.—10 Madr. 363.

The limitation to the power of the Appellate Court in hearing a second appeal under secs. 585 and 586 of the Code of Civil Procedure, 1882, must be attended to, and the appellant cannot be allowed to question the finding of the first Appellate Court on a question of fact.—17 Cal. 291.

In a suit for rent at the rate of Rs. 22-2 per annum the defence was that the yearly rent was not Rs. 22-2, but Rs. 18-10-6, and that the difference was made up of certain illegal cesses, such as *sarak*, *neg*, *khuruch*, which had been paid for a long time with the rent and without specification in the rent receipts. Both the lower Courts found that Rs. 18-10-6 was the defendant's *asul jama*. Held by the Full Bench upon a review of the history of *abwabs*:—That the amounts sued for under the head of *sarak*, *neg*, and *khuruch* were *abwabs*, and were therefore not recoverable, and that all additions to the actual rent under the denomination of *abwabs*, are illegal, and any agreement to pay them is void. *Pudma Nund Singh v. Baij Nath Singh*, I. L. R., 15 Cal. 828, dissented from. *Per Fetheram*, C. J.—The law, whether under the Regulations, of the Bengal Tenancy Act, or as laid down by the Privy Council in *Tilukdhari Singh v. Chultan Mahton*, I. L. R., 17 Cal. 131; L. R., 16 I. A., 152, is the same, namely, that no imposition under any name whatever shall be recovered from the tenant for or on account of the occupation or tenure of the land beyond the sum which had been fixed for rent, whether that sum has been paid by agreement or by judicial determination between the landlord and the tenant. Any contract, whether express or implied, to pay anything beyond that sum, under any name whatever, for or in respect of the occupation of the land cannot be enforced. The case of *Pudma Nund Singh v. Baij Nath Singh* (1) has been overruled by the Privy Council in *Tilukdhari Singh v. Chultan Mahton* (2) *Per Ghose*, J.—If in any given case the Court finds that any particular sum specified in the lease, or agreed to be paid, is a lawful consideration for the use and occupation of any land, that is to say if it is really part of the rent although not described as such, the court would be justified in holding that it is not an *abwab* and is recoverable by the landlord. *Pudma Nund Singh v. Baij Nath Singh*, I. L. R., 15 Cal. 828, explained.—17 Cal. 726.

Under the Code no second appeal will lie, except on the grounds specified in section 584. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. *Anangamanjari Chowdhurani v. Tripura Sundari Chowdhurani* L. R. 14 I. A., 101; I. L. R., 14 Cal. 740, and *Pertab Chunder Ghose v. Mohendra Purkait*, L. R. 16 I. A., 233; I. L. R., 17 Cal. 291, referred to and followed. *Futtehma Begum v. Mohamed Ausur*. I. L. R., 9 Cal. 309, and *Nivath Singh v. Bhikki Singh*, I. L. R., 7 Al. 649, overruled.—18 Cal. 23.

A defendant who obtains a judgment in his favour in the Court of first instance, and who, on appeal by the plaintiff, does not appear at the hearing of the appeal or present a petition for a re-hearing, may, under Act X of 1877, present a second appeal against the decree of the lower Appellate Court.—2 Madr. 75.

An order on appeal from a decree in an original suit of the nature cognizable in Mofussal Courts of Small Causes, under sec. 562 of Act X of 1877, remanding the suit for re-trial, is appealable, sec. 586 of Act X of 1877 notwithstanding, as that section applies to appeals from appellate decrees, and not to appeals from orders.—3 Al. 18.

Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led, not into any mere incidental mistake, but totally to misconceive the case, the High Court will interfere in second appeal, though it is not the ordinary course of procedure for it to interfere in such cases with any findings of facts which have been arrived at by the lower Appellate Court. In a suit on a mortgage-bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction.—9 Cal. 309.

No Court of second appeal can entertain an appeal upon any question as to the soundness of findings of fact by the Court of first appeal; and if there is evidence to be considered, the decision of that Court, however unsatisfactory it might be, if examined, must stand final. The plaintiff to make good his claim against the estate of his deceased debtor, relied upon a document purporting to have been signed by the latter's widow, since then also deceased. The Court of first appeal, however, found that there had been no actual execution of the instrument by the widow, and dismissed the suit. The burden of proving due execution by the widow, lay upon the plaintiff, who relied upon it as binding the estate which she represented [a matter commented on in *Kameswar Pershad v. Run Bahadur Singh*]. After the decision of the second Court no further appeal on the question of fact was allowable. 19 Cal.—249.

A suit to redeem a usufructuary mortgage of certain lands was instituted in the Munsif's Court. After the suit had been admitted, and the parties called on to produce evidence, the Munsif ordered the plaint in the suit to be returned to the plaintiff for presentation in the proper Court, on the ground that the suit should have been instituted in the Court of the Subordinate Judge, the value of the property in suit being beyond the jurisdiction of a Munsif. *Held* that, under Act VIII of 1859, the Munsif's order was appealable to the lower Appellate Court, and, under Act X of 1877, the lower Appellate Court's order to the High Court. Where the question in dispute in such a suit is not only whether the property has been redeemed out of the usufruct, but whether the property and the right to redeem belongs to the plaintiff, and the value of the property exceeds Rs. 1,000 such suit is not cognizable by a Munsif.—1 Al. 620.

The holder of a decree for money applied for the attachment, in the execution of decree, of certain moneys deposited in Court to the credit of the judgment-debtor. On the 4th June 1877, the Court of first instance refused the attachment on the ground that the decree directed the sale of certain immoveable property for its satisfaction, and awarded no other relief. The order of the Court of first instance was affirmed by the lower Appellate Court on the 4th August 1877. Act X of 1877, repealing Act VIII of 1859, and Act XXIII of 1861, came into force on 1st October 1877. On 13th November 1877, the decree-holder applied to the High Court for the admission of a second appeal from the order of the lower Appellate Court, on the ground that the decree had been misconstrued:—*Held* that an appeal under the repealed Act VIII of 1859 was admissible under Act I of 1868, sec. 6, and that the order of the lower Appellate Court was appealable under Act X of 1877, sec. 584. *Thakur Prasad v. Ashan Ali*, I. L. R., 1 Al. 668. See also *Runjit Sing and others v. Meherban Koer*, I. L. R., 3 Cal. 662. *Murli Dhar v. Parsotam Dass and another*, I. L. R., 2 Al. 91: *Hurbuns Sahai and others v. Bhairo Pershad Singh and others*, I. L. R., 5 Cal. 259. But see *Uda Begam v. Imam-ud-din*, I. L. R., 2 Al. 74.

See I. L. R., 6 Cal. 2063 Al. (F. B.) 152, noted undersec. 540; 9 Al. 26, noted under sec. 564; 9 Al. 36, noted under sec. 623.

Second appeal on no other grounds. **585.** No second appeal shall lie except on the grounds mentioned in section 584.

NOTE.—See I. L. R., 16 Cal. 753, 17 Cal. 291 & 19 Cal. 249, noted under sec. 584.

**586.** No second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

#### Notes.

A suit was brought for recovery of Rs. 133-7-10 for mesne-profits from the defendant in respect of certain properties covered by a decree which was passed in favour of the plaintiff's ancestor for the period during which he was out of possession. In special appeal it was objected by the respondent that, under sec. 27, of Act XXIII. of 1861, a special appeal would not lie, because the damage or demand for which the suit was originally instituted did not exceed Rs. 500. *Per Macpherson, J. (Bayley, J., concurring).*—I think that the contention is sound, and that the suit is cognizable by a Small Cause Court: and therefore no special appeal will lie. The suit is for mesne-profits only; no question of title or right arising in it. That being so, it is a suit for damages within the meaning of sec. 6 of Act XI. of 1865, and is cognizable by a Small Causes Court. The appeal is dismissed with costs—2 B. L. R., S. N., 13; 10 W. R., 375.

The widow and heiress of a deceased person sued the defendants to recover personal property, valued at Rs. 200, said to have been taken by them from deceased in his lifetime. *Held* that a special appeal was barred by sec. 27 of Act XXIII. of 1861.—2 B. L. R., App. 13; 11 W. R., 93.

In a suit for recovery of a sum of money less than Rs. 500, as money paid in excess of rent due, *held* that the suit being cognizable by the Court of Small Causes under sec. 6, Act XI. of 1865, no special appeal lay to the High Court.—2 B. L. R., (A. C.) 172; S. C. 11 W. R., 30.

A suit to recover a share of malikana, which the defendant had realized from the Collector, is a suit for recovery of a sum of money which has been taken away by the defendants to the damage of the plaintiff, and

is therefore cognizable by the Small Cause Court; and under sec. 26, Act XXIII of 1861, no special appeal lies from a judgment passed in appeal in such a suit.—3 B. L. R., App. 96, S. C. 12 W. R., 29.

A sum of money was stolen from the Judge's Court of Tipperah while A was the nazir. A paid the amount to Government, and died, leaving B his heir. B sued Government for recovery of the amount paid by A, on the ground that, as there was no negligence of A, and as the amount was under the custody of the guards of Government at the time of the theft, A was not responsible for the loss thereof. *Held* the suit was cognizable by a Small Cause Court, and, therefore, under sec. 27, Act XXIII, of 1861, no special appeal lay to the High Court.—4 B. L. R., App. 46.

Suits for defamation of character where there has not been any actual pecuniary loss, are not, under cl. 3, sec. 6, Act XI of 1865, cognizable by the Small Cause Courts.—4 B. L. R., App. 59; 13 W. R., 118.

When the subject-matter of an award is as to its nature and value cognizable by a Court of Small Causes, no special appeal will lie to the High Court against the decree of an ordinary Civil Court in respect of such award.—4 B. L. R., App. 82; 13 W. R., 233.

In a suit cognizable by the Small Cause Court, and in which no special appeal lies to the High Court under sec. 13, Act XXIII. of 1861, the High Court exercised their extraordinary powers, and dismissed the suit.—5 B. L. R., App. 91.

In a suit for recovery a sum of money below Rs. 500, the parties entered into a compromise, whereby the defendant made over a certain piece of land in lieu of the money claimed, and a decree was passed accordingly. In execution of the decree, disputes arose between the parties. Upon special appeal by the judgment-debtor to the High Court, *held* that, under sec. 27, Act XXIII of 1861, no special appeal lay to the High Court.—6 B. L. R., App. 82; 15 W. R., 65.

No special appeal lies from a regular appeal from an order made in execution of a decree passed in a suit of a nature cognizable by a Small Cause Court, though the suit was instituted before the passing of Act XLIII of 1860.—12 B. L. R., 261; 20 W. R., 421.

A suit brought to enforce a debt or demand not exceeding Rs. 500, which is secured upon, and must in law be primarily satisfied out of, immoveable property, is not a suit of the nature cognizable in Courts of Small Causes under sec. 27 of Act XXIII. of 1861, so as to exclude a right to special appeal. This is so, though the plaint on the face of it seeks recovery in the alternative, either from the mortgagor personally, or from the mortgaged property.—2 Bom. H. C. R., (A. C.) 1.

A Hindu widow, who had been supported by her father-in-law after his death, sued his eldest son for maintenance, and obtained a decree for Rs. 150, notwithstanding the defendant's objection that, being one of three brothers who inherited their father's estate, he was not solely liable for the maintenance claimed. *Held* that, as this was a Small Cause Court suit, an appeal did not lie. The maintenance of a widow is by Hindu law a charge upon the whole estate, and therefore upon every part thereof. The defendant might have the question raised by him decided by suing his brothers for contribution.—4 Bom. H. C. R., (A. C.) 73; 4 Bom. H. C. R., (A. C.) 75.

Where in a suit cognizable by a Court of Small Causes, in order to determine the question at issue between the parties, it was necessary for the Court of Appeal in the first instance to determine a question of title to land



(which had been raised by the Munsif), *held* that a special appeal lay to the High Court, though the Court below had omitted to determine such question of title.—5 Bom. H. C. R., (A. C.) 57.

In suits for arrears of rent of land, when the claim is under Rs. 500, a special appeal lies to the High Court, such claims not being generally cognizable by Courts of Small Causes. For the purpose of recovering rent from a tenant, the *mrugsal* year ends on the 31st of July.—6 Bom. H. C. R., (A. C.) 12.

A suit for the recovery of *mesne*-profits (not amounting to Rs. 500) is cognizable by a Court of Small Causes. A special appeal does not lie in such a suit.—8 Bom. H. C. R., (A. C.) 96.

The expression “or former year” in Reg. XVII. of 1827, sec. 31, cl. 3, does not mean the year immediately preceding the current year, but any previous year, and a suit for rent could have been brought before a revenue-officer when Act XI. of 1865 was passed, and not before the Small Cause Courts constituted by that Act. A special appeal lay in a suit of this nature. Payment of rent by the lessee to one of several joint lessors, and at his request, discharges the debt as to all; as also payment made at his request to one of several joint creditors. Where one of several joint creditors, who has no rights separate from those of the others, refuses to join in the suit as plaintiff, and there is no averment of collusion on his part with the defendant, he cannot rightly be joined as a defendant.—11 Bom. H. C. R., (A. C.) 106.

A suit to recover certain cash, and the value of certain grain, which defendants had persuaded plaintiff to pay them, engaging that the *lambardar* would allow the same in his account (as part payment of rent), but which such *lambardar* refused to do, is practically a suit for damages, and the amount in question being cognizable by a Small Cause Court, no special appeal can be entertained.—2 N.-W. P. H. C. R., 111.

A stone sugar-mill is moveable or personal, as contradistinguished from immoveable property.—4 N.-W. P. H. C. R., 15.

Where the plaintiff claimed a sum of money under the name of a *zemin-dari* cess, but in point, of fact what was claimed was claimed on account of the use of land, *held* that such a suit being a suit of a nature cognizable by a Small Cause Court, a special appeal would not lie.—4 N.-W. P. H. C. R., 56.

A suit brought to recover the value of a tree destroyed by the defendants, and for the value of fish taken from the plaintiff's tank (the claim being under Rs. 500) is cognizable by a Small Cause Court.—5 N.-W. P. H. C. R., 24.

G and R referred to arbitration disputes between them regarding the partition of their paternal estate. The concluding portion of the award ran as follows: “Both parties shall jointly satisfy the debts on the creditors demanding payment, which debts are joint, and have here under been declared payable by both parties. Should one party neglect to pay or show carelessness in the matter, and should the other be obliged to pay the whole amount of any such debts, the latter shall be competent to realize from the former the portion of the debt paid on his account, together with costs and interest, by the enforcement of this award, and shall also be entitled to recover the amount by suit in Court. Both parties shall act up to this award in its entirety. The sum of Rs. 338.0.9, which has been found due and payable by Gauri Sahai to Ram Sahai as per account showing the mutual dealings between the parties, shall be made good as follows, *i. e.*, Gauri

Sahai shall pay to Ram Sahai the whole amount of Rs. 338-0-9 by the middle of the month of Pous 1276 Fasli, either in a lump-sum or by instalments, and in case of non-payment within the said period he shall be charged with interest at the rate of one per cent. up to the day of payment." R sued to recover from G. the money found to be due and payable to him under the award. G admitted the claim, but desired to set-off half the amount of certain debts, which were payable under the award by the parties jointly, and which he alone had satisfied. The lower Appellate Court deducted from the claim items of the demand admitted by R, but refused to determine G's right to set off the items which R disputed, on the ground that they could be more conveniently enquired into in a separate suit. It was held that sec. 27 of Act XXIII. of 1861 was no bar to the hearing of a special appeal. It was also held (*per* Stuart, C. J., Spankie, J., dissenting) that G was entitled to demand a set-off, and that the lower Appellate Court should have enquired into the disputed items of the demand, and not have referred G to a separate suit in respect of those items.—7 N.-W. P. H. C. R., 157.

Plaintiff, a talookdar, sued her late husband's agent for the delivery up of certain account papers and documents, for an account of his agency, and, in default of account, for Rs. 500 as damages. *Held* that the suit was of a nature cognizable by a Small Cause Court, and that consequently no special appeal would lie.—2 C. L. R., 17.

In applications for review of judgments of Courts of Small Causes constituted under Act XI of 1865, the procedure laid down in the rules contained in ch. 42 of the Code of Civil Procedure (Act X of 1877) is to be strictly followed, without reference to the Procedure relating to new trials under sec. 21 of Act XI of 1865.—5 C. L. R., 559.

*Held* that the suit to recover Rs. 200 paid in respect of the purchase of land which was not completed was a suit of the description cognizable by the Small Cause Court, and a special appeal would not lie.—1 Agra H. C. R., 275.

*Held* that a suit for division of debts due to the deceased's estate (the sum being ascertained) was cognizable by a Small Cause Court, and no special appeal lay to the High Court.—2 Agra H. C. R., 234.

Where a suit was brought for the recovery of the value of the fruit of certain mango trees alleged to have been misappropriated by the defendants, *held* that, as the suit was of the nature of a suit cognizable by Courts of Small Causes, a special appeal would not lie.—3 Agra H. C. R., 290; S. C. Agra H. C. R., (F. B.) Ed. 1874, 153.

When the damages claimed in a suit exceeded Rs. 500, and the Court gave the plaintiff less than Rs. 500 damages, *held* that the right of appeal was not taken away by Act XXIII of 1851, sec. 27.—1 Ind. Jur., N. S. 356; 6 W. R., 152.

A suit for damages for an amount not exceeding rupees 500 is within the competency of a Small Cause Court to decide, notwithstanding that it involves an inquiry into a question of right. No special appeal lies in such a case.—W. R., 1864, 237; 8 Bom. H. C. R., (A. C.) 23.

In a suit by a lessee upon a contract for a refund of excess revenue remitted by Government, a special appeal is not admissible if the amount claimed be under Rs. 500.—W. R., 1864, 297.

No special appeal lies in a suit for damages for breach of a private arrangement by which the parties agree to control the terms of a decree, when the amount is within the jurisdiction of the Small Cause Court.—W. R., 1864, 346.

A suit for damages for detention of materials of a house involves no question of title. Such a suit is cognizable by a Small Cause Court, if under Rs. 500, and a special appeal was barred by sec. 27, Act XXIII of 1861.—1 W. R., 35.

A suit lies in a Small Cause Court by a co-sharer to recover the price of a share of personal property alienated by another co-sharer.—2 W. R., 87.

No special appeal lay under sec. 27, Act XXIII of 1861, for damages for inadequate sale of a decree.—5 W. R., 215.

Under sec. 3, Act XLII of 1860, a suit for damages of any kind below Rs. 500 (*e. g.*, a suit for damages for not cutting through a bund whereby plaintiff's crops were destroyed in consequence of accumulation of water) was cognizable by a Small Cause Court; and, consequently, under sec. 27, Act XXIII of 1861, no special appeal lay in such a case.—6 W. R., 7.

A suit (valued at Rs. 500) for specific performance of a contract is not cognizable by a Small Cause Court, consequently no special appeal will lie in such a case.—6 W. R., 322.

A claim for money below Rs. 500 paid as revenue by one partner in an estate on account of another, in order to save the whole estate from sale, arise under an implied contract between them, and therefore is cognizable by a Small Cause Court. No special appeal lay in such a case under sec. 27, Act XXIII of 1861.—6 W. R., 325.

Sec. 27, Act XXIII of 1861, which barred a special appeal in suits below Rs. 500, as being of a nature cognizable by a Small Cause Court, did not apply to a case in which the lower Appellate Court had wrongly decided that the case was not cognizable by any Civil Court.—7 W. R., 41.

A special appeal was held not to lie in a case for damages for value of crops misappropriated under Rs. 500 cognizable by a Small Cause Court, notwithstanding that the case involved a question of title.—7 W. R., 73; 10 W. R., 272.

A suit to establish a surety's liability on account of arrears of rent due from a putnidar where the non-payment of the rent by the putnidar would have to be established is not cognizable by a Small Cause Court; and consequently a special appeal was not barred in such a case by sec. 27, Act XXIII of 1851.—8 W. R., 111.

Sec. 27, Act XXIII of 1861, barred a special appeal in execution proceedings arising out of decisions passed on regular appeal in suits of a nature cognizable by Courts of Small Causes.—8 W. R., 112; 12 W. R., 86.

A case in which a zemindar sues a putnidar for dak expenses, according to his putni jumma, is of a nature cognizable by a Court of Small Causes, and as such, by sec. 27, Act XXIII of 1861, no special appeal will lie.—8 W. R., 517; 9 W. R., 518.

A suit by a co-sharer to recover from the defendant collections which are in his charge, and which he is under agreement to pay to the other co-sharers, is a suit for dues under a contract, and if less than Rs. 500 is cognizable by a Small Cause Court.—10 W. R., 79.

No special appeal lies in a suit for damages below Rs. 500, whether the damages are on account of moveable or immoveable property.—11 W. R., 369.

A suit for damages not exceeding Rs. 500 on account partly for injury to reputation and partly for loss in business and professional position, was held to come within the provisions of sec. 6, Act XI of 1865, and was not open to special appeal.—15 W. R., 179.

When a suit is of a nature cognizable by a Small Cause Court, there is no right of special appeal although a question of title is incidentally raised; the finding of the Small Cause Court not being conclusive, and being only for the purpose of determining the suit brought in that Court.—18 W. R., 104.

In a suit to recover the balance, unaccounted for, of the plaintiff's money in the hands of the defendant, who had been employed as a law-agent on a salary to conduct and look after the plaintiff's law-suits, and to recover and disburse moneys connected with such suits, it was held that the case might be brought under the terms "claim for money due under a contract" in Act XI of 1865, sec. 6, and that, therefore, under Act XXIII of 1861, sec. 27, a special appeal would not lie.—20 W. R., 4.

A suit to recover possession of a share of a boat by establishment of the plaintiffs' right is a suit for personal property within the meaning of Act XI of 1865, sec. 6, and therefore no special appeal lies in such a case under Act XXIII of 1861, sec. 27.—2 W. R., 413.

Where, on an adjusted account between two parties, one claims from the other some money and some grain which are shown to be due to him, and asks in effect that they may be made over to him, the suit is not a suit for a declaratory decree, and a special appeal does not lie in such a suit to the High Court under sec. 27, Act XXIII of 1861.—25 W. R., 234.

No second appeal lies from an order passed in execution of a decree in suit of the nature cognizable by a Small Cause Court where the subject-matter of the suit does not exceed Rs. 500.—I. L. R., 12 Madr. 116.

In a suit upon a bond executed by a Hindu, the plaintiff made the debtor's sons defendants along with their father, and a decree was passed against the father and sons jointly for payment of the debt. *Held* by the Full Bench that the suit as against the sons was not a suit of the nature cognizable in a Court of Small Causes within the meaning of sec. 586 of the Code of Civil Procedure. *Held* further by the Divisional Bench that the decree against the sons was bad.—12 Madr. 139.

The plaintiff, in a suit for damages laid at Rs. 200, claimed Rs. 50 on account of medical expenses caused by an assault committed on him by the defendants, Rs. 50 as the costs of a criminal prosecution which he had brought against them, and Rs. 100 for injury to his reputation and feelings. *Held* that, inasmuch as part of the claim related to alleged actual pecuniary damage resulting from an alleged personal injury, the whole suit was, with reference to sec. 6, pro. 3, of the Mofussil Small Cause Courts Act (XI of 1865), of the nature cognizable by a Court of Small Causes, and that, under sec. 586 of the Civil Procedure Code, no second appeal in such suit would lie. *Gunga Narain Moytro v. Gudadhar Chowdhry* (13 W. R., 434) referred to.—10 Al. 49.

For the purpose of determining whether a second appeal lies or is prohibited by sec. 586 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance.—11 Al. 13.

A suit of a nature cognizable by a Small Cause Court does not cease to be so within the meaning of a Civil Procedure Code, sec. 586, because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under Provincial Small Cause Courts

Act, sec. 23, on the ground that the suit involved questions of title.—15 Madr. 98.

A suit for money due on a contract within the meaning of Act VI of 1865, sec. 6, is none the less cognizable by a Small Cause Court, because it may be necessary to go into the accounts of both parties to see whether the amount claimed is really due or not—Dyebukee Nundun Sen and another v. Mudhoo Mutty Goopta and another, I. L. R., 1 Cal. 123 ; 24 W. R., 478. And therefore no second appeal lies in such a suit under Act X of 1877, sec. 586.—6 Cal. 284.

A suit by one decree-holder against another for the money received by the latter on a division between them of the proceeds of an execution-sale as his share of such proceeds under the order of the Court executing the decree is a suit of the nature cognizable in a Court of Small Causes, and consequently, where the amount of such money does not exceed five hundred rupees, no second appeal lies in such suit.—3 Al. 59.

A suit by a landholder against a tenant for Rs. 130, being the value of a moiety of the produce of a grove of mango trees held by such tenant, such amount being claimed in virtue of an agreement recorded in the *wajib-ul-arz*, and not in virtue of any custom or right, is not cognizable in Revenue Court, but is cognizable in a Court of Small Causes, and consequently no second appeal in the suit will lie.—3 Al. 37.

The plaintiff sued to recover from the defendant Rs. 71-3-3, alleging that the defendant had illegally levied the money on the plaintiff's land on account of enhanced summary settlement and local-fund cess. The defendant, being a minor, was represented by the Collector as his administrator. The Assistant Judge who tried the suit awarded the plaintiff's claim. The District Judge, in appeal, reduced the amount of the plaintiff's claim to Rs. 38-4-9, but upheld the decree of the first Court in other respects. The defendant thereupon filed a second appeal in the High Court. *Held* that, under the Civil Procedure Code (Act X of 1877), sec. 586, no second appeal lay, as the suit was one cognizable by a Small Cause Court. Act X of 1876, sec. 15, remove suits to which the Collector is a party from the jurisdiction of the Small Cause Court; but the nature of the suit remains unaltered.—7 Bom. 100.

A was the proprietor of nine-annas of a mauza, B and his family of one-anna, and C and others of the remaining six annas. B and his family having occupied and enjoyed, to the exclusion of their co-shareholders, fifty-four bighas of the mauza, failed to pay any rent in respect of such occupation. A instituted a suit against them (making C and the other holders of the six annas share defendants to the suit) to recover the sum of Rs. 412-8 as the sum justly due to him after making all proper deductions, including as well as the share of the rent of the forty-four bighas to which the six annas share-holders were entitled to retain as proprietors of a one-anna share. *Held* that the facts showed an implied contract on the part of B and his family to pay to their co-shareholders whatever, upon taking an account, should appear to be due to them; and that, inasmuch as the total amount sought to be recovered in the suit by A did not exceed 500 rupees, the suit was one which might have been brought in a Small Cause Court, and therefore the plaintiff had no right of second appeal to the High Court under sec. 586 of the Code of Civil Procedure.—6 Cal. 284; 7 C. L. R., 94.

See I. L. R., 7 Bom. 292 & 10 Cal. 523, noted under sec. 562; 3 Al. 18 & 12 Al. 581, noted under sec. 584; 3 Madr. 192, noted under sec. 13; 13 Madr.

1, noted under sec. 253; 12 Al. 579, noted under sec. 223; 3 Al. 66, noted under sec. 70 of the Contract Act; 15 Madr. 298, noted under sched. II, cl. 31 of the Provincial Small Cause Courts Act.

**587.** The provisions contained in Chapter XLI shall apply, as far as may be, to appeals under this chapter, and to the execution of decrees passed in such appeals.

**Notes.**

Where an issue has been directed, and the finding and evidence returned, a special appellant cannot take an objection going to the merits which otherwise would not properly be open upon special appeal. Sec. 25 of Act XXIII of 1861 gives no rights inconsistent with sec. 372 of Act VIII of 1859.—1 M. H. C. R., 250.

Sec. 374 leaves it in the discretion of the Court to admit any new ground of appeal arising out of the proceedings, though it may have been omitted in the petition of special appeal.—5 W. R., 147.

See I. L. R., 7 Madr. 52, noted under sec. 565; 10 Cal. 932, noted under sec. 574; 9 Al. 26, noted under sec. 564; 9 Al. 36, noted under sec. 623; 11 Bom. 177 noted under sec. 579; 10 Al. 223, noted under sec.

## CHAPTER XLIII.

### OF APPEALS FROM ORDERS.

**588.** An appeal shall lie from the following orders under this Code, and from no other such orders:—

Orders appealable.

- (1) orders under section 20, staying proceedings in a suit;
- (2) orders under section 32, striking out or adding the name of any person as plaintiff or defendant;
- (3) orders under section 36 or section 66, directing that a party shall appear in person;
- (4) orders under section 44, adding a cause of action;
- (5) orders under section 47, excluding a cause of action;
- (6) orders returning plaints for amendment or to be presented to the proper Court;
- (7) orders under section 111, setting-off, or refusing to set-off, one debt against another;
- (8) orders rejecting applications under section 103 (in cases open to appeal) for an order to set aside the dismissal of a suit;
- (9) orders rejecting applications under section 108 “for”\* an order to set aside a decree *ex parte*;

\* In this clause, the word “for” has been substituted for the word “or” by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 55.



- (10) orders under sections 113, 120, and 177 ;
- (11) orders under section 116 or section 245, rejecting, or returning for amendment, written statements or applications for execution of decrees ;
- (12) orders under sections 143 and 145, directing anything to be impounded ;
- (13) orders under section 162, for the attachment and sale of moveable property ;
- (14) orders under section 168, for attachment of property, and orders under section 170, for the sale of attached property ;
- (15) orders under section 261, as to objections to draft-conveyances or draft-endorsements ;
- (16) orders under section 294, "and orders under"\*section 312 or section 313, for confirming, or setting aside, or refusing to set aside, a sale of immoveable property ;
- (17) orders in insolvency-matters, under section 351, section 352, section 353, or section 357 ;
- (18) orders under section 366, paragraph two, section 367, or section 368 ;
- (19) orders rejecting applications under section 370 for dismissal of a suit ;
- (20) orders under section 371, refusing to set aside the abatement or dismissal of a suit ;
- (21) orders disallowing objections under section 372 ;
- (22) orders under section 454, section 455, or section 458, directing a next friend or guardian for the suit to pay costs ;
- (23) orders interpleade suits under section 473, clause (a), (b), or (d), section 475, or section 476 ;
- (24) orders under section 479, section 480, section 485, section 492, section 493, section 496, section 497, section 502, or section 503 ;
- (25) orders under section 514, superseding an arbitration ;
- (26) orders under section 518, modifying an award ;
- (27) orders of refusal under section 558 to re-admit, or under section 560 to re-hear, an appeal ;
- (28) orders under section 562, remanding a case ;
- (29) orders under any of the provisions of this Code, imposing fines, or for the arrest or imprisonment of any person, except when such imprisonment is in execution of a decree.

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\* In this clause, the words quoted have been substituted for the words, " the first paragraph of," by the same Act and section.

The orders passed in appeals under this section shall be final.

#### Notes.

An application under sec. 119, Act VIII of 1859, for the re-hearing of a case decreed *ex-parte*, was rejected. Under that law this order was appealable. No appeal was, however, filed until October 1st, 1877, on which date Act X. of 1877 came in force. *Held* that the appeal was inadmissible, there being no provision in Act X. of 1877 for such an appeal.—1 C. L. R., 402.

Where an application for probate has been granted, and an objection being made a subsequent order is passed directing that the case be re-opened, that probate be suspended for a time certain, and that the executor bring in his evidence to prove his right to obtain probate, *held* that no appeal lies from such an order. Act X. of 1865, sec. 263, and Act VIII. of 1859, sec. 363, discussed.—2 C. L. R., 589.

There is no appeal against an order made by the Civil Court, under sec. 38 of Beng. Act VIII. of 1869, directing the measurement of lands. *Crowdy v. Goburdhun Roy* (22 W. R., 491) followed. *Goluck Kishore Acharjee v. Kesha Majhee* (15 W. R., 23) and *Manoo Dassee v. Ishan Chunder Banerjee* (*ib.* 245) cited.—5 C. L. R., 484.

An order made by a Subordinate Judge, dismissing an application under sec. 503 for the appointment of a receiver in a suit pending before him, or declining to nominate a receiver, is an order under that section, and not under sec. 505, and is therefore appealable under sec. 588 of the Civil Procedure Code, as amended by Act XII of 1879. A Subordinate Judge, if he has good grounds, may decline to appoint a receiver even after he has received the necessary authority from the District Judge under sec. 505 to do so.—6 C. L. R., 467.

An auction-purchaser of property sold in execution of decree is not "a party to the suit;" he is not therefore entitled to appeal from an order passed as to the execution of the decree.—1 Agra H. C. R., Mis., 5.

An appeal lay to the Judge, in cases of partition under Act XIX. of 1863, where the objection raised by the party opposing partition is severalty of holding by virtue of a former partition.—1 Agra H. C. R., Rev., 44.

The proceedings of a Settlement Officer under sec. 3, Act XIV of 1863, were not judgments or orders appealable to the Judge, or especially to the High Court under Act X. of 1859.—2 Agra H. C. R., 239.

There is no appeal open to a pauper when his application to sue as pauper is rejected for default. Where there has been no refusal under sec. 310, Act VIII. of 1859, the applicant may revive his application for leave to sue as a pauper.—3 Agra H. C. R., Mis., 1.

There is no appeal from an order setting aside an *ex parte* decree.—1 L. R., 16 Cal. 426.

Section 15 of the Letters Patent of the High Court at Madras being controlled by sec. 588 of the Civil Procedure Code no appeal lies from the order of a single Judge of the High Court made under sec. 592 of the Code of Civil Procedure rejecting an application for leave to appeal *in forma pauperis*.—9 Madr. 447.

A party aggrieved by an interlocutory order of remand may object to its validity in his appeal against the final decree, though he might have appealed against the order under sec. 588 of the Civil Procedure Code (Act XIV of 1882), and has not done so.—14 Bom. 232.

An appeal lies against an order rejecting a plaint on the ground of its being insufficiently stamped.—6 Cal. 249; 6 C. L. R., 567; 23 W. R., 269.

Sec. 588, Act X of 1877, restricting appeals against orders, does not apply to prevent an appeal to the High Court from the order of a Judge of that Court.—9 Cal. 482.

An order made by a lower Court, directing a suit to be re-admitted and registered on the file of the Court, is not appealable. Second appeals to the High Court must either come within chap. 42 or secs. 588 and 591 of Act X of 1877.—5 Cal. 711.

An order refusing to grant an application to be made an insolvent is appealable under cl. 17, sec. 588 of the Code of Civil Procedure. Such an order must be considered to be one made under sec. 351. *Juggutjeebun Goopto v. Harocoomar Pal* (I. L. R., 5 Cal. 719) dissented from.—6 Cal. 168. Also I. L. R., 4 Cal. 888.

After a decree had been made *ex parte*, the defendant applied to have it set aside. The Subordinate Judge refused the application, but his order was reversed by the District Judge. *Held* that the order of the District Judge was final under sec. 588, and that no second appeal would lie; nor would the Court interfere under sec. 622 of the Code.—8 Cal. 832.

A decision of a Judge directing a penalty to be enforced under the Stamp Act, the case being afterwards proceeded with, is not appealable as a decree, as it cannot be said to be a decree affecting the merits of the case or the jurisdiction of the Court. Nor can such a decision be said to be "an order as to a fine" within the meaning of Act VIII of 1859, sec. 365 (corresponding with Act X of 1877, sec. 588, cl. 29), which is not intended to apply to penalties under the Stamp Act, but only to fines which may be levied under the Code itself.—5 Cal. 311.

On the 25th June 1879, a Subordinate Judge made an order setting aside the sale of immoveable property in the execution of a decree, from which an appeal was preferred, under Act X of 1877, to the District Court on the 25th July 1879, before Act XII of 1879 came into force. *Held* that, as the appeal would not have lain at all had Act XII of 1879 been in force on the date of its institution, sec. 102 of that Act did not apply; but, as the appeal lay to the District Court under the law in force on that date, it was competent to dispose of it under the provisions of sec. 7 of Act I of 1878.—2 Al. 785.

A suit to redeem a usufructuary mortgage of certain lands was instituted in the Munsif's Court. After the suit had been admitted, and the parties called on to produce evidence, the Munsif ordered the plaint in the suit to be returned to the plaintiff for presentation in the proper Court, on the ground that the suit should have been instituted in the Court of the Subordinate Judge, the value of the property in suit being beyond the jurisdiction of a Munsif. *Held* that, under Act VIII of 1859, the Munsif's order was appealable to the lower Appellate Court, and, under Act X of 1877, the lower Appellate Court's order to the High Court.—1 Al. 620.

In proceedings in execution of the decree passed in a small cause suit by a District Munsif who had been invested with insolvency jurisdiction, the judgment-debtors filed a petition under section 344 of the Civil Procedure Code praying that they might be declared insolvents. Their petition was dismissed by the District Munsif:—*Held*, an appeal lay to the District Court against the order dismissing the petition.—15 Madr. 89.

See I. L. R., 2 Al. 904, noted under sec. 32; 2 Al. 216 & 14 Al. 361, noted under sec. 556; 7 Bom. 292, 12 Al. 510, 10 Cal. 523 & 17 Cal. 168, noted

under sec. 562 ; 9 Cal. 627, noted under sec. 97 ; 2 Al. 396, noted under sec. 311 ; 7 Cal. 490, noted under sec. 525 ; 3 Al. 18, noted under sec. 584 ; 2 Al. 471, noted under sec. 520 ; 8 Cal. 28, 1 Madr. 401, 12 Madr. 125 and 454, 5 Bom. 45, 2 Bom. 553, 5 Cal. 50 and 592, noted under sec. 244 ; 3 Al. 844, 8 Cal. 477, 19 Cal. 485, 6 Al. 211 & 10 Cal. 410, noted under sec. 2 ; 2 Al. 357, 3 Al. 855, & 8 Cal. 126, noted under sec. 57 ; 4 Al. 478, noted under sec. 25 ; 3 Al. 456, noted under sec. 540 ; 10 Madr. 179, noted under sec. 503 ; 12 Bom. 279, noted under sec. 545 ; 11 Bom. 603, noted under sec. 312 ; 13 Al. 569, noted under sec. 293 ; 14 Madr. 99, noted under sec. 258 ; 14 Al. 226, noted under sec. 206 ; 14 Al. 361, noted under sec. 556.

What Courts to hear appeals.

**589.\*** An appeal from any order specified in section 588, clauses (15), (16), and (17), shall lie to the High Court.

When an appeal from any other order is allowed by this chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or, when such order is passed a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court :

Provided that an appeal from an order specified in section 588, clause (17), shall lie—

(a) to the District Court where the order was passed by a Court subordinate to that Court, and

(b) to the High Court in any other case.†

**Note.**

See I. L. R., 3 Al. 18, noted under sec. 584 ; 10 Cal. 523, noted under sec. 562.

**590.** The procedure prescribed in Chapter XLI shall, so far as may be, apply to appeals from orders under this Code, or under any special or local law in which a different procedure is not provided.

NOTE.—See I. L. R., 14 Bom. 232, noted under sec. 588.

**591.** Except as provided in this chapter, no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction ; but if any decree be appealed against, any error, defect or irregularity in any such order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

No other appeal from orders ; but error therein may be set forth in memorandum of appeal against decree.

\* See Repealing and Amending Act (XII of 1891).

† This proviso has been added by Act X of 1888.

**Notes.**

Pending an Appeal before the lower Appellate Court, the plaintiff-appellant died, and two persons separately applied to be substituted as the deceased's representative. The Court, applying secs. 367 and 582 of the Civil Procedure Code, decided in favour of one of the applicants and brought him upon the record. No appeal was made against this order by the unsuccessful applicant. The lower Appellate Court decided the appeal adversely to the successful applicant. Subsequently the unsuccessful applicant established by a separate suit that she was the deceased's legal representative, and that her opponent was not. She attempted to appeal to the High Court against the lower Appellate Court's decree dismissing the appeal. *Held* that the appellant, not having been a party to the decree below, and the order below having decided that she was not entitled to be a party to the proceedings of the lower Appellate Court, she was not entitled to maintain the appeal to the High Court, and sec. 591 of the Civil Procedure Code was not applicable to the case. *Har Narain v. Kharag Singh* distinguished. Where an order under the group of sections in the Civil Procedure Code relating to representative has been made excluding a person from the record, that person must seek his remedy by an appeal against the order, and is not entitled to appeal against the decree so long as the order stands. Error, defect or irregularity within the meaning of sec. 591 of the Code means error, defect or irregularity in procedure or in law, and not in matters of fact. In the present case there was no error, defect or irregularity within the meaning of the section, and even if there were, it did not affect the decision of the case in appeal below.—I. L. R., 12 Al. 200.

See I. L. R., 5 Cal. 311, noted under sec. 588; 7 Bom. 5, noted under sec. 136; 14 Al. 226, noted under sec. 206; 7 Cal. 148, noted under sec. 32; 12 Al. 510, noted under sec. 562.

## CHAPTER XLIV. OF PAUPER APPEALS.

**592.** Any person entitled under this Code or any other law to prefer an appeal, who is unable to pay the fee required for the petition of appeal, may, on presenting an application accompanied by a memorandum of appeal, be allowed to appeal as a pauper, subject to the rules contained in Chapters XXVI, XLI, XLII and XLIII, in so far as those rules are applicable;

Provided that the Court shall reject the application, unless, upon a perusal thereof, and of the judgment and decree against which the appeal is made, it sees reason to think that the decree appealed against is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

**Notes.**

An appeal lies from a decision in a suit heard *in forma pauperis*. A separate formal application for enquiry into the pauperism of applicant need not precede an application for leave to appeal *in forma pauperis*.—1 N.-W. P. H. C. R., 167; Ed. 1873, 246.

An application for leave to appeal *in forma pauperis*, under sec. 592 of the Code of Civil Procedure, must be made by the party in person, subject to the exemption contained in sec. 404 of the Code of Civil Procedure.—In *re Norisi*—I. L. R., 8 Madr. 504.

No appeal lies under Act X of 1877 from an order made under that Act rejecting an application for permission to sue as a pauper.—1 Al. (F. B.) 745.

An application for permission to appeal as a pauper was presented, not by the applicant personally, but by his pleader, and was on that ground rejected. *Held*, on an application to the High Court for revision, that sec. 622 of Act X of 1877 did not apply to a proceeding of so purely an interlocutory a character as mentioned in sec. 592, and such application, therefore, could not be entertained.—4 Al. 91.

**593.** The inquiry into the pauperism of the applicant may be made either by the Appellate Court or by the Court against whose decision the appeal is made under the orders of the Appellate Court :

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court against whose decree the appeal is made, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees special cause to direct such inquiry.

## CHAPTER XLV.

### OF APPEALS TO THE QUEEN IN COUNCIL.

**594.** In this chapter, unless there be something repugnant in the subject or context, the expression “decree” includes also judgment and order.

**595.** Subject to such rules as may, from time to time, be made by Her Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained,

an appeal shall lie to Her Majesty in Council—

(a) from any final decree passed on appeal by a High Court or any other Court of final appellate jurisdiction ;

(b) from any final decree, passed by a High Court in the exercise of original civil jurisdiction ; and

(c) from any decree, when the case, as hereinafter provided, is certified to be a fit one for appeal to Her Majesty in Council.



**Notes.**

An order of the High Court directing execution to proceed is not a "final" decree, judgment, or order within the meaning of cl. a, sec. 595 of the Code of Civil Procedure, Act X of 1877.—1 C. L. R., 354.

On the death of a party on the record of an appeal pending before Her Majesty in Council, proof must be given in the Court from which the appeal has been preferred, of the representative character of the person by or against whom revivor is sought. There ought to be some finding of the Court below, which, also, should give its own opinion as to who are the parties proper to be substituted upon the record. A certificate or statement on which their Lordships can act should be made by the Court below.—1. L. R., 16 Cal. 184.

Where a decree has been made directing accounts to be taken, but there is nothing so special in the case as to bring it under clause (c) of sec. 595 of the Civil Procedure Code (Act XIV of 1882), leave to appeal to the Privy Council will not be given.—14 Bom. 428.

Where a decree directing the taking of accounts which the defendant contends ought not to be taken at all, decides, in effect, that, if the result should be found to be against the defendant, he is liable to pay the amount, the decree is final within the meaning of sec. 595 of the Civil Procedure Code (XIV of 1882) for the purpose of appeal. On the ground that a decree for an account was not final within that section, the High Court refused, under sec. 601, to grant the defendant a certificate. On his application for special leave to appeal to Her Majesty in Council, not by way of an appeal from the local Court's refusal, but asking for the exercise of the prerogative right to admit an appeal: *Held*, that, as leave could be granted on any other ground, should any appear, besides the ground that the Court had refused the certificate without good cause, while leave could also be granted on the latter ground, if established, to make this application was, perhaps, more convenient than to appeal from the order of refusal. *Held*, also, that the real question in this suit having been the liability of the defendant to account to the plaintiff upon several claims, the decree had decided this against the defendant in such a way that, although the account had not been taken, the decrees was final within sec. 595.—15 Bom. 155.

Leave to appeal to Her Majesty in Council granted in one of six suits directed to be heard together, although the amount involved in such suit was under the appealable value; there being an important question of law, which did not arise in the five other suits, the suit, however, involving other questions of law common to all the six suits; such suits having been, by agreement of counsel, heard upon the same evidence, and concluded by the same judgment; five of such suits being appealable as of right, and the aggregate amount in the six suits being considerably more than the appealable value.—11 Cal. 740.

The High Court has not any power, under X of 1877, or cl. 31 of the Letters Patent (which is repealed by Acts VI of 1874 and X of 1877), to grant leave to appeal to the Privy Council from an order of the Court remanding a suit for re-trial.—1 Al. 726.

An order passed on appeal by a High Court determining a question mentioned in sec. 244 of Act X of 1877 is a final "decree" within the meaning of sec. 595 of that Act. *Held*, therefore, where such an order involved a claim or question relating to property of the value of upwards of ten thousand rupees, and reversed the decisions of the lower Courts, that, notwithstanding the value of the subject-matter of the suit in which the decree

was made in the Court of first instance was less than that amount, such order was appealable to Her Majesty in Council.—3 Al. 633.

A candidate at an examination for pleaderships, a mistake in the computation of his marks having been made, was erroneously declared qualified for admission as a vakil of the High Court by a Government Notification. The mistake having been discovered, such Notification was, so far as he was concerned, cancelled. He then petitioned the High Court in the matter, and was informed by it that his name must be excluded from such Notification, as he had not qualified by obtaining the requisite number of marks. The candidate having applied for leave to appeal to Her Majesty in Council, *held* that Chapter 45 of the Civil Procedure Code had no application, and the matter was not one in which the High Court was concerned to grant or refuse leave to appeal to Her Majesty in Council.—9 Al. 163.

The District Judge of Ghazipur re-called to his own file the proceedings in the execution of a decree which were pending in the Court of the Subordinate Judge of Shahabad, and disallowed an application for the execution of the decree which had been preferred to that Judge. The High Court, on appeal from the order of the District Judge, annulled his order as void for want of jurisdiction, and remitted the case in order that the application might be disposed of on its merits, directing that the record of the case should be returned to the Subordinate Judge of Shahabad. On an application for leave to appeal to Her Majesty in Council from the order of the High Court, *held* that such order was in the nature of an interlocutory order, and was not one from which the High Court could or ought to grant leave to appeal to Her Majesty in Council.—2 Al. 65.

Certain persons interested in an award applied under sec. 525 of the Civil Procedure Code to have it filed in Court. The Court made an order under sec. 526 “that the claim of the plaintiffs be decreed.” The defendants appealed to the High Court from this “decree.” The High Court held that the appeal would not lie; and suggested to the plaintiffs to apply to the lower Courts to give judgment according to the award, and a decree to follow it. Thereupon the plaintiffs made an application to the lower Court of the nature suggested, but styled it one for review of judgment. The lower Court granted the so-called review of judgment. The defendants appealed from the order of the lower Court, contending that the “review of judgment” had been improperly granted. On the 23rd June 1880, the High Court held that the order of the lower Court was not appealable, not being one passed on review of judgment, but on application to give judgment and decree in accordance with an award which had been filed in Court. The defendants applied for leave to appeal to Her Majesty in Council from the order of the High Court on the 23rd June 1880. *Held* that such order was not a “final decree” within the meaning of sec. 595 (a) of the Civil Procedure Code, and therefore it was not appealable to Her Majesty in Council.—4 Al. 238.

Where the High Court reverses the decree of the Court below, and remands the case for re-trial on the merits, and for a new decree to be passed by the Court below, no appeal lies as a matter of right, under sec. 595 of the Code of Civil Procedure (Act XIV of 1882), to the Privy Council, albeit the value of the subject-matter admittedly exceed Rs. 10,000, as such a decree of the High Court is not a final, but an interlocutory, decree. In such a case a certifitate should first be obtained under clause (c) of the section that the case is a fit one for appeal to Her Majesty in Council.—8 Bom. 548.

**596.** In each of the cases mentioned in clauses (a) and (b) of section 595, .

Value of subject-matter.

the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum or upwards ;

or the decree must involve, directly or indirectly, some claim or question to, or respecting, property of like amount or value ;

and, where the decree appealed from affirms the decision of the Court immediately below the Court passing such decree, the appeal must involve some substantial question of law.

#### Notes.

A and B purchased the same properties, deriving the title through different persons. The value of the properties with mesne-profits was over Rs. 10,000. B granted two patni-leases of the properties to different persons. A was, therefore, obliged to bring two suits for the recovery of the properties, and the value of the subject-matter in each suit was less than Rs. 10,000. *Held* that an appeal would lie to the Privy Council.—I. L. R., 8 Cal. 210.

Civil Courts Act (Madras) III of 1873 does not control the construction of Civil Procedure Code, sec. 596, and under that section the real market value of the matter in dispute is the test as to whether or not an appeal lies to the Privy Council.—15 Madr. 237.

Where the issues in a case involved questions both of law and fact, and the Subordinate Judge had decided against the plaintiff on two issues of fact, sufficient for the disposal of the case, without trying the other issues, the High Court found on those two issues substantially in favour of the plaintiff, but raised a further question of fact on the evidence, and decided that against him, coming finally to the same conclusion on the facts as the Subordinate Judge, though not agreeing with him on all his findings or in the reasons on which they were based. *Held*, on an application for leave to appeal to the Privy Council, that the High Court did not “affirm” the judgment of the lower Court within the meaning of sec. 596 of the Civil Procedure Code. *Held*, also, even assuming the judgment of the lower Court was affirmed by the High Court, that there were substantial questions of law in the case which entitled the plaintiff to appeal, notwithstanding that such questions might be immaterial to the decision of the case.—16 Cal. 287.

See I. L. R., 3 Al. 633, noted under sec. 244 ; 9 Al. 93, noted under sec. 574.

**597.** Notwithstanding anything contained in section 595,

Bar of certain appeals.

no appeal shall lie to Her Majesty in Council from the judgment of one Judge of a High Court established under the twenty-fourth and twenty-fifth of Victoria, Chapter 104, of one Judge of a Division Court, or of two or more Judges

of such High Court, or of a Division Court constituted by two or more Judges of such High Court, wherever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being ;

and no appeal shall lie to Her Majesty in Council from any decree which, under section 586, is final.

NOTE.—See I. L. R., 10 Cal. 814, noted under sec. 575.

**598.** Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of.

Application to Court whose decree complained of.

#### Notes.

A on the 8th September 1885 filed his petition of appeal to Her Majesty in Council against a decree obtained against him by B on the 19th May 1885. On the 11th September 1885 A's attorney received for approval from the Registrar the usual draft notice calling upon B to show cause why the case was not a fit and proper one for appeal to Her Majesty in Council ; this draft notice was never returned as approved or otherwise to the Registrar, and on further steps were taken to prosecute the appeal. On the 1st April 1886 B applied to have the appeal struck off for want of prosecution. *Held* that he was entitled to the order.—I. L. R., 12 Cal. 658.

See I. L. R., 15 Madr. 169, noted under sec. 12 of the Limitation Act.

**599.** Such application must ordinarily be made within six months from the date of such decree.

Time within which application must be made.

But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens.

**600.** Every petition under section 598 must state the grounds of appeal, and pray for a certificate, either that, as regards amount or value and nature, the case fulfils the requirements of section 596, or that it is otherwise a fit one for appeal to Her Majesty in Council.

Certificate as to value or fitness.

Upon receipt of such petition, the Court may direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

#### Note.

The Court may enlarge the time for making the deposit required by Civil Procedure Code, sec. 602, for cogent reasons under the rule in *Burjore and Bhawani Pershad v. Mussumat Bhagana* (L. R., 11 I. A., 7 ; s. c. I. L. R., 10 Cal., 557), but those reasons must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so not owing to absence and the difficulty of getting funds, but owing to some

circumstances accidental or otherwise over which he had no control or owing to mistake which the Court would consider not unreasonable or caused by negligence.—14 Madr. 391.

Effect of refusal of certificate.

**601.** If such certificate be refused, the petition shall be dismissed :

Provided that, if the decree complained of be a final decree passed by a Court other than a High Court, the order refusing the certificate shall be appealable, “ within thirty days from the date of the order,”\* to the High Court, to which the former Court is subordinate.

NOTE —See I. L. R., 15 Bom. 155, noted under sec. 595.

**602.** If the certificate be granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, whichever is the later date,

Security and deposit required on grant of certificate.

(a) give security for the costs of the respondent, and  
(b) deposit the amount required to defray the expense of translating, transcribing, indexing, and transmitting to Her Majesty in Council a correct copy of the whole record of the suit, except

(1) formal documents directed to be excluded by any order of Her Majesty in Council in force for the time being ;

(2) papers which the parties agree to exclude ;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may direct to be excluded ;

and when the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in the first clause of this section, deposit the amount required to defray the expense of printing such copy.

#### Notes.

The time allowed by sec. 602 of the Civil Procedure Code for giving the security and making the deposit required by that section may be extended.—I. L. R., 6 Al. 250.

The words in sec. 602 of Act X of 1877, relating to the time within which security is to be given, are directory only ; and although they are not to be departed from without cogent reason, the Court from which the appeal is preferred has the right of extending the time. In this case, the satisfactory explanation having been given of delay in giving security un-

\* See Act XII of 1891 (Repealing and Amending Act.)

til after the time limited by the above section had expired, *held* that the Court had rightly exercised direction in extending the time. *In the matter of the Petition of Soorj mukhi Koer* (I. L. R., 5 Cal. 2) approved. The paternal grandmother of a deceased village-shareholder, claiming to inherit in preference to his male collateral relations, the issue was fixed with the assent of the pleaders on both sides, whether the plaintiff, as a female, was excluded from inheriting by the custom of the family or tribe. *Held* that this was substantially a question of fact, and that on the evidence, which included the village *wajib-ul-arz*, the customary exclusion of females was not proved.—10 Cal. 557; L. R., 11 I. A., 7.

See I. L. R., 14 Madr. 391, noted under sec. 600.

**603.** When such security has been completed, and deposited made to the satisfaction of the Court, the Court may

Admission of appeal and procedure thereon.

declare the appeal admitted, and

give notice thereof to the respondent, and shall then

(c) transmit to Her Majesty in Council, under the seal of the Court, a correct copy of the said record, except as aforesaid, and

(d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor, and paying the reasonable expenses incurred in preparing them.

**604.** At any time before the admission of the appeal, the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

Revocation of acceptance of security.

**605.** If at any time after the admission of the appeal, but before the transmission of the copy of the record, except as aforesaid, to Her Majesty in Council, such security appears inadequate, or further payment is required for the purpose of translating, transcribing, printing, indexing, or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

Effect of failure to comply with order.

**606.** If the appellant fail to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of Her Majesty in Council,

and in the meantime execution of the decree appealed against shall not be stayed.



**607.** When the copy of the record, except as aforesaid, has been transmitted to Her Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under section 602.

**608.** Notwithstanding the admission of any appeal under this chapter, the decree appealed against shall be unconditionally enforced, unless the Court admitting the appeal otherwise directs.

But the Court may, if it thinks fit, on any special cause shown by any party interested in the suit, or otherwise appearing to the Court,

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed against to be enforced, taking such security from the respondent as the Court thinks fit for the due performance of any order which Her Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed against, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed against, or of any order which Her Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions, or give such other direction respecting the subject-matter of the appeal, as it thinks fit.

**609.** If, at any time during the pendency of the appeal, the security so furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

In default of such further security being furnished as required by the Court, if the original security was furnished by the appellant, the Court may, on the application of the respondent, issue execution of the decree appealed against as if the appellant had furnished no such security.

And, if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay all further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject matter of the appeal as it thinks fit.

**610.** Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred.

Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, in the manner and according to the rules applicable to the execution of its original decrees.

In so far as the order awards costs to the respondent, it may be executed against a surety therefor, to the extent to which he has rendered himself liable in the same manner as it may be executed against the appellant. \*

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surety :\*

When any moneys expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed by the Secretary of State for India in Council, with the concurrence of the Lords Commissioners of Her Majesty's Treasury, for the adjustment of financial transactions between the imperial and the Indian Governments.

#### Notes.

A party to a suit in an Appellate Court, who had obtained leave to appeal from its decree to Her Majesty in Council, petitioned for the order of the latter staying execution of interlocutory orders made in execution of such decree, and directing payment by the petitioner to the opposite party of large sums without security taken for their repayment in the event of the decree being reversed. This accompanied a petition for special leave to appeal against those orders. The latter was granted, but it not being competent to the judicial Committee to make any order as to the stay of execution, an intimation was made by it to the Court below that it appeared to be the reasonable course that the opposite party should not, pending the appeal, be put into possession of the large sums in dispute. The intimation being made, the petitioner might apply to the Court below for the due security of all money paid into the treasury in obedience to the decree.

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\* This para has been inserted by the Civil Procedure Code Amendment Act (VII of 1888), sec. 58.

Sidhee Nazur Ali Khan v. Oojoodhyaram Khan, 10 Moore's I. A., 322, and Zerai tool Batool v. Hosseinee Begum, 10 Moore's I. A., 196, referred to.—I. L. R., 14 Cal. 290.

Before a decree-holder in the District Court can obtain execution of a decree which has been affirmed by the Privy Council, he must produce, on the application for execution, a certified copy of the order passed by Her Majesty in Council.—5 Cal. 329.

The provisions of Act X of 1877, sec. 610, are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council to a certified copy, on an application for execution made under that section. They must be read as directory, having the object that proper information regarding the order shall be supplied to the Courts in India. Where the original order (given, according to the practice in England, to the successful party, or to one of such parties) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy, *held* that a copy, though not certified by him, might accompany a petition for execution under sec. 610.—9 Cal. 482.

A decree obtained on appeal of certain defendants in the High Court was appealed to the Privy Council by one only of the two plaintiffs to the suit, and the decision of the High Court was reversed; the plaintiff who had appealed assigned her share in the order of the Privy Council to one of the defendants, and delivered him the certified copy of the decree made in the Privy Council. The plaintiff who had not appealed to the Privy Council applied to the High Court for leave to transmit the order to the Court of first instance for execution of the share decreed to him, but, on account of the assignment above-mentioned, was unable to produce the certified copy of the decree of the Privy Council. The Judge presiding over the Privy Council Department in the High Court held that the production of a certified copy of the order of the Privy Council was excusable under the circumstances, but refused the application, on the ground that the decree of the Court of first instance, which was affirmed by the Privy Council, could only be executed as a whole, and not partly by one of the plaintiffs. *Held* on appeal *per* GARTH, C. J.—That the duties of a Judge in dealing with the meaning of decrees of the Privy Council are purely ministerial, and that any order made in such ministerial capacity could not be considered a judgment, and could not, therefore, be made the subject of an appeal to a Bench of the High Court under sec. 15 of the Charter. *Per* WHITE and MITTER, J. J.—An order of a Judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order, and is a judgment within the meaning of sec. 15 of the Charter, and is therefore appealable.—6 Cal. 594.

See I. L. R., 2 Al. 604, noted under sec. 253; 15 Madr. 203, noted under sec. 211.

**611.** The orders made by the Court which enforces or executes the order of Her Majesty in Council, relating to such enforcement or execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the enforcement or execution of its own decrees.

**612.** The High Court may, from time to time, make rules consistent with this Act to regulate—  
Power to make rules.

- (a) the service of notices under section 600 ;
  - (b) the grant or refusal of certificates, under sections 601 and 602, by Courts of final appellate jurisdiction subordinate to the High Court ;
  - (c) the amount and nature of the security required under sections 602, 605, and 609 ;
  - (d) the testing of such security ;
  - (e) the estimate of the cost of transcribing the record ;
  - (f) the preparation, examination, and certifying of such transcript ;
  - (g) the revision and authentication of translations ;
  - (h) the preparation of indices to transcripts of records, and of lists of the papers not included therein ;
  - (i) the recovery of costs incurred in British India in connection with appeals to Her Majesty in Council ;
- and all other matters connected with the enforcement of this chapter.

**Publication of rules.** All such rules shall be published in the local official Gazette, and shall thereupon have the force of law in the High Court and the Courts of final appellate jurisdiction subordinate thereto.

**613.** All rules heretofore made and published by any High Court relating to appeal to Her Majesty in Council, and in force immediately before the passing of this Act, shall, so far as they are consistent with this Act, be deemed to have been made and published hereunder.

**Legalization of existing rules.**

**614.** In sections 595 and 612, the expression " High Court " shall be deemed to include also the Recorder of Rangoon, but not so as to empower him to make rules binding on Courts other than his own Court.

**Recorder of Rangoon.**

**615.** The rules and restrictions referred to in Bengal Regulation III of 1828, section IV, Clause *fifth*, shall be deemed to be the rules and restrictions applicable to appeals under this Code from the decisions of the High Court of Judicature at Fort William in Bengal.

**of Bengal Regulation III of 1828, Clause 5.**

**Saving of Her Majesty's pleasure.**

**616.** Nothing herein contained shall be understood—

(a) to bar the full and unqualified exercise of Her Majesty's pleasure in receiving or rejecting appeals to Her Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to Her Majesty in Council, or their conduct before the said Judicial Committee.

and of rules for conduct of business before Judicial Committee.

And nothing in this chapter applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

## PART VII.

### CHAPTER XLVI.

#### OF REFERENCE TO AND REVISION BY THE HIGH COURT.

**617.** If, before or on the hearing of a suit or an appeal in which the decree is final, or if, in the execution of any such decree, any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

Reference of question to High Court.

#### Notes.

This section applies to Provincial Small Cause Courts.

It is only when a matter cannot come before the High Court as a Court of Appeal that a reference can be made under sec. 617 of the Civil Procedure Code (Act X. of 1877) — 7 C. L. R., 144.

Sec. 617 of the Civil Procedure Code (Act XIV of 1882) does not authorize a reference, except on a point arising in a litigation between parties in a suit or appeal, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce on the opposite pretensions of contending parties. A pleader was fined Rs. 25 by a Second-class Subordinate Judge for refusing to act on behalf of his client after receipt of retaining fee. On appeal, the District Judge referred the matter to the High Court under sec. 617 of the Code of Civil Procedure (Act XIV. of 1882.) *Held* that the inquiry into the pleader's professional conduct was of a disciplinary, and not litigious character. The fact that an appeal lay from the Subordinate Judge to the District Judge did not make it litigious. In such an inquiry

no reference could properly be made under sec. 617 of Act XIV. of 1882.—I. L. R., 12 Bom. 78.

The High Court has no power to review a judgment passed by it on a reference from a Subordinate Judge with Small Cause Court powers. Clause (c) of sec. 623 of Act XIV of 1882, allows of a review of judgment on a reference only from a Court of Small Causes. The judgment of the High Court in such a case is not a decree or order within the meaning of clause (b) of the section, but is simply a statement of the grounds, in conformity with which the lower Court is to dispose of the case, as provided by sec. 619.—10 Bom. 68.

A Munsif, being of opinion that he had no jurisdiction to entertain a particular suit, made an order returning the plaint for presentation to the proper Court. An appeal was preferred under sec. 588 of the Civil Procedure Code, to the District Judge, who, entertaining doubts upon the question of jurisdiction, referred the matter to the High Court, under sec. 617 :—*Held* that, inasmuch as the order of the Munsif was not a final decree in the suit, and any order of the Judge in appeal disposing of the plea of jurisdiction would not amount to a "final" decree within the meaning of sec. 617 the High Court had not jurisdiction to entertain the reference.—7 Al. 815.

Where A, under the terms of a will, although not expressly appointed an executor, was directed to receive and pay the testator's debts, and to get in and distribute his personal estate: *Held* that A must be taken to have been appointed under the will an executor by implication. In the goods of Baylis (L. R., 1 P. M. 21) followed. The order made by a District Judge on an application for probate, not being a final order, cannot be referred for the opinion of the High Court under sec. 617 of the Code of Civil Procedure. But the Court will, under certain circumstances, entertain such an application, as a Court of concurrent jurisdiction, under sec. 264 of the Indian Succession Act.—5 Cal. 756; 7 C. L. R., 228.

**618.** The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or order contingent upon the opinion of the High Court on the point referred

Court may pass decree contingent upon opinion of High Court.

but no execution shall be issued, property sold, or person imprisoned, in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon such reference.

NOTE.—This section applies to Provincial Small Cause Courts.

**619.** The High Court shall hear the parties to the case in which the reference is made, in person or by their respective pleaders, and shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made and such Court shall, on the receipt thereof, proceed to di

Judgment of High Court to be transmitted, and case disposed of accordingly.



pose of the case in conformity with the decision of the High Court.

NOTE.—This section applies to Provincial Small Cause Courts.

Costs of reference to High Court.

**620.** Costs (if any) consequent on a reference for the opinion of the High Court shall be costs in the case.

NOTE.

This section applies to Provincial Small Cause Courts.

Under sec. 620 of the Civil Procedure Code the costs of a reference to the High Court cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit.—I. L. R., 15 Cal. 507.

**621.** When a case is referred to the High Court under this chapter, the High Court may return the case for amendment, and may alter, cancel, or set aside any decree or order which the Court making the reference has passed in the case out of which the reference arose, and make such order as it thinks fit.

Power to alter, &c., decrees of Court making reference.

NOTE.—This section applies to Provincial Small Cause Courts.

**622.** The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction “illegally or” with material irregularity ; and may pass such order in the case as the High Court thinks fit.

Power to call for record of cases not appealable to High Court.

Notes.

This section applies to Provincial Small Cause Courts.

Where an appeal preferred to the District Court against an order refusing an application for execution of a decree for costs was allowed, the High Court, on a second appeal being instituted, held that no appeal lay either to the District Court or to the High Court, but entertained the matter under sec. 622 of the Civil Procedure Code, and upheld the order of the District Court.—6 C. L. R., 234.

It is only on the application of a party interested that the High Court can act as a Court of Revision under sec. 622 of the Civil Procedure Code. Accordingly, where a Munsif, considering that the Subordinate Judge had acted without jurisdiction in setting aside, on appeal, certain orders made by him, brought the matter to the knowledge of the District Judge, who took the same view, and the latter referred the case to the High Court under that section, it was held that the Court had no power to interfere.—7 C. L. R., 191.

In a suit instituted upon a ten-rupee stamp for an account, the removal of the original trustee and the appointment of a new trustee, where the value of the trust-property was 5 lakhs of rupees, the Court below directed that the stamp should be calculated upon the value of the trust-property, and ordered that the deficiency should be made up within a particular time. Before the time expired, a rule was obtained from the High Court under sec. 622 of the Civil Procedure Code to show cause why the order should not be set aside. *Held* that the rule must be discharged, inasmuch as if the suit had been dismissed on the expiration of the time limited, on the ground that the relief was not properly valued, there would have been an appeal.—12 C. L. R., 148.

A Court that has decided a suit over which it had jurisdiction cannot, only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally, or with material irregularity, within the meaning of sec. 622 of Act X. of 1877, as amended by sec. 92 of Act XII of 1879.—I. L. R., 11 Cal. 6; L. R., 11 I. A., 237.

In 1862 a suit for mesne-profits was brought against certain persons as being the heirs of one Romanath Lahiry, deceased, among whom were his widow and two infant sons. During the pendency of this suit the two infant sons died; and the widow was made a defendant as representing the estate of her deceased sons. The suit was decreed in favour of the plaintiffs in 1875; and on the plaintiffs applying for execution, the widow objected that 5-15th of the properties against which execution was sought was the property of her adopted son, whom she alleged to have adopted in 1874; the adopted son was not made a party to the suit; this objection was overruled, but the same objection was taken by the adopted son through his natural father as his guardian and next friend, and the Court released the 5-16th share from attachment, and allowed the objection. Against this order some of the plaintiffs appealed, but pending the appeal another of the plaintiffs applied to the High Court under sec. 622 of the Code of Civil Procedure to have the order set aside. The Court whilst refusing to interfere with the order, inasmuch as there appeared to be no material irregularity therein, pointed out to the lower Court that the decree of 1875 having been obtained on account of a debt of Romanath Lahiry's, and being against the widow as representing her husband's (Romanath's) estate, the estate would be answerable for the debt, whether the widow or the adopted son represented the estate, supposing the decree to have been properly obtained. The principle in *Ishan Chunder Mitter v. Buksh Ali Soudagur* (Marsh. 314) followed.—11 Cal. 45.

A merely erroneous construction of the provisions of an Act is not a ground for relief under sec. 622 of the Civil Procedure Code. M. J. instituted an interpleader-suit against two rival claimants, N and A, in respect of a sum of Rs. 20,000. R subsequently claimed a portion of the money, and applied to be made a party to the suit; but was opposed by M. J. and N. The Subordinate Judge refused the application on the ground that, though it was probably made under sec. 32 of the Civil Procedure Code, R's right or claim not having been admitted by the plaintiff, nor asserted to his knowledge, she was not a necessary party under the special provisions of ch. 33 of the Civil Procedure Code, and referred her to a regular suit. *Held* that the order, though based upon an erroneous construction of the provisions of sec. 32 of the Code, did not come within the scope of sec. 622, inasmuch as it could not be said that the Subordinate Judge had failed to exercise a jurisdiction vested in him by law.—13 Cal. 90.

The words, "a material irregularity," sec. 622 of the Code of Civil Procedure, include an irregularity of procedure materially affecting the merits of the case. An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section. *Magni Ram v. Jiwa Lal* (I. L. R., 7 Al. 336) observed on.—13 Cal. 225.

Sec. 622 of the Code is one of very limited operation; and where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on those questions. *Amir Hassan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal. 6) followed.—15 Cal. 446.

A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under sec. 622 of the Civil Procedure Code.—16 Cal. 749.

Where a Court, professing to act under sec. 311 of the Code of Civil Procedure, set aside a sale in execution of a decree without proof of substantial injury having been suffered by the applicant, *held* that such order was passed without jurisdiction within the meaning of sec. 622 of the said Code.—9 Madr. 145.

A Small Cause Court, which had jurisdiction under Act XI. of 1865 to entertain suits for rent only where the claim was founded on contract, erroneously assumed that a sub-tenant, by entering on land with notice that his lessor was bound to pay rent to the landlord, became liable by an implied contract to pay rent to the landlord, and passed a decree against the sub-tenant for the rent in arrears. *Held* that, under sec. 622 of the Code of Civil Procedure, the High Court had power to set aside the decree. *Amir Hassan Khan v. Sheo Baksh Sing* (I. L. R., 11 Cal. 6) discussed and explained.—11 Madr. 220.

In a suit to recover a debt incurred by the deceased father of a Hindu family, the District Judge gave a personal decree against the sons of the debtor, of whom two were minors. *Held* that, under sec. 622 of the Code of Civil Procedure, the decree against the minors should be reversed, but that the Court has no power to revise the decree against the other defendants.—11 Madr. 303.

A District Munsif having dismissed a suit, plaintiff appealed to the District Court, and, at the same time, applied to the Court to allow him to withdraw his suit with permission to bring a fresh suit on the same cause of action. The District Court granted the application without assigning any reasons for its order. *Held*, under sec. 622 of the Code of Civil Procedure, that the District Court had acted with material irregularity.—11 Madr. 322.

The parties to a suit having referred the matters in dispute between them to arbitration, the arbitrators, without being specially authorized to decide the question of costs, included in the award a direction that the defendant should pay the costs of the plaintiff. On the application of the plaintiff the Subordinate Judge under sec. 526 of the Civil Procedure Code (Act XIV. of 1882) ordered the award to be filed, holding that the arbitrators had, as such, an implied power to deal with the costs. The defendant applied to the High Court, under its extraordinary jurisdiction praying that the record of the case might be sent for, and the order of the Subordi-

nate Judge set aside. *Held* that the arbitrators had no implied power to deal with the question of costs, and that, on the defendant's objection, the Subordinate Judge should have refused to file the award. Under the circumstances, the High Court, instead of setting aside the order to file the award directed the award to stand good, except so far as it awarded costs, and that the decree should be drawn in accordance with it, as it would be if it contained no direction as to costs. In any case where there is a disregard of the law amounting to an excess of jurisdiction, or a perversion of the purposes of the Legislature, the High Court will interfere under its extraordinary jurisdiction where no other remedy is available.—9 Bom. 82.

A wrong decision on a question of *res-judicata* is not a subject for the interference of the High Court under sec. 622 of the Code of Civil Procedure (Act XIV. of 1882).—9 Bom. 432.

The plaintiffs obtained a decree in the Court of a Second-class Subordinate Judge for a sum less than Rs. 5,000, which, with accumulations of interest, subsequently exceeded Rs. 5,000. The plaintiffs applied in execution to recover the total amount. The application was rejected by the Subordinate Judge, on the ground that the Court had no jurisdiction under sec. 24 of Act XIV. of 1869. On appeal, the District Judge made an order confirming the decision of the Subordinate Judge. The plaintiffs filed a second appeal in the High Court. *Held* that no second appeal lay to the High Court from such an order; but, as the Subordinate Judge was wrong in refusing to exercise his jurisdiction, the High Court would give relief under the extraordinary jurisdiction conferred by sec. 622 of the Civil Procedure Code (Act XIV. of 1882). The subject-matter of the suit was within the jurisdiction of the Subordinate Judge, and his jurisdiction continued, whatever might be the result of the suit, in all such matters in the suit as were within his cognizance, amongst which were matters in execution in the suit. The mere circumstance that the amount actually due by process of accumulation exceeded Rs. 5,000 could not oust him from the jurisdiction he hitherto had over the suit.—10 Bom. 200.

On the 29th November 1886, this suit was filed on *Wapnd*, dated the 29th November 1881, payable in two years. The Subordinate Judge dismissed it as time-barred, being of opinion that the cause of action had accrued on the 28th November 1883. Against this decision the plaintiff applied to the High Court under sec. 622 of the Code of Civil Procedure (Act XIV. of 1882). *Held*, reversing the decision of the Subordinate Judge, that the suit was not barred by time, the cause of action having accrued on the 29th November 1883, that is, the day of the month corresponding with the day on which the bond was dated. *Held*, further, that the decision of the Subordinate Judge being probably wrong and illegal, the High Court had jurisdiction to exercise its revisional powers under sec. 622 of the Code of Civil Procedure (Act XIV. of 1882). Where a Court, with a full and correct apprehension of the questions which it is necessary for it to decide in any case, errs, in law or in fact, in its decision of any such questions with which it has jurisdiction to deal, its errors can only be corrected in due course of appeal; and where no appeal is permissible there is no remedy under sec. 622 of the Code, or under the provisions of sec. 15 of Stat. 24 & 26 Vic., c. 104, whatever remedy there may be, in the Bombay Presidency, under cl. 2 of sec. 5 of Reg. II. of 1827. But it is otherwise in any case where the Court, having a mistaken and wrong apprehension of the questions at issue, proceeds to determine an issue which does not really in the case, and bases its decision of the case on its determination of

that issue. If it does so, it acts with material irregularity in the exercise of its jurisdiction.—12 Bom. 617.

The defendant contracted to sell to the plaintiffs a quantity of rape-seed, April—May delivery. On the 23rd of April the defendant endorsed over to the plaintiffs a delivery-order for the seed given him by Messrs. L. M. & Co., which plaintiffs presented to Messrs. L. M. & Co. on the 26th April, and on three or four subsequent occasions. Messrs. L. M. & Co. refused to deliver, on the ground that they had till the 31st May for delivery. On the 15th May, Messrs. L. M. & Co. failed, and then, but not before, plaintiffs informed the defendant that they had not had delivery from Messrs. L. M. & Co., and demanded it of him. The defendant failing to deliver, the plaintiff sued for damages as of the 31st May. The learned Judge of the Small Cause Court, on this statement of facts, and before evidence was gone into, ruled that the damages were assessable as of the 25th April, on which day it was admitted the market-rate was as high or higher than the contract rate. The plaintiffs on this ruling, without going into their case further, accepted judgment for nominal damages, and took out a rule for a new trial, on the ground that the Judge was in error in assigning the 25th April, and not the 31st May, as the date which ruled the question of damages. On the argument of the rule the Full Court decided against the plaintiffs, not on this point, which they did not decide one way or the other, but on another point altogether, *viz*, that plaintiffs ought to have given defendant notice of Messrs. L. M. & Co.'s refusal to give delivery on the 25th April, and, not having done so, could not call on the defendant to deliver. The plaintiffs now moved the High Court, under sec. 622 of the Civil Procedure Code (Act XIV. of 1882), to set aside the order of the Full Court of the Small Cause Court as one which at the stage of the proceedings that Court had no right to make. *Held* that, in making the order in question under the circumstances of the case, and the state of the record, the Full Court had acted with material irregularity within the meaning of sec. 622 of the Civil Procedure Code, and that the case must be remanded to be dealt with according to law.—13 Bom. 642.

Where a Court has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent give it jurisdiction. A suit of a nature cognizable by a Court of Small Causes alone was brought in the Court of a Joint Subordinate Judge. The defendant objected to the jurisdiction of the Court, but his objection was overruled. The suit was, however, dismissed on the merits. In appeal before the District Judge, the defendant did not renew the plea of want of jurisdiction. The District Judge reversed the decree of the Subordinate Judge, and awarded the plaintiff's claim. The defendant thereupon applied to the High Court under sec. 622 of the Code of Civil Procedure (Act XIV. of 1882). *Held* that both the lower Courts had no jurisdiction to deal with the suit. The mere circumstance that the defendant did not raise the plea of want of jurisdiction in the Appellate Court did not clothe the Court with a jurisdiction not given to it by law.—13 Bom. 650.

In a suit to enforce the right of pre-emption in respect of a usufructuary mortgage of immoveable property, the plaintiffs alleged that the consideration-money was less than that stated in the mortgaged-deed. The Court of first instance gave the plaintiffs a decree for possession of the property, on payment of an amount less than that mentioned in the deed, and this decree was affirmed on appeal. The mortgagees appealed to the High Court on the following grounds: "(1) Because it was for the respondents to prove

that any portion of the consideration was not paid. (2) Because the lower Court has not considered the evidence of the appellants. (3) Because the finding of the lower Court is based on conjecture." *Held*, on the question whether such grounds, not being grounds on which a second appeal is allowed by ch. 42 of the Civil Procedure Code, the appeal should not proceed rather under ch. 46, sec. 622 of that Code that the appeal could not proceed under sec. 622 of the Civil Procedure Code in consequence of the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal. 6 (that only questions relating to the jurisdiction of the Court could be entertained under that section.—7 Al. 336.

Where property had been attached in execution of a decree, *held* that the date on which the property was attached, and not the date of the sale in execution, being the date of executing the first process for enforcing the decree, was the date from which limitation should be computed under art. 164, sch. 2 of Act XV. of 1877. *Pachu v. Jaikishen* (Weekly Notes, 1884, p. 322) referred to. A Court which admits an application to set aside a decree *ex-parte* after the true period of limitation has expired acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of sec. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision by the High Court under that section. *Amir Hassan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal. 6) and *Magni Ram v. Jiwa Lal* (I. L. R., 7 Al. 336) commented on by MAHMOOD, J. *Per* MAHMOOD, J.—The term "jurisdiction" as used by their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal. 6) must be understood in its broad legal sense, signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by the law upon the judicial authority.—7 Al. 345.

A decree of the High Court, giving possession of certain shares in a Bank to the plaintiff R, was reversed on appeal by the Privy Council. The defendant then applied to the Court of first instance to order restitution of the shares, which had been realized by the plaintiff. Upon being ordered to produce the shares, R made an application to the Court, professedly under sec. 244 of the Civil Procedure Code, in which he alleged that, pending the appeal to the Privy Council, he had transferred the shares to G, his counsel in the case, who had failed to restore them, and he prayed "that the said person might be brought upon the record, and that execution for recovery of the said shares might be given against him." The Court passed an order upon this application, calling on G to show cause why he should not be called upon to restore the shares, made over to him by R, and he thereupon filed an answer denying that he was the custodian of the shares, and alleging that he was their purchaser for value. The Court passed an order directing that G's name should be placed on the record, so that the decree might be executed against him. *Held* that the question being one between two judgment-debtors, *inter se*, and not between the parties arrayed against each other as decree-holders of the one part, and judgment debtors or their representatives of the other, the provisions of sec. 244 of the Civil Procedure Code were not applicable to the case; that G could not be regarded as "representative" of R, within the meaning of that section; that the application by R was meant to be and actually was one praying that, in respect of the scrip, restitution of which was being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such in-



terest had passed from him, be brought under the operation of the execution-proceeding; that this was an application under sec. 372 of the Civil Procedure Code; and the order passed on it, being appealable under sec. 588 (21), was not open to revision by the High Court under sec. 622.—7 Al. 681.

Under sec. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Act to defend a suit on the minor's behalf as guardian of such minor. Where a Subordinate Judge had so acted, *held* that the High Court had no power to revise his order under sec. 622 of the Civil Procedure Code.—7 Al. 914.

A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs. 49, being the amount due under a bond, and which the plaintiff alleged had been recovered on her account by one of the defendants from the obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person, and that consequently the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value, held that he had no jurisdiction to entertain the suit, and accordingly returned the plaint for presentation to the proper Court under sec. 57 of the Civil Procedure Code. *Held* by the Full Bench that the Munsif had acted upon an erroneous view, as the only subject-matter of the suit was the Rs. 49; that he had consequently failed to exercise jurisdiction vested in him, and the High Court was therefore competent to revise his order under sec. 622 of the Civil Procedure Code. The result of *Amir Hassan v. Sheo Baksh Singh* (I. L. R., 11 Cal 6) and *Magni Ram v. Jiwa Lal* (I. L. R., 7 Al. 336) is that the questions to which sec. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under sec. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to facts; but that, when no appeal is provided, its decision on questions of both kinds is final. *Per* STRAIGHT and TYRRELL, JJ.—Cls. *a* and *b* of sec. 584, specifying the grounds on which a second appeal lies to the High Court, embody what sec. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Cl. *c* of sec. 584 indicates the meaning of the words "material irregularity in sec. 622, *i. e.*, some material irregularity in procedure, which may possibly have produced error or defect in the decision of the case upon the merits." *Moulvi Muhammad v. Syed Hussain* (I. L. R., 3 Al. 203) referred to.—8 Al. 111.

In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to a portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment-debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that, the decree itself being barred by limitation and finally pronounced to be incapable of execution, the Court had acted beyond its jurisdiction in amending it. *Held* that the application for revision must be

rejected. *Per* OLDFIELD, J., that the High Court had no power to entertain the application under sec. 622 of the Civil Procedure Code, with reference to the decision of the Privy Council in *Amir Hassan Khan v. Sheo Bakhsh Singh* (I. L. R., 11 Cal. 6) and of the Full Bench in *Badami Kuar v. Dinu Rai* (I. L. R., 8 Al. 111), and further that, upon the facts stated, the Court ought not to interfere. *Per* MAHMOOD, J.—That the Court was not precluded from entertaining the application for revision under sec. 622 of the Civil Procedure Code. *Amir Hassan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal. 6), *Badami Kuar v. Dinu Rai* (I. L. R., 8 Al. 111), *Raghunath Das v. Raj Kumar* (I. L. R., 7 Al. 276), *Surta v. Ganga* (I. L. R., 7 Al. 411), *Magni Ram v. Jiwa Lal* (I. L. R., 7 Al. 336), *Har Prasad v. Jafar Ali* (I. L. R., 7 Al. 345), referred to. *Bhagwant Singh v. Jageshar Singh* (Weekly Notes, 1886, p. 57) and *Abu Said Khan v. Hamid-un-nissa* (Weekly Notes, 1886, p. 39) dissented from. The meaning of the term “jurisdiction” used in sec. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court, or to the nature of the class to which the case belongs. It implies, in addition to questions of these kinds, the presence or absence of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the action of subordinate tribunals in cases where there is no remedy, either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power, and the jurisdiction which the law confers upon them, or under the pretence of exercising such authority, power, and jurisdiction, have acted against a positive prohibition of the law. *Combe v. Edwards* (L. R., 3 P. D., 103) and *Crepps v. Durden* (1 Smith’s L. C., 8th Ed., 711,) referred to. *Held* also *per* MAHMOOD, J., that in the present case the Court below had jurisdiction to entertain the application under sec. 206 of the Code; that it did so entertain it; and that in making the amendment its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction “illegally or with material irregularity,” within the meaning of sec. 622. *Lucas v. Stephen* (9 W. R., 301), *Oomanund Roy v. Maharajah Suttish Chunder Roy* (9 W. R., 471), *Zuhoor Hossein v. Syedun* (11 W. R., 142), and *Goluck Chunder Mussant v. Ganga Narain Mussant* (20 W. R., 111), referred to. Under a proper interpretation of the preamble and sec. 4 of the Limitation Act (XV of 1877), the rule of limitation is confined to the litigants, and is inapplicable to acts which the Court may or has to perform *suo motu*. Sec. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application, asking the Court to exercise that power, will not render the action of the Court subject to the rule of limitation. *Robarts v. Harrison* (I. L. R., 7 Cal. 333), *Vithal Janardan v. Rakmi* (I. L. R., 6 Bom. 586), and *Kylasa Goundan v. Ramasami Ayyar* (I. L. R., 4 Madr. 172) referred to.—8 Al. 519.

The High Court has no power to revise, under sec. 622 of the Civil Procedure Code, an order passed by a Collector under sec. 183 of the N. W. P. Rent Act (XII of 1881) on appeal from an Assistant Collector of the second class. *Hur Pershad v. Lalu* distinguished.—12 Al. 198.

*Held* by EDGE, C.J., and OLDFIELD and BRODHURST, J.J., that under sec. 15 of 24 and 25 Vic., c. 104, it is competent to the High Court, in the exercise of its power of superintendence, to direct a Subordinate Court to do its duty or to abstain from taking action in matters of which it has no cog-

nizance; but the High Court is not competent, in the exercise of this authority, to interfere with and set right the orders of a Subordinate Court on the ground that the order of the Subordinate Court has proceeded on an error of law or an error of fact. The High Court's power to direct a Subordinate Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application within his jurisdiction. *Held* by STRAIGHT and TYRRELL, J.J., that the word "superintendence" used in sec. 15 of the Charter Act contemplated and now includes powers of a judicial or *quasi* judicial character, apart from those conferred on the Court by sec. 622 of the Civil Procedure Code; but that the last mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final. *Tej Ram v. Harsukh*, *Girdhari Singh v. Hurdeo Narain Singh*, and in the matter of the petition of *Mathra Pershad*, referred to. The judgment of PETHERAM, C.J., in *Badami Kuar v. Dina Rai* explained.—9 Al. 104.

A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where there is no evidence or admission before him to support the decree, and where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree, it is liable to be set aside in revision under sec. 622 of the Civil Procedure Code. *Maulvi Muhammad v. Syed Husain* and *Sarnam Tewari v. Sakina Bibi* referred to. S hired a horse from W, and while it was in his custody it died from rupture of the diaphragm, which was proved to have been caused by over-exertion on a full stomach. In a suit, by W against S to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles, and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that for some time previously it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was a likely result of the horse running away while its stomach was distended with food. The Court of first instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property, that he must have used his whip freely, or done something else which caused the horse to bolt, and that in so doing he had acted without reasonable care, and had thus caused the animal's death. The Court accordingly decreed the claim. *Held* by EDGE, C.J., that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave, and which was neither contradicted nor *prima facie* improbable; and that the decree of the lower Court, being unsupported by any proof, and based on speculation and assumption, was one which that Court had no jurisdiction to pass, and should consequently be set aside in revision under sec. 622 of the Civil Procedure Code. *Per* BRODHURST, J., that, as the decree was not only unsupported by proof, but opposed to the evidence on the record, the lower Court had "acted in the exercise of its jurisdiction illegally," within the meaning of sec. 622. *Collins v. Bennett*, *Byrne v. Boadle*, *Gee v. The Metropolitan Railway Company*, *Scott v. The London Dock Company*, *Nanzoni v. Douglas*, *Cotton v. Wood*, *Davey v. The*

London and South Western Railway Company, and Hammack v. White referred to —9 Al. 398.

The plaintiffs sued upon two bonds executed by the defendant in their father's favour—one for Rs. 200, and the other for Rs. 99-15 annas. The defendant in his written statement, as well as in his deposition, admitted execution of the bonds in question, but pleaded non-receipt of consideration. The Subordinate Judge held that the bond for Rs. 200 was not proved, but awarded the claim upon the other bond. On appeal, one of the issues raised by the Assistant Judge was—are the bonds in suit proved? He held that the plaintiffs had failed to prove execution of the bonds, and dismissed the claim *in toto*. On an application to the High Court under sec. 622 of the Civil Procedure Code (Act XIV of 1882), *held*, reversing the decision of the lower Court, that, the defendant having admitted execution of the bonds in question, the Assistant Judge acted illegally in the exercise of his jurisdiction in raising the question of the execution. The first rule of adjudication is that a Judge shall decide *secundum allegata et probata*. The only question that could be tried in the present case was non-receipt of consideration.—11 Bom. 435.

Sec. 9 of Regulation VIII of 1827 empowers the District Court to make an order directing the administrators appointed under the Regulation to make over the property, when “it has been determined” between the rival claimants who is the heir of the deceased; but, to give full effect to the object of the Regulation, the word “determined” must be understood “finally determined.” Where the Judge considered that he was bound to make an order directing administrators appointed under Regulation VIII of 1827 to make over the property of the deceased to one of the rival claimants who was judicially declared to be the heir of the deceased. *Held* that so long as the party, against whom the decision in the matter of the rival claims was given, had a right of appeal, the order of the Judge was one which he could not make under the Regulation, and that in exercising his jurisdiction under the Regulation he had exercised it illegally, and that being so, the High Court had power, under sec. 622 of the Civil Procedure Code (Act XIV of 1882), to interfere in the exercise of its extraordinary jurisdiction.—16 Bom. 708.

The plaintiff sued the defendant to recover arrears of an annual *allowance* to which the plaintiff claimed to be entitled under a *sanad*, dated 1846. The defendant in his defence raised certain points, most of which he had raised in a previous suit brought against him by the plaintiff for the recovery of arrears of the same allowance, and which in that suit had been decided against him. The lower Court held that the decision of the former suit operated as *res judicata* and refused to allow the defendant to put forward any new matter which might and ought to have been urged as a defence in the former suit. A decree was made in favour of the plaintiff. The defendant applied to the High Court under sec. 622 of the Civil Procedure Code (Act XIV of 1882). *Held* that the decision, even though wrong, of a question of *res judicata* was not a failure, or a cause of failure, to exercise jurisdiction, and did not warrant the interference of the High Court under sec. 622 of the Civil Procedure Code (Act XIV of 1882).—11 Bom. —

There is nothing in sec. 622 of the Code which prevents the High Court from setting aside an interlocutory order if made without jurisdiction. The word “case” in that section is wide enough to include such an order, and the words “records of any case” include so much of the proceedings in any suit as relate to an interlocutory order. *Omrao Mirza v.*

Jones, 12 C. L. R., 148 ; Harsaran Singh v. Muhammad Raza (I. L. R., 4 Al. 91), Chattar Singh v. Lekraj Singh, (I. L. R., 5 Al. 293), Farid Ahmad v. Dulabi Bibi, I. L. R., 5 Al. 233, dissented from.—14 Cal. 768.

The consideration of an objection under sec. 278 of the Civil Procedure Code, having first been entertained and adjourned by an Additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under sec. 25 transferring the case to the Subordinate Judge was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with it. *Held* that the High Court, in the exercise of its revisional powers under sec. 622 of the Code, should not presume that the Subordinate Judge had taken up the case without jurisdiction ; that the proper remedy of the petitioner was an application under sec. 103, read with sec. 647, or a suit under sec. 283, and that the High Court should not interfere in revision.—10 Al. 119.

Where a District Court, purporting to act under sec. 4 of Act XIX of 1841 directed an inventory of the estate of a deceased person to be taken without conforming to the requirements of sec. 3 of that Act, the High Court set aside the order under sec. 622 of the Code of Civil Procedure as made without jurisdiction.—10 Madr. 68.

An order passed under sec. 18 of Act XX of 1863, refusing leave to sue, is not appealable, nor, if the Judge have exercised his discretion, liable to revision under sec. 622 of the Code of Civil Procedure.—10 Madr. 98.

In a suit in a Small Cause Court for rent due in respect of two pieces of land, the Court passed a decree in favour of the plaintiff. The defendant preferred a petition to the High Court under Civil Procedure Code, sec. 622, which came on for hearing before one Judge. He held that the Small Cause Court had failed to give effect to a former decree between the parties in respect of one piece of land, and made an order reversing the decree as to that, and calling for a report of what was due on the other piece of land. The plaintiff preferred an appeal under Letters Patent, sec. 15 :—*Held*, (1) the above-mentioned order was subject to appeal as being a judgment ; (2) even if the Subordinate Judge had failed to give effect to the previous decree, the error was not such as to give the Court jurisdiction to revise his proceedings under Civil Procedure Code, sec. 622.—14 Madr. 406.

A sued four persons, against whom, together with A, a money decree had been passed in a previous suit, to recover a proportionate part of a sum paid by A, in discharge of the decree-debt. Two of the defendants pleaded that they had not appeared in the former suit, and have been unnecessarily brought into the record by A. *Held* that the Court had jurisdiction to inquire into the circumstances of the previous suit. *Suput Singh v. Imrit Tewari*, (I. L. R., 5 Cal. 720) followed.—10 Madr. 518.

The discretionary power of a Civil Court, before or against which an offence mentioned in sec. 468 of sec. 469 of Act X of 1872 is alleged to have been committed, to grant or withhold sanction to the prosecution for such offence, is not subject to revision by the High Court under sec. 622 of Act X of 1877.—3 Al. 508.

Sec. 9 of the Specific Relief Act does not prohibit a rehearing under sec. 105 of the Code of Civil Procedure. A rehearing differs widely from a review. A High Court can interfere under sec. 622 of the Code of Civil Procedure without an application made to it by a party to a suit.—4 Madr. 217.

The rule of English practice which prevents a minor from instituting a suit *in forma pauperis* through his next friend, unless he gives proof n o



only that he is himself pauper, but that the next friend is a pauper, and that he cannot get any substantial person to act as his next friend, is not to be found in, or deduced from, the provisions of the Civil Procedure Code.—3 Madr. 3.

Where an auction-purchaser applied to the High Court to set aside, in the exercise of its power under sec. 622 of the Civil Procedure Code, an order setting aside a sale of immoveable property in execution of a decree, on the ground that such order was illegal, such application being made nearly seventeen months after the date of such order, the Court, having regard to the time that had elapsed before such application was made, refused to interfere.—4 Al. 154.

An application to sue as a pauper having been refused, on the ground that the suit was barred by limitation, the High Court, on revision, permitted the applicant to renew his application to the Court below. The Subordinate Judge verbally rejected this second application, stating that he would deliver a written judgment. Before the written judgment was delivered, the applicant offered to pay the usual court-fees (although not actually tendering them at the time), and asked that the petition might be taken as a plaint filed on the date of the first application. This offer was mentioned and refused in the written judgment. *Held*, on the case coming up to the High Court under Act X of 1877, sec. 622, that the circumstances of the case were not such as would justify the Court in interfering under that section.—5 Cal. 807; 6 C. L. R., 223.

No Court, other than a Court of Appeal or a High Court acting under sec. 622, can discharge an order of attachment issued by another Court. Where a claimant to property attached in execution of a decree intervenes, but fails to get the order of attachment set aside, and is compelled to bring a suit to establish his right, the discharge of the order of attachment cannot properly be asked for in such suit. The intervenor, having established his title by declaratory decree or otherwise, should then carry the decree to the Court by which the order of attachment was issued, and such Court is bound to recognize the adjudication, and govern itself accordingly. *Narayanrav Damedar v. Balkrishna Mahadev Gadre* (I. L. R., 4 Bom. 529) followed.—4 Madr. 131.

After a mortgage had been foreclosed under the provisions of Regulation XVII of 1806, the representative of the mortgagor deposited the mortgage-money in Court. The District Judge ordered that the money should be paid to the mortgagee, on the ground that the mortgagor had not been personally served with the notice required by sec. 8 of that Regulation, and that it did not appear that she had been aware of the foreclosure-proceedings. The District Judge subsequently ordered the mortgagee, who was in possession of the mortgaged property under the term of the mortgage, to surrender the property. The mortgagee applied to the High Court to revise these orders under sec. 622 of Act X of 1877. *Held* that the application was entertainable under the provisions of that section, and that the orders of the District Judge were made without jurisdiction, and should be set aside.—3 Al. 576.

S instituted a suit against T in the Court of the Assistant Collector of the first class, who dismissed the suit. On appeal by S the District Court gave her a decree. On second appeal by T the High Court held that, as the suit was one of the nature cognizable in a Court of Small Causes, a second appeal would not lie in the case, and dismissed it. T thereupon



applied to the High Court to set aside, under the provisions of sec. 622 of Act X of 1877, the proceedings of both the lower Courts, on the ground that both those Courts had exercised a jurisdiction not vested in them by law. *Held* that the High Court was competent to entertain such application, and to quash the proceedings of both the lower Courts under the provisions of sec. 622 of Act X of 1877, and the proceedings of both those Courts should be quashed. Observations by STUART, C. J., on the powers of revision of the High Court under sec. 622 of Act X of 1877.—3 Al. 417.

*Per* PEARSON J., OLDFIELD J., and STRAIGHT, J.—When, under sec. 622 of Act X of 1876, the High Court has called for the record of a case in which no appeal lies to it, it may, under that section, pass any order in such case which it might pass if it dealt with the case as a second appeal under chap. 42 of that Act. *Per* STUART, C. J.—The High Court may, under that section, pass in such case any order, whether in regard to fact or law, as it thinks proper. Where, in a case of the execution of a decree in which no second appeal lay to the High Court, the Appellate Court held, on the construction of the decree, that it awarded interest on the principal amount of the decree, the High Court, under sec. 722 of Act X of 1877, holding that the Appellate Court has misconstrued the decree, and that the decree did not award such interest, modified the order of the Appellate Court accordingly.—3 Al. (F. B.) 203.

The purchaser at a sale by public auction did, by the exercise of fraud and collusion with the agent of the execution-creditor (though without the creditor's personal knowledge), succeed in becoming the purchaser at a depreciated value. There was no material irregularity in publishing or conducting the sale. *Held* that the Court which ordered the sale had jurisdiction to refuse to confirm the sale on the ground of the the fraud practised by the agent of the execution-creditor and the purchaser. *Held* also that the High Court had power under sec. 622 of Act X of 1877, to rescind the order made by the Court of first instance confirming the sale. *Held* by KERNAN, J.—That the party defrauded ought not to be referred to bring a regular suit. The question ought to be decided at once on motion in the original cause. *Held* by MUTTUSAMI AYYAR, J., that fraud was a valid ground of relief on petition when it related to the mode in which the auction was held, and the purchaser was a party to it, but it was doubtful whether fraud was a ground of relief on petition when it was a remote cause of the sale.—2 Madr. 264.

A and B, both of whom set up a claim to certain land, brought separate rent-suits against the tenants. In none of these suits did the amount claimed exceed Rs. 100. Subsequently to the institution of the rent-suit, A sued B to establish his title to the land in dispute. The District Judge, before whom the rent-suits came on appeal, allowed them to stand over until the decision in the suit between A and B. That suit was decided in favour of B, and the Judge then decided the rent-suits instituted by B in his favour, and dismissed the suit instituted by A. *Held* that no second appeal would lie in the rent-suits, as no question of title between parties having conflicting claims was decided in them. *Held* also that there was no such irregularity on the part of the District Judge in the course which he pursued, of making his decision in the rent-suits depe[n]ded upon the decision in the suit to establish title, as would justify the Court in interfering under sec. 622 of the Civil Procedure Code.—7 Cal. 330.

A Division Bench (PINHEY and NANABHAI HARIDAS, JJ.) of the High Court referred the following question for the determination of the Full Bench: "Whether the High Court should exercise its extraordinary juris-

diction under sec. 622 of the Code of Civil Procedure or otherwise, on behalf of persons who feel themselves aggrieved by orders passed by Courts below in cases in which it appears the law has specifically prescribed another remedy by suit or otherwise?" *Held* that the question did not admit of a precise categorical reply; that the High Court could not impose on itself limitations without regard to circumstances; but that the general principles governing the exercise, by the High Court, of its visitatorial or superintending powers to be deduced from a general survey of the authorities on the subject might be reduced to the form on the following seven propositions, the fifth of which would ordinarily govern in the class of cases alluded to in the question: (1) The visitatorial or superintending power of the High Court is so necessary, and almost indispensable, that it is not to be wholly excluded even by a clause in a Statute withdrawing cases under the Statute from its control. When such a Statute has been made a mere pretext, or has been wholly misapplied, the case will be treated as one not really arising under the Statute, but on an evasion or perversion of the Statute, and, as such, subject to the general control of the Court. (2) The Court, having called up the record or proceedings of a subordinate Court, will itself investigate the facts on which a jurisdiction has been assumed or declined; on which it depends whether the subordinate Court could or could not legally deal with the matter in question, either at all or on the principle to which it has referred the case; or according to which its mode of inquiry or of action may or may not have been in contradiction rather than obedience to the rules of procedure, or the principles implied in them, to such a material extent as to defeat the purpose of the law. (3) If the Court finds that the external conditions of jurisdiction, of investigation, and of command, have been satisfied by the inferior Court, it will not substitute its own appreciation of evidence, or its own judgment thereon, for the determination of the inferior Court in any matter committed by the Legislature to the discretion of such Court. (4.) Where an appeal is provided, the Court will not interfere by any peremptory order with the ordinary course of adjudication, save in cases wherein a defeat of the law and a grave wrong are manifest, and are irremediable by the regular procedure. (5) Where a decree or order of a Subordinate Court is declared by the law to be, for its own purposes, final or conclusive, though in its nature provisional, as subject to displacement by the decree in another more formal suit, the Court will have regard to the intention of the Legislature that promptness and certainty should, in such cases, be in some measure accepted instead of judicial perfection. It will rectify the proceedings of the inferior Court where the extrinsic conditions of its legal activity have plainly been infringed; but where the alleged or apparent error consists in a misappreciation of evidence, or misconstruction of the law, intrinsic to the inquiry and decision, it will respect the intended finality, and will intervene) peremptorily only when it is manifest that by the ordinary and prescribed method and adequate remedy, or the intended remedy cannot be had. (6) The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretionary, and subject to considerations of the importance of the particular case, or of the principle involved in it, of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for or against the Court's intervention, due weight is to be given to them, regard being always had to principles already enunciated. (7) The Court will "sedulously abstain" from making any order or refusing to make it on

grounds the appreciation of which is exclusively assigned by law to some other authority, provided the legal competence be exercised in good faith on matters that may reasonably be understood as within its lawful range. —7 Bom. 341.

See I. L. R., 3 Madr. 68, noted under sec. 525; 6 Madr. 414, noted under sec. 507; 15 Bom. 77, noted under sec. 412; 5 Al. 42, noted under sec. 310; 5 Cal. (F. B.) 878, noted under sec. 290; 15 Madr. 372, noted under sec. 295; 6 Al. 125, noted under sec. 206; 6 Al. 211 and 8 Al. 108, noted under sec. 2; 6 Al. 233, noted under sec. 25; 5 Al. 293, noted under sec. 521; 8 Cal. 832, noted under sec. 588; 1 Madr. 401, noted under sec. 244; 9 Al. 486, noted under sec. 21; 10 Madr. 51, noted under sec. 206; 11 Madr. 144, noted under sec. 516; 13 Al. 533, noted under sec. 203; 14 Madr. 462, noted under sec. 13 of the Madras Civil Courts Act; 14 Al. 420, noted under sec. 87 of the Transfer of Property Act.

## PART VIII.

### CHAPTER XLVII.

#### OR REVIEW OF JUDGMENT.

Application for review of judgment.

**623.** Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is hereby allowed, but from which no appeal has been preferred;

(b) by a decree or order from which no appeal is hereby allowed; or

(c) by a judgment on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed or order made, or an account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him,

may apply for a review of judgment to the Court which passed the decree or made the order, or to the Court, (if any) to which the business of the former Court has been transferred.

A party who is not appealing from a decree may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except when the ground of such appeal is common to the applicant and the appellant, or when, being a respondent, he can present to the Appellate Court the case on which he applies for the review.

**Notes.**

This section applies to Provincial Small Cause Courts.

This was an application for review of judgment of three out of five analogous cases decided by the High Court, the judgment in two of which had been reversed by the Privy Council. The application was made after a lapse of more than 90 days from the date of judgment. *Held* a lapse of 90 days, under the circumstances, would not be a bar to the granting of the review.—3 B. L. R., (A. C.) 287; S. C. 12 W. R., 154.

The omission of a Court to take into consideration a material issue is a sufficient ground to admit an application for review of judgment. When an application for review is admitted upon other grounds, fresh evidence not produced at the trial may be received, although on reason, as required by sec. 376, Act VIII. of 1859, has been assigned for the non-production at the trial.—3 B. L. R., (A. C.) 346.; 12 W. R., 223; 16 W. R., 134; 16 W. R., 150.

A Court of original jurisdiction has power to entertain an application to review an order refusing a petition for leave to sue *in forma pauperis*. Under sec. 15 of 24 and 25 Vic., c. 104, the High Court set aside an order of a Court of original jurisdiction, refusing to entertain such an application on the ground that the Court had not jurisdiction to entertain it.—5 B. L. R., App. 29. See 5 B. L. R., 318 note; 11 W. R., 22.

A daughter succeeded to a share of her father's estate, and transferred it in full property, by a formal instrument or *ikrarnama* dated March 1849, to her grand-daughter, expressly naming her, and treating her as her heiress: the transfer being in the nature of a release, reserving maintenance and other advantages to the donor. Upon the application of the grand-daughter before the Collector, for the mutation of names according to the terms of the *ikrarnama*, the reversioners (collateral heirs of the father) affected to contest the unauthorized nature of the alienation, but dropped their opposition. In 1857, the diaras, or alluvial lands attached to the estate, were perpetually settled with the grand-daughter. The alienor quarrelled with her grand-daughter, and in 1857 brought a suit against her to set aside the *ikrarnama*, upon the ground of the non-performance of a condition subsequent. The plaintiff succeeded in the first Court, but the judgment was reversed (October 1858) on appeal to the Zilla Judge. Pending the appeal, the plaintiff died (February 1858), and the reversioners applied to be, and were, admitted as her heirs to conduct the appeal. The grand-daughter remained in possession from the date of transfer until 1866, when she died. In April 1867 the present suit was brought by the surviving reversioner, who claimed to be entitled to recover possession of the property by right of inheritance from the alienor's father. He was one of the reversioners who had been admitted to conduct the appeal in the former suit upon the death of the alienor. *Held* (on special appeal and review) there had been no adverse possession; the instrument enured as a transfer of the donor's lifeinterest only; judgment in the former suit brought to set it aside did not bind or affect the reversioners, who, in that suit, merely represented the interest of their predecessor, the life-tenant. In the first Court an issue was raised whether or no the hearing of this suit was barred by the law of limitation. One of the grounds of appeal to the Judge was that the Principal Sadr Amin ought to have held the suit barred as regards the diaras under the special limitation of three years from the date of the Collector's settlement. The Judge did not notice this ground in his judgment. The same ground of appeal was repeated in the special appeal to the

High Court, but that Court refused to entertain it for the reason that it did not appear to have been raised in argument before the Judge, or in the first Court. On application for review, it was urged that the Court ought to have listened to this ground, but the Court adhered to its former decision. Counsel should not be heard to re-argue a case on review upon the same points as were argued in special appeal.—5 B. L. R., 585 ; 13 W. R., 52.

It cannot be treated as a universal rule that on point can be raised on an application for a review which has been already discussed and decided on the original hearing of the appeal ; or that no new point, which has not been raised on the hearing of the appeal, can be argued on the application for a review. In each case the Court to which the application is made must consider and decide whether a review is necessary to correct any evident error or omission, or is otherwise requisite for the ends of justice.—6 B. L. R., 126 ; 15 W. R., (F. B.) 1.

BAYLEY, J.—We are of opinion that there is no ground for this review. We are asked to pass an order enabling the applicant to have the plaint back in order to file it in the proper Court. The case was discussed at great length when the special appeal was argued, but no such request was then made before us. It was held by us, on the plaintiff's own showing, that the Court in which the suit was brought was admittedly a Court which had no jurisdiction to try it. If a party brings a suit in a Court which, according to his own showing, has no jurisdiction to try the case, it does not lie in him, failing in that Court, to ask to have the plaint back in order to file it in the proper Court. However, as the matters stand in the case, this request, as an alternative plea, was never made, or otherwise raised before ; and I think that, to allow such a point to be raised at this stage, would be against the proper legal principle.—*viz.*, that there must be some end to litigation.—6 B. L. R., App. 141.

Upon the dismissal of a special appeal by the High Court, the appellant in special appeal applied to the High Court for a review of judgment upon the ground of discovery of fresh evidence. This application was rejected, on the ground that the Court could not take cognizance of the merits of a case in special appeal, and, therefore, could not admit a review upon fresh evidence. The special appellant then applied to the lower Appellate Court for a review of its judgment, on the ground of discovery of fresh evidence. This application was admitted, and a review of the judgment was allowed. On application to the High Court under sec. 15 of the Charter Act, *held* that the lower Appellate Court had no jurisdiction to admit the application for review.—6 B. L. R., 333 ; S. C. 14 W. R., 438. See also 6 B. L. R., 334 note ; 7 W. R., 218.

Upon the appeal of one of the defendants to the Privy Council, the judgment of the High Court was reversed. Another defendant, whose defence was the same as that of the defendant who had appealed, applied to the High Court to review its judgment after a lapse of several years from the date of the judgment of the High Court, but within three months from the date on which he became aware of the decision of the Privy Council. The application was refused. (3 B. L. R., (A.C.) 287) doubted.—9 B. L. R., 187 ; 18 W. R., 317.

An order refusing to admit a special appeal is open to review, and the application for review may be made without notice to the other side.—10 B. L. R., 155 ; 18 W. R., 475.

An application was made to the High Court for the admission of a special appeal. The petition contained ten grounds of appeal, and, after hearing a pleader in support of the application, it was rejected by two Judges. The present application was for a review of the order passed rejecting the application to admit the special appeal. The High Court refused the application, as the petitioner had had three distinct hearings in three different Courts, and therefore his case was thoroughly investigated; moreover, it was not suggested that there was anything peculiar or exceptional in this case, or that there had been any new discovery since the case was last heard, or that there had been any miscarriage by the Court, or that the case put forward on the last occasion was not correctly understood and disposed of.—10 B. L. R., 156 note, where, however, under the circumstances, the Court refused the application.—S. C., 17 W. R., 484.

Where a Subordinate Judge, after deciding a regular appeal, granted an application for review of judgment on the ground that new evidence had been discovered, but without any enquiry or proof that such evidence was not within the knowledge of the applicant, or could not have been adduced by him at the time the decree was passed, *held* that this was an error or defect in the procedure or investigation of the case which affected the decision, and was a ground of appeal when the decision upon review was brought before the High Court on special appeal. The word “final” in sec. 378 of Act VIII. of 1859 means that the order rejecting the application or granting the review shall not by itself be open to appeal.—11 B. L. R., 423; 20 W. R., 84; 20 W. R., 426; 4 Bom. H. C. R., (A. C.) 57.

Where a party applying for a review of judgment after the expiry of the period of ninety days allowed by sec. 377, Act VIII of 1859, had not, as required by that section, shown any just and reasonable cause for not preferring his application within the prescribed period, the order admitting the review was held to have been improperly granted, and was set aside with all subsequent proceedings thereon.—14 B. L. R., 373; S. C. L. R., 2 I A. 58; 10 W. R., 42; 24 W. R., 294; 8 Bom. H. C. R., (A. C.) 234; 8 W. R., 184; 25 W. R., 343; 12 W. R., 94; 18 W. R., 286.

A Judge is bound to proceed with an application for a review of his judgment, even though a petition of appeal has been filed subsequently to the application for a review.—B. L. R., Sup. Vol., 362; 5 W. R., 59.

A Court has no power to reverse an order of a Co-ordinate Court which has determined the precise question after a suit has proceeded to its conclusion in pursuance of that order.—2 M. H. C. R., 349. But see 16 W. R., 78; 16 W. R., 85.

A Civil Court, in hearing an appeal from the decision of a Collector under Madr. Act VIII. of 1865, must be guided by the Civil Procedure Code, and the judgment of the Civil Court may be reviewed under sec. 376 of the Code. The order granting a review is final. *Semble*, the terms of sec. 57 of Act VIII. of 1865 are wide enough to justify a Collector in treating as *ex parte* a defendant not appearing on the day to which the hearing of the suit may have been adjourned under sec. 66 of the Act.—4 M. H. C. R., 251.

A Court has no jurisdiction to grant a second review of judgment on the application of the same party under the Code of Civil Procedure.—5 M. H. C. R., 323.

Applications for reviews should be drawn up in the same manner as applications for the admission of special appeals, and should set forth concisely the grounds of objection to the decision sought to be reviewed.—1 Bom. H. C. R., (A. C.) 185.



A remand-order made on special appeal is (unless a review of it be obtained within the prescribed time) a conclusive determination of the points of law involved in it ; and the correctness of law laid down upon a remand cannot be questioned on a second special appeal ; nor is the fact of the Court's adopting a different view of the law after an order has been made in general a good ground for allowing a review of such order after the time for a review has elapsed.—6 Bom. H. C. R., (A. C.) 146.

As a general rule, the discovery of new evidence is not a ground for the admission of a review of a judgment passed in special appeal. Whether this is so when such new evidence might affect the jurisdiction of the Court which tried the case.—*Quære*.—When new evidence is discovered, the proper course for the appellant to adopt is to ask leave to withdraw his special appeal, and to apply to the lower Court for a review of its judgment.—9 Bom. H. C. R., (A. C.) 89 ; 6 Bom. H. C. R., (A. C.) 68.

When a review of a decision has been admitted, the whole case is thereby re-opened.—10 Bom. H. C. R., (A. C.) 360.

A Judge is not competent to hear a review in a case in which a special appeal has been admitted by the higher Court. When a tenant is sued for arrears of rent, even though he should deposit the rent in Court during the pendency of the suit, he is still liable to have the decree passed against him, as the arrear was admittedly due when the suit was brought. Interest to date of deposit in Court, and costs of suit being paid within 15 days, execution would be avoided.—1 N.-W. P. H. C. R., Pt. II 39 ; Ed. 1873, 97.

Sec. 7 of Act VIII of 1859 does not authorize the taking a case in progress of trial off the file of a Subordinate Judge in order that it may be completed by the Judge himself or some other Court. It is clear that such transfer must take place on the institution of the suit.—2 N.-W. P. H. C. R., 230.

The Court which pronounces a judgment is the only Court that can review such judgment.—2 N.-W. P. H. C. R., 230.

The Lower Courts refused to give effect to an order of a former Munsif passed under the following circumstances, on the ground that it was passed without jurisdiction. The plaintiff's suit was dismissed "in default of prosecution," on the ground that he had failed to deposit *talabana*, although time had been allowed him for that purpose. He was represented by a pleader at the adjourned hearing. He subsequently applied for the re-admission of the suit on the ground that he had been prevented by illness from depositing the money. The defendants objected (1) that, if the application was one for a review of judgment, it was insufficiently stamped ; (2) that the suit was not decided under sec. 110 or sec. 119 of the Civil Pro. Code ; and (3) that the reason assigned by the plaintiff for his default, even if true, was an insufficient reason. The Munsif treated the application as one under sec. 119 of the Code, and directed the re-admission of the suit. It was held that the plaintiff's application might fairly be regarded as an application for a review of judgment under sec. 376 of the Code, and, in that view, that the misconstruction by the Munsif of the nature of the application was not a sufficient reason for depriving the plaintiff of the relief which he not inequitably obtained by the order passed upon it, and the Court of first instance was directed to call upon the plaintiff to pay the fee payable on his application for a review of judgment, and, in the event of his complying with the requisition, to give effect to the former Munsif's order.—7 N.-W. P. H. C. R., 126. See also 5 N.-W. P. H. C. R., 74.

The Munsif dismissed a suit. Afterwards he issued a rule calling upon the defendant to show cause why a review of judgment should not be granted. The defendant showed cause, but his objections were overruled; the review was granted, both plaintiff and defendant adduced new evidence, and a decree was given for the plaintiff. On appeal, the Subordinate Judge reversed this decision on the ground relied upon by the defendant in showing cause in the lower Court, namely, that the defendant had not established that with due diligence he could not have brought forward in the original trial the evidence upon which his application for review was based. *Held*, on special appeal, that the fact of the defendant having adduced fresh evidence in the Court below did not debar him from objecting before the Subordinate Judge that the review was wrongly granted, because the order admitting it was final.—2 C. L. R., 257.

In a suit to recover possession of certain land, which, though described in the plaint as partly bastoo and partly agricultural land, was treated by both parties as agricultural only, it was found by the Court of first instance that the defendants had acquired a right of occupancy. The finding having been confirmed by the lower Appellate Court, an application was made for a review, and on review that Court reversed its former decree on the ground that no right of occupancy could be acquired. *Held* that on review the lower Appellate Court ought not to have entertained the objection that the land was not agricultural without remanding the case for the trial of a fresh issue on that point.—10 C. L. R., 106.

Sec. 623 of the Civil Procedure Code applies to all cases, whether they are disposed of in the presence of the parties or *ex parte* in the absence of the defendants.—13 C. L. R., 254.

*Held* that, when an issue which decides the case on the merits has been found in favour of either party, a review of judgment will not be granted merely because there has been an erroneous decision on a point affecting an issue which, in consequence of the finding, has become immaterial.—Bourke's Rep., (O. C.) 131.

A Judge cannot, by transferring a case to his own file, confer on himself the power to review an order of dismissal pronounced by a Principal Sadr Amin.—W. R., 1864, Mis., 29.

A Judge has power to grant a review after the lapse of the ninety days within which the application ought to be made.—W. R., (F. B.) 84.

When a case is admitted to review by the deciding Judge, and tried afterwards by another Judge, the new Judge ought to try only the point directed by the order of review.—W. R., 1864, 142.

An application for a review of judgment by the High Court on a reference from a Small Cause Court was not admissible under the Code of 1859.—3 W. R., S. C. C. Ref. 8.

No review can be admitted of a judgment passed on a compromise.—5 W. R., 226.

A Court should give reasons on review of judgment, for coming to a different conclusion from that which it had previously formed.—6 W. R., 18.

An appeal to the Privy Council being once admitted, whether properly or erroneously, the High Court has no further jurisdiction to review its order, and declare the appeal rejected.—6 W. R., Mis., 97; 6 W. R., Mis., 120.

The preferring of an appeal against a decision by one defendant does not deprive another defendant of his right to apply for a review of the same decision with reference to sec. 376, Act VIII of 1859.—7 W. R., 166.

A proceeding admitting a review, without notice to the opposite party, as required by sec. 378 of the Code of Civil Procedure, 1859, is wholly vitiated by such defect, and not binding on that party.—8 W. R., 304.

There seems to be no limit to the time after the expiration of ninety days at which the application for review may be filed, provided the applicant can satisfy the Court that there is just and reasonable ground for review.—8 W. R., 483.

An application for a review, on the ground of the discovery of new evidence, of a judgment of the late Sadr Court rejecting a special appeal, ought not to be made to the High Court, but to the Court of original jurisdiction.—8 W. R., 511.

That the lower Court should have improperly neglected to examine a witness is not a ground for a review of judgment, if the objection was not taken when the case was heard by the Court in regular appeal.—9 W. R., 129.

That one Division Bench of the High Court has decided a point at variance with the decision of another Division Bench is no reason for granting a review of judgment.—9 W. R., 158.

A party wishing to be heard in support of new grounds must apply for permission under sec. 374, Act VIII of 1859 : he cannot be permitted to raise them in an application for review.—9 W. R., 370.

The fact that the High Court ought to have remanded the case on the ground that the Judge had wrongly decided a point of law is no ground for review.—9 W. R., 589.

When once a Civil Court has passed a final decision between the parties it loses jurisdiction over the suit, except for the purposes of executing the decree ; and it cannot hold a new trial of the same unless, for some reason within the Procedure Act, the first trial appears to have been unfair between the two parties.—10 W. R., 42.

An error on a point of law is a ground for a review of judgment.—10 W. R., 143.

Section 376 of the Code of Civil Procedure authorized reviews of judgment in respect to decrees of Court, and also in respect to orders which not decrees.—10 W. R., 345.

An order rejecting a review is final.—11 W. R., 264 ; 11 W. R., 184.

A petition for the rectification of a decree is not different from an application for a review when the object of the rectification is to alter decision of the Court, and such a petition cannot be received after ninety days without just and reasonable cause for the delay being shown to the satisfaction of the Court.—13 W. R., 33.

Though a certain issue in a suit was decided against the plaintiff, the suit was decreed, and the defendants obtained a review on which that decree was set aside, and the plaintiff's suit declared barred by limitation. On this the plaintiff applied for a review of both judgments. *Held* that, though his application in relation to the former judgment was not in time, yet, as he had no occasion to ask for a review until the latter judgment was passed, the words of sec. 376, Civil Procedure Code, 1859, entitled him to ask the Court to re-consider both judgments.—13 W. R., 69.

Where a review has been admitted by the sole remaining Judge of the Bench which heard the case originally, it is not open to counsel, on the rehearing of the appeal, to question the propriety of the order for admission. If such order is wrong, the error cannot be corrected by the Bench appointed to hear the appeal after its restoration to its original number on the file.—13 W. R., 82.

Where a Subordinate Judge admitted a review on the representation of plaintiff that he (the Judge) had made a mistake as to the subject of a certain *dagh* in a Government *halabadee chitta*, the applicant filing with his petition for review another *chitta* and other evidence for the purpose of convincing the Court that it had made an error, *held* that an error of this kind was sufficient to found the jurisdiction of the Court to entertain the review.—14 W. R., 236.

Where the decision of a lower Court follows a view of the law taken by the High Court, and that view is set aside by a ruling of Her Majesty in Council, the judgment-creditor has a right to have his case re-tried upon that ruling.—15 W. R., 143. \*

An infant is as much bound by a judgment in his own action as if of full age, and, if an application for review is made on his behalf, it must be subject to the conditions of the 376th and 377th sections of the Code of Civil Procedure.—16 W. R., 231.

Where a Judge on appeal declined to admit additional evidence, on the ground that the application should have been made to the lower Court, *held* it was a ground for applying for a review of his order pointing out his mistake.—17 W. R., 47.

A Subordinate Judge has the power under the law to review the decision of his predecessor, although the power is one which should be exercised very sparingly.—18 W. R., 198.

The objection to the admission of a review of judgment on the strength of a new document was not allowed to prevail in a case where the so-called new document was not the sole reason for the admission of the review.—18 W. R., 316.

A review cannot be granted on the ground that, if the facts had been better or more fully placed before the Court, the judgment would have been different, or even on the ground of a subsequent decision of a question of law by the Privy Council in another suit where there has been no discovery of new evidence such as is contemplated in sec. 376 of Act VIII. of 1859.—19 W. R., 189.

The inferior Courts in the *mofussil* have no jurisdiction to review their own judgments, except under the circumstances and with the limitations set forth in the Code of Civil Procedure.—20 W. R., 180.

Where claims for rent were decreed by a Deputy Collector on the basis of a decree for a *kabuliat*, which latter decree was subsequently set aside, the proper remedy was an application to the Deputy Collector for a review of his decision.—22 W. R., 161.

The discovery of new evidence may make it proper to grant a review, but the circumstances must be very special—the more so when the application for review is made many years after the date of the decree, and the evidence discovered must be of a clear and conclusive character.—23 W. R., 323.

A review cannot be given merely for the purpose of allowing the *par-*

ties to re-argue the case upon the evidence, upon the chance of eventually throwing doubt upon the decision already passed.—24 W. R., 186.

Whether certain documents which have already been admitted as evidence were so admissible or not, is not a point which can be urged in review.—24 W. R., 186.

Where a Judge, who had ordered a certificate of guardianship to be granted under Act XL. of 1858, granted a review of his order on one point, *held* that he had no power to re-open another question which he had already decided finally, and on which no application for review was made.—24 W. R., 427.

It is not a proper ground for granting a review of judgment that a Judge, by going through the evidence a second time, might arrive at a different conclusion.—25 W. R., 324.

In a suit between A and B, heard on the 29th January 1883, a certain conveyance was filed with the plaint, but up to the hearing this conveyance has been protected from discovery. B's counsel had, however, had a copy thereof delivered to him at the time B's written statement was being drawn, and a copy briefed to him at the hearing. At the hearing A's counsel stated that the effect of the conveyance was to vest the entirety of a certain property in A; this view was accepted by B's counsel, who did not read the conveyance. The only issue in the case was "who was in possession of the property," and the Court decided this issue on the 5th February in favour of the plaintiff. On the 26th February, B brought a suit against A to set aside this conveyance on the ground of fraud. And in certain proceedings in this case taken on the 31st March, B's counsel discovered, as he alleged for the first time, that under the conveyance a moiety of a seven-twenty-fourth share remained in B. On that day instructions were given to B's counsel to draw up a petition of review of the judgment of the 5th February. This petition, owing to the Easter Vacation, was not, and could not have been, presented till the 9th April. *Held* that the words "sufficient reason" in sec. 623 of the Code should receive a liberal construction, and should be construed so as to do substantial justice to the parties; that, as in this case it appeared to the Court that the construction placed upon the conveyance by B's counsel was the correct one, "sufficient reason" had been shown for making the application. In deciding whether B had shown "sufficient cause" within the meaning of sec. 5 of the Limitation Act for not making the application within the time allowed by law, the Court, following the principles laid down by BOWEN, L. J., in *re Manchester Economic Building Society* (L. R., 24 Ch. D. 488) in its discretion, held that "sufficient cause" had been shown by B.—*Anderson v. Corporation of the Town of Calcutta* (I. L. R., 10 Cal. 445) distinguished.—I. L. R., 11 Cal. 767.

*Per* GARTH, C. J.—Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason" in sec. 623 of the Civil Procedure Code, yet from the earlier part of the clause it is clear that a point which might have been, but which was not, discovered at the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review. *Per* WILSON, J.—*Semble*.—If at a trial all parties, counsel on both sides, and the Judge, are under a misapprehension as to the contents of a document, or, even if the Judge alone is misled on such a point, and in consequence a wrong decree is made, the mistake ought to be corrected on review.—13 Cal. 62.

When an application for review is presented to the Judge who made the decree, and he thereupon issues notice to the other side, the application is "made" to him within the meaning of sec. 624 of the Civil Proce-

dure Code, and may be heard and disposed of by his successor in office. *Karoo Sing v. Deo Narain Singh* (I. L.R., 10 Cal. 80) followed.—13 Cal. 231.

A second appeal was decided on the 1st June 1888 in favour of the respondent by Mr. JUSTICE WILSON and Mr. JUSTICE BEVERLEY. On the 24th July 1888, an application for review was filed with the registrar. Various reasons prevented the learned Judges abovenamed from sitting together until the month of March 1889. On the 6th March, the matter came up before their Lordships, when a rule was issued, calling upon the other side to show cause why a review of judgment should not be granted, being made returnable on the 28th March 1889. On the 28th March, Mr. JUSTICE WILSON had left India on furlough, and the rule was taken up, heard, and made absolute, by Mr. JUSTICE BEVERLEY, sitting alone. *Held* that Mr. JUSTICE BEVERLEY had jurisdiction to hear the rule.—16 Cal. 788.

R, as surety for her husband, joined with him in executing a bond for Rs. 90. In a suit brought upon the bond, a decree was passed against both. R was arrested in execution of the decree, and brought before the Court. She was then asked if she desired to apply to be declared an insolvent under the insolvency-sections of the Civil Procedure Code (Act XIV of 1882), but not doing so she was committed to jail. Subsequently, however, she applied to be declared an insolvent, but her application was rejected. She then claimed to be released on the ground of her overture. The Judge rejected her application as being too late. On reference to the High Court, *held* that her application for release was virtually an application for review of the order for her imprisonment, on the ground that it was contrary to law; that her mere omission to take the objection at the time of her arrest could not be regarded as a waiver of her right of exemption from arrest; and, having regard to the nature of the right claimed, it was one which the Court could not properly decline to consider on review, however late the application might have been. *Held*, also, that, although the decree was absolute in its terms, and contained no express limitation of R's liability, nevertheless the law being clear that she could only be liable to the extent of her *stridhan*, it was to be assumed that the direction to pay, contained in the decree, had reference to that fund only.—12 Bom. 228.

By a deed of sale, dated 9th May 1858, certain lands belonging to a minor talukdar were sold by his mother and natural guardian to the plaintiffs, father. The lands were described as *nakri* (i.e., held free of assessment), and the sale-deed provided that, in case the vendee were at any future time compelled to pay assessment to Government in respect of the *nakri* lands, the vendor would recoup the vendee for any payment so made. In 1872 Government for the first time levied assessment on the *nakri* lands. In 1876 the plaintiff filed a suit against the talukdar to recover the amount of assessment paid by them in respect of the *nakri* lands for the years 1872-76. The High Court passed a decree in plaintiffs' favour in March 1883. Against this decree the talukdar appealed to the Privy Council. In April 1883, the plaintiffs filed a second suit on the same cause of action to recover from the talukdar the amount of assessment levied on the *nakri* lands for the years 1877-82. In this suit a decree was passed against the talukdar solely on the strength of the High Court's decree in the former suit. In execution of this decree the plaintiffs attached the talukdar's property. Thereupon the talukdar deposited in Court the amount due under the decree, and applied to the Court for removal of the attachment, and for stay of further proceedings in execution pending the disposal of his appeal to the Privy Council in the former suit. This application was granted.



In March 1887, the Privy Council decided the appeal in favour of talukdar, and reversed the High Court's decree. Thereupon the talukdar applied for a refund of the money he had deposited in Court. The Court suggested that his proper remedy was by an application for review of the decree in the second suit. The talukdar accordingly presented a petition of review. This petition was rejected by the District Judge, on the ground that he had no jurisdiction to grant a review of his predecessor's decision, except on the grounds set forth in sec. 624 of the Code of Civil Procedure. *Held* that the District Judge had jurisdiction to entertain the application for review. The decision of the Privy Council, reversing the decree of the High Court in the first suit, having been passed subsequently to the decree in the second suit, which depended on the reversed decree of the High Court, was "new and important matter" within the meaning of secs. 623 and 624 of the Code of Civil Procedure.—13 Bom. 330.

A review of judgment may be granted (if it is necessary for the ends of justice that the judgment should be reviewed) where there is an error of law on the face of the judgment, or where the decision of the Court has proceeded upon a mistaken view of the law. *Rewa Mahton v. Ram Kishen Singh*, (I. L. R., 14 Cal. 18; L. R., 13 I. A., 106, referred to. In this case, without deciding whether there was or not any error in law, the application for review of judgment was refused on the ground that it did not appear there was any danger of its causing a miscarriage of justice.—14 Cal. 627.

Sec. 647 of the Civil Procedure Code provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with secs. 545 and 546 give no power to the Court or a Judge, after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order stay of execution of the decree. No such power exists under the Code. Sec. 623 gives a more extensive right of review than existed in England, where a review could only be obtained by showing that there was apparent on the record error in law, or that new and relevant matter had been discovered after the judgment which could not possibly have been used when the judgment was given, or that judgment was obtained by fraud. The words "or for any other sufficient reason" mean that the reason must be one sufficient to the Court or Judge to whom the application for review is made, and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases "any other sufficient reason" may depend on a question of law or a question of fact, or a mixed question of law and fact. *Reasat Hosein v. Hadjee Abdoollah*, referred to. In cases where a stay of execution or an injunction is granted on an *ex parte* application, liberty to apply to the Judge to vary or set aside his order must be implied, if not expressed. *Fritz v. Hobson* referred to. On the 29th July 1886, an application was made by a party against whom the High Court, on second appeal, had passed a decree, dated the 18th March 1886, for review of judgment. On the 28th Aug., the applicant made a further application that execution of the decree might be stayed pending the determination of the application for review, and an order was passed *ex parte* granting this application. Subsequently the opposite party applied under sec. 623 of the Civil Procedure Code for a review of the *ex parte* order on the grounds (i) that the Court had no jurisdiction to make it, and (ii) that the application of the 29th July was beyond time, and therefore there could be no review of judgment, and no order for stay of execution pending such review. *Held* that the Court had power, under

sec. 623 of the Code, to review the *ex parte* order of the 28th August, and that such order had been made without jurisdiction, and ought to be reviewed. *Held* that the decree of the 18th March being final and unappealable, and no application for review of judgment having been granted within the meaning of sec. 630 of the Code, the application for stay of execution did not fall within sec. 545 or sec. 546, nor did sec. 647 apply to it, nor any other provision of the Code. *Held* that, having regard to the circumstances that the order of the 28th August was made without jurisdiction, and upon an *ex-parte* application, of which the opposite party had no notice, and interfered perhaps indefinitely with his right to obtain the money in Court under the final and unappealable decree in his favour, as to which no application for review had been granted, and that the application for review of judgment was made after the statutory period of ninety days had expired, and contained no explanation of the delay, sufficient reason for reviewing the order of the 28th August had been shown.—9 Al. 36.

An appeal which was referred to the Full Bench for disposal was heard and determined by the Full Bench, and judgment given in favour of the appellant in the absence of the respondent. Subsequently the respondent applied for a review of judgment, and proved that his absence at the hearing before the Full Bench was due to a mistake which had been made in not serving him with notice of the reference. *Held* by the Full Bench that, under the circumstances, the applicant's absence at the hearing came within the words "any other sufficient reason" in sec. 623 of the Civil Procedure Code, and the review should be granted, and the appeal re-heard. Upon the hearing of an application for review of Judgment, upon which an order has been passed, directing the opposite party to show cause why the application should not be granted, counsel for the opposite party should begin.—9 Al. 61.

An order passed under sec. 63 of Act II of 1874 can be reviewed under Act X of 1877, sec. 623.—3 Cal. 340.

The absence of a formal finding on an issue tried and decided by a High Court of first instance is not an error calling for review of judgment in the High Court. A party who not only had an opportunity of raising a question, but who did raise it in appeal, and on argument abandoned it, cannot, under ordinary circumstances, be allowed to agitate the question on review.—2 Madr. 58.

Applications for the extension of the period for the submission of an award, and orders thereon, should be made in writing and recorded. When a party has been prejudiced by having the time allowed for taking objections to an award curtailed by the Court, no appeal lies, but a review should be granted by the Court of first instance.—3 Madr. 59.

The notice-clause in sec. 21, Act XI of 1865, is applicable only to those cases where a new trial cannot be applied for within seven days after the judgment, in consequence of there being no sitting of the Court. Where the application is made within seven days, the notice is unnecessary. If the grounds upon which the new trial is moved are proper grounds for granting a review, the applicant is entitled to proceed under sec. 623 of the Code of Civil Procedure without resorting to Act XI of 1865.—8 Cal. 287 ; 10 C. L. R., 275 ; 5 Cal. 699 ; 5 C. L. R., 539.

Having regard to the decisions in *Nanabhai v. Nathabhai* (9 Bom. H. C. R., 89) and *Narayan v. Davudhbhai* (9 Bom. H. C. R., 238), and the uniform practice in accordance with them which had since obtained, and the practical similarity on this point of Act X of 1877, sec. 623, and Act VIII

of 1859, sec. 376 (on which the cases above-mentioned were decided), the High Court allowed the appellant to withdraw his second appeal, after it had been argued, though not decided, in order that he might apply to the lower Court for a review of its judgment on the ground of the discovery of new evidence. The appellant to pay the respondent's costs of appeal.—7 Bom. 287.

The term "made" in sec. 624 of the Civil Procedure Code does not mean "presented," but means and includes the hearing and determination of the application for review of judgment. *Held* therefore, where an application for a review of judgment on the ground, not of the discovery of new and important matter or evidence as mentioned in sec. 623 of the Civil Procedure Code, or of a clerical error apparent on the face of the decree, but on other grounds, was presented to the District Judge who delivered the judgment, and such Judge was transferred before he could entertain such application, that his successor was not competent to entertain it.—4 Al. 278.

Where a Judge allowed a review of his predecessor's judgment on the sole ground that it appeared to him that the judgment of his predecessor had done injustice, *held* by the High Court (MORGAN, C. J., and INNES, J.) that, though the generality of the terms used in the sections of the Procedure Code, Act VIII of 1859, relating to review of judgment, *viz.*, "other good and sufficient reason" (see 376), and "otherwise requisite for the ends of justice" (see 378), confers a wide jurisdiction, this jurisdiction could not be held to authorize a Judge to revise and reverse his predecessor's decree on the ground above-mentioned. If the review is asked for in reference to the conclusions of fact drawn from the evidence, it should not be granted simply upon the same evidence. *Reasut Hossein v. Hadjee Abdoolah* (I. L. R., 2 Cal. 131, P.C.) discussed.—2 Madr. 10.

A Divisional Bench of the High Court sitting as a Court of second appeal, being of opinion that the Court of first appeal had omitted to determine a certain issue of fact, determined such issue itself, and decided the appeal in accordance with its determination of such issue. An application for review of judgment was made on two grounds, *viz.*, (i) that the Bench was wrong in thinking that such issue had not been determined by the Court of first appeal and (ii) that the Bench sitting as a Court of second appeal was not empowered to determine an issue of fact which the Court of first appeal had omitted to determine, but should have referred such issue to that Court for determination under sec. 566 of the Civil Procedure Code. *Held* that, looking to the provisions of that Code relating to review of judgment, such application ought not to be allowed on the grounds mentioned, which virtually disclosed reasons for appeal from the judgment.—5 Al. 14.

Although the discovery of a new ruling may not entitle a party to a review of judgment, yet when a Court is satisfied that this judgment has proceeded upon an erroneous view of the law, the provisions of sec. 623 of the Code of Civil Procedure allow a review of judgment. Where a decree-holder applied to the Court to transmit the decree to another Court for execution, and on a subsequent date paid into Court postage-stamps for the transmission of the records, *held* that, if when the postage-stamps were paid into Court an application was made to take some steps in aid of execution, such application would be sufficient to give a new period of limitation.—7 Madr. 307.

It is competent to a party against whom an *ex-parte* decree has made to apply for review of judgment.—6 Al. 65.

A lower Court admitted a review of judgment on the ground that the decision of a Divisional Bench of the High Court, which it had followed in that judgment, had subsequently been overruled by the Full Bench. *Held* that the lower Court was not authorized to admit a review of judgment on such ground.—6 Al. 292.

See I. L. R., 11 Al. 267, noted under sec. 206 ; 14 Madr. 252, noted under sec. 231 ; 15 Bom. 594, noted under sec. 11.

**624.** Except upon the ground of the discovery of such new and important matter or evidence as To whom applications for review may be made. aforesaid, or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.

#### Notes.

An application for review of judgment was presented on other grounds than those specified in sec. 624 to a District Munsif who had delivered the judgment, and he thereupon ordered the decree to be produced. The District Munsif having resigned, his successor heard and determined the application. *Held*, it was not competent to the District Munsif who had not delivered the original judgment to entertain the application for review.—I. L. R., 12 Madr. 509.

In the absence of the decree-holder and without giving him notice of the day fixed for the hearing of the *darkhast*, the Subordinate Judge struck off an execution proceeding. *Held*, that under section 624 of the Civil Procedure Code (XIV of 1882) an application to review the order could not be heard by the successor of the Judge who made it.—14 Bom. 101.

An application for review of judgment upon grounds other than those mentioned in sec. 624 of the Code of Civil Procedure (as amended by Act VII of 1888), if presented to the Judge who delivered it, and who has thereupon directed notice to be given to the opposite party, may be heard and disposed of by his successor.—16 Bom. 603.

A Judge of a Mufassal Small Cause Court has jurisdiction to direct a new trial of a case tried by his predecessor, sec. 21 of Act XI of 1865, not having been repealed by the Civil Procedure Code (Act X of 1877). *Per GARTH., C.J.*—The Judge, however, in dealing with applications for new trial under sec. 21, should have regard to the rule laid down in sec. 624 of the Code of Civil Procedure.—6 Cal. 236.

An application for review of judgment, upon a ground other than those mentioned in sec. 624 of the Civil Procedure Code, if presented to the Judge who delivered it, and who thereupon directs notice to be given to the opposite party, may be heard and disposed of by his successor. *Pancham v. Jhinguri*, I. L. R., 4 Al. 278, dissented from.—10 Cal. 80.

Sec. 624 of the Code of Civil Procedure must be read as a proviso to sec. 633. *Held*, therefore, that, when a Court had been abolished and its business transferred presided over by another Judge, such Judge should not entertain an application for review of judgment except in the case provided for by sec. 624.—8 Madr. 567.

See I. L. R., 4 Al. 278 and 13 Bom. 330, noted under sec. 623 ; 11 267, noted under sec. 206.

**625.** The rules hereinbefore contained as to the form of making appeals shall apply, *mutatis mutandis*, to applications for review.

Form of applications for review.

**Note.**

An order made under Act X of 1877, sec. 409, refusing leave to sue as a pauper, is subject to review under sec. 623. The provisions of sec. 413 do not affect the right of a person against whom such order has been made to obtain a review. A petitioner applying for such review must file a copy of the order of which he seeks a review, together with a memorandum of objections (secs. 541 and 625).—I. L. R., 4 Bom. 414.

**626.** If it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

Application when rejected.

If the Court be of opinion that the application for the review should be granted, it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion :

Application when granted.

**Proviso.**

Provided that—

(a) no such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree a review of which is applied for ; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation ; and

(c) an application made under section 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (a) to this section, be disposed of by his successor.\*

**Notes.**

This section applies to Provincial Small Cause Courts.

The Judge of a Mufassal Small Cause Court may grant an application for a review of judgment under Act X of 1877.—I. L. R., 5 Cal. 699.

See I. L. R., 3 Al. 316, noted under sec. 311 ; 16 Bom. 603, noted under sec. 624.

**627.** If the Judge or Judges, or any one of the Judges, who passed the decree or order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is

Application for review in Court consisting of two or more Judges.

\* This clause has been added by the Civil Procedure Code Amendment Act (VII of 1888), sec. 59.

not or are not precluded by absence or other cause, for a period of six months next after the application, from considering the decree or order to which the application refers, such Judge or Judges, or any of them, shall hear the application, and no other Judge or Judges of the Court shall hear the same.

NOTE.—See I. L. R., 16 Cal. 788, noted under 623.

**628.** If the application for a review be heard by more than one Judge, and the Court be equally divided, the application shall be rejected.

when reject-

If there be a majority, the decision shall be according to the opinion of the majority.

**629.** An order of the Court for rejecting the application shall be final ; but whenever such application is admitted, the admission may be objected to on the ground that it was—

Order of rejection final.  
Objections to admission.

(a) in contravention of the provisions of section 624,  
(b) in contravention of the provisions of section 626, or  
(c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in the suit.

Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, if it be proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court may order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

No order shall be made under this section unless the applicant has served the opposite party with notice in writing of the latter application.

No application to review an order passed on review or on an application for a review shall be entertained.

#### Notes.

No second appeal lies against an order passed under sec. 629 of the Civil Procedure Code. An application was made by a plaintiff for review



of a judgment dismissing his suit as against all the defendants, which application was granted. Against that order the defendant appealed, and the lower Appellate Court confirmed the lower Court's order granting the review as against one of the defendants, but set it aside as against the other defendants. *Held* that no second appeal lay against such order.—11 Cal. 296.

Sec. 15 of the Letters Patent for the High Court of Judicature at Madras, which allows an appeal to the High Court from the judgment of one Judge of that Court, is controlled by sec. 629 of the Code of Civil Procedure, which provides that an order of a Civil Court rejecting an application for review of judgment shall be final.—9 Madr. 253.

No appeal lies from an order granting a review of judgment, except in the cases set forth in sec. 629 of the Civil Procedure Code (Act XIV of 1882).—12 Bom. 171.

See I. L. R., 3 Al. 316, noted under sec. 311; 12 Madr. 125, noted under sec. 244.

**630.** When an application for a review is granted, a note thereof shall be made in the register, and the Court may at once re-hear the case, or make such order in regard to the re-hearing as it thinks fit.

Registry of application granted, and order for re-hearing.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where a review of judgment is granted on a particular ground, the Court is not bound to re-hear the whole case under sec. 630 of the Civil Procedure Code; it is in the discretion of the Court to re-hear the whole case, or only the particular point on which the review has been granted.—I. L. R., 9 Cal. 209.

## CHAPTER XLVIII.

### SPECIAL RULES RELATING TO THE CHARTERED HIGH COURTS.

**631.** This chapter applies only to High Courts which are or may hereafter be established under the twenty-fourth and twenty-fifth of Victoria, chapter 104 (*An Act for establishing High Courts of Judicature in India.*)

Chapter to apply only to certain High Courts.

**632.** Except as provided in this chapter, the provisions of this Code apply to such High Courts.

Application of code to High Courts.

NOTE.—See I. L. R., 9 Al. 93, noted under sec. 574.

High Court to record judgments according to its own rules.

**633.** The High Court shall take evidence, and record judgments and orders, in such manner as it by rule from time to time directs.

NOTE.—See I. L. R., 9 Al. 93, noted under sec. 574.

**634.** Whenever a High Court considers it necessary that a decree made in the exercise of its ordinary original civil jurisdiction should be enforced before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs ;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

**635.** Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its ordinary original civil jurisdiction, or to examine witnesses, except when the Court shall have, in the exercise of the power conferred by its charter, authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils, and attorneys.

#### Notes.

Reading together secs. 7 and 8 of the Letters Patent for the High Court, and secs. 2, 36, 39, and 635 of the Civil Procedure Code, an advocate on the roll of the Court can, for the purpose of the Code, perform on behalf of a suitor all the duties that may be performed by a pleader, subject to his exemption in the matter of a *vakalatnama* and to any rules which the High Court may make regarding him. No such rule having been made to the contrary, such an advocate may take instructions directly from a suitor, and may "act" for the purposes of the Code on behalf of his clients.—I. L. R., 9 Al. 617.

See I. L. R., 9 Al. 613, noted under sec. 36.

**636.** Notices to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the ordinary or extraordinary original civil jurisdiction of the High Court, and of its matrimonial, testamentary, and intestate jurisdictions, except summonses to defendants issued under section 64, writs of execution, and notices under section 553, may be served by the attorneys in the suit, or by persons employed by them, or by such other persons as the High Court by any rule or order from time to time directs.

**637.** Any non-judicial or quasi-judicial act which this Code requires to be done by a Judge, and any act which may be done by a Commissioner appointed to examine and adjust accounts under

section 394, may be done by the Registrar of the Court, or by such other officer of the Court as the Court may direct to do such act.

The High Court may, from time to time, by rule declare what shall be deemed to be non-judicial and quasi-judicial acts within the meaning of this section.

**638.** The following portions of this Code shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely, sections 16, 17, and 19, sections 54, clauses (a) and (b), 57, 119, 160, 182 to 185 (both inclusive), 187, 189, 190, 191, 192 (so far as relates to the manner of taking evidence), 198 to 206 (both inclusive), and so much of section 409 as relates to the making of a memorandum ;

and section 579 shall not apply to the High Court in the exercise of its appellate jurisdiction.

Code not to affect High Court in exercise of insolvent jurisdiction.

Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an insolvent Court.

**639.** The High Court may, from time to time, frame forms for any proceeding in such Court, and may make rules as to the books, entries, and accounts to be kept by its officers.

Power to frame forms.

## PART X.

### CHAPTER XLIX.

#### MISCELLANEOUS.

**640.** Women, who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court.

Exemption of certain from personal ap-

But nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process, "in any case in which the arrest of women is not prohibited by this Code."\*

\* The words quoted have been added by the Debtors Act (VI. of 1888), sec. 6.

**Notes.**

This section applies to Provincial Small Cause Courts.

Exemption from arrest on process of execution under sec. 21, Act VIII of 1859, does not extend to all women of rank, but is limited to the women therein described—women, that is, “who, according to the custom and manners of the country, ought not to be compelled to appear in public.”—8 W. R., 282.

In the case of an unmarried girl of some 12 years of age, without any distinguished rank or station, but belonging to that class of Hindu society, the female members of which never go out in public, it was held that she was entitled to the privilege of Act VIII. of 1859, sec. 21, even though it was essential to have her testimony in a case recorded by the Judge himself, and that her testimony should be taken out of Court under suitable precautions.—24 W. R., 375.

A plaintiff applied, under sec. 640 of the Civil Procedure Code (Act XIV of 1882), for a commission to issue for the examination of three female witnesses (Perozbai, Bachoobai and Awabai) at the residence of one of them (Perozbai). The grounds upon which he based his application were the following:—(1) that Perozbai had lost her husband ten months previously and was in mourning; that, according to Parsi usage, a widow observed mourning for two or three years, and during that time did not leave her house; (2) that Bachoobai was fifty-eight years of age and sickly and physically unable to attend the Court; (3) that Awabai was about to go up-country, and could not stay in Bombay until hearing. *Held*, the circumstances alleged were not such as to justify the issue of a commission.—14 Bom. 584.

See I. L. R., 7 Cal. 19, noted under sec. 271.

**641.** The Local Government may, by notification in the official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption, and may, by like notification, withdraw such privilege.

The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government, and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

When any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

**NOTE.**—This section applies to Provincial Small Cause Courts.

**642.** No Judge, Magistrate, or other judicial officer, shall be liable to arrest under civil process while going to, presiding in, or returning from his Court.

Persons exempt from arrest under civil process.

And, "except as provided in section 337A, sub-section (5), and sections 256 and 643,"\* where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue agents, and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where a native of Patna came from Calcutta to Madras on 24th October on account of a suit pending, in which he was plaintiff, and, the case having been adjourned on 27th October for seven weeks, remained in Madras on account of the suit, and was arrested on 10th November, *held* that he was privileged under sec. 642 of the Code of Civil Procedure.—I. L. R., 4 Madr. 317.

The general rule that a party to a suit is protected from arrest upon any civil process, while going to the place of trial, while attending there for the purpose of the cause, and while returning home, applies to a defendant to a suit under the summary-procedure sections of Act X of 1877 who has not obtained leave to appear and defend, and who therefore, cannot be heard at the trial. Questions as to the privilege of exemption from arrest, in the case of persons arrested under writs issued from the Small Cause Court in Calcutta, must be governed by the English law, and not by sec. 642 of the above Act. It is not a deviation sufficient to forfeit the privilege if the shortest road home is deviated from, and a less crowded and more convenient road adopted.—5 Cal. 106.

A Revenue Court is a "Court of Civil Judicature" within the meaning of sec. 651 of the Code of Civil Procedure. A person, therefore, who escapes from custody under the process of a Revenue Court, is punishable under that section. Sec. 642 of the Civil Procedure Code only protects an accused person while he is attending a Criminal Court from arrest "under that Code." *Held*, therefore, where a person, who had been convicted by a Magistrate, and had been fined, was arrested in execution of the process of a Revenue Court while waiting in Court until the money to pay such fine was brought, that such person was not protected from such arrest by the provisions of that section, and that, having escaped from custody under such arrest, such person had properly been convicted under sec. 651 for escaping from "lawful custody."—4 Al. 27.

**643.** When, in a case pending before any Court, there appears to the Court sufficient ground for sending for investigation to the

Procedure in case of certain offences.

\* The words quoted have been substituted by the Debtors' Act (VI. of 1888), sec. 7, for the words "except as provided in secs. 256 and 643," as originally enacted.

Magistrate a charge of any such offence as is described in section 193, section 196, section 199, section 200, section 205, section 206, section 207, section 208, section 209, section 210, section 463, section 471, section 474, section 475, section 476, or section 477 of the Indian Penal Code, which may be made in the course of any other suit or proceeding, or with respect to any document offered in evidence in the case, the Court may cause the person accused to be detained till the rising of the Court, and may then send him in custody to the Magistrate, or take sufficient bail for his appearance before the Magistrate.

The Court shall send to the Magistrate the evidence and documents relevant to the charge, and may bind over any person to appear and give evidence before such Magistrate.

The Magistrate shall receive such charge, and proceed with it according to law.

#### Notes.

This section applies to Provincial Small Cause Courts.

Where the provisions of sec. 258 of the Code of Civil Procedure have not been complied with, a Civil Court is not debarred from admitting evidence that the decree has been satisfied out of Court, for the purpose of an investigation with a view to sending the judgment-creditor to a Magistrate under sec. 643 of the Code of Civil Procedure.—I. L. R., 4 Madr. 325.

**644.** Subject to the power conferred in the High Court by section 639 and by the twenty-fourth and twenty-fifth of Victoria, Chapter 104, section 15, the forms set forth in the fourth schedule hereto annexed, with such variation as the circumstances of each case require, shall be used for the respective purposes therein mentioned.

NOTE.—This section applies to Provincial Small Cause Courts.

**645.** The language which, when this Code comes into force, is the language of any Court subordinate to a High Court, shall continue to be the language of such subordinate Court until the Local Government otherwise orders;

but it shall be lawful for the Local Government, from time to time, to declare what language shall be the language of every such Court.

NOTE.—This section applies to Provincial Small Cause Courts.

Assessors in causes of salvage, &c.

**645A.** In any Admiralty or Vice-Admiralty cause of salvage, towage, or collision, the Court, whether it be exercising its original or its



appellate jurisdiction, may if it thinks fit, and upon request of either party to such cause shall, summon to its assistance, in such manner as the Court may, by rule, from time to time, direct, two competent assessors; and such assessors shall attend and assist accordingly.

Every such assessor shall receive such fees for his attendance as the Court by rule prescribes. Such fees shall be paid by such of the parties as the Court in each case may direct.

NOTE.—This section applies to Provincial Small Cause Courts.

**646.** Whenever the Registrar of a Court of Small Causes has any doubt upon any question of law or usage having the force of law, or as to the construction of a document, which construction may affect the merits of the decision, he may state a case for the opinion of the Judge; and all the provisions herein contained relative to the stating of a case by the Judge shall apply, *mutatis mutandis*, to the stating of a case by the Registrar.

NOTE.—This section applies to Provincial Small Cause Courts.

**646A\*** (1) If at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable, by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

(2) On receiving the record and statement the High Court may order the Court either to proceed with the suit or to return the plaint for presentation in such other Court as it may in its order declare to be competent to take cognizance of the suit.

NOTE.—This section applies to Provincial Small Cause Courts.

**646B.\*** (1) If it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and, if required by a party, shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the sub-

\* These sections have been inserted by the Civil Procedure Code Amendment Act, (VII. of 1888) sec. 60.

ordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement, the High Court may pass such order in the case as it thinks fit.

(3) With respect to any proceeding subsequent to decree in any case submitted to the High Court under this section, the High Court may make such order as in the circumstances appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this section.

#### Notes.

This section applies to Provincial Small Cause Courts.

Before a District Court can make a reference under sec. 646B of the Civil Procedure Code, it must be of opinion that the subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that therefore the matter is one in which the interference of the High Court should be sought. The word "shall" in sec. 646B, cl. I, is not mandatory, but directory.—I. L. R., 11 Al. 304.

**647.** The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals.

Miscellaneous proceedings.

The High Court may, from time to time, make rules to provide for the admission, in such proceedings, of affidavits as evidence of the matters to which such affidavits respectively relate ; and such rules, on being published in the local official Gazette, shall have the force of law.

Admission of affidavits as evidence.

*“ Explanation.—*This section does not apply to applications for the execution of decrees, which are proceedings in suits.”\*

#### Notes.

This section applies to Provincial Small Cause Courts.

The provisions of sec. 110 of Act VIII. of 1859 are properly applicable, under sec. 33 of Act XXIII. of 1861, to proceedings in execution of decree.—4 N.-W. P. H. C. R., 10.

The plaintiff brought his suit in a Munsiff's Court to recover a sum of money. The District Judge transferred the suit to a Sub Court and the latter Court passed a decree. The decree-holder applied to the Subordinate Judge's Court for execution of his decree. By an order of the District Court the execution proceedings were transferred to the Munsiff's file. The judgment-debtor objected to the jurisdiction of the Munsiff on the ground that the District had no power to transfer execution proceedings from one Court to another.

*Held*, that the District Court has no power to transfer execution proceedings from one Court to another and that the power is limited only to transfer suits.—I. L. R., 15 Cal. 177.

Section 647 of the Code of Civil Procedure does not operate to extend the rule laid down in respect of a suit in section 373 to an application for execution.—78 Cal. 635.

Sec. 372 of the Civil Procedure Code cannot be applied to the assignment, creation, or devolution of an interest subsequent to the decree in a suit. The section has no application to proceedings in execution of decree; and a Court has no jurisdiction, reading sec. 372 with sec. 647, to bring in a party after decree and make him a judgment-debtor for the purposes of execution. Where a Court had so acted, by an order which might have been, but was not, made the subject of appeal, under sec. 588 of the Court,—*held*, that as there was no jurisdiction to make such an order, the party aggrieved was competent to object thereto on appeal from a subsequent order enforcing execution against him as a judgment debtor.—10 Al. 97.

An appeal lies under sec. 647 of the Code of Civil Procedure against an order of a District Court under sec. 5, Act XX of 1863.—4 Madr. 295.

See I.L.R., 7 Cal. 163, noted under s. 311; 3 Bom. (F.B.) 204, noted under sec. 575; 6 Cal. 762, noted under sec. 182; 5 Bom. 680, noted under sec. 25; 10 Cal. 416, noted under sec. 108; 10 Cal. 538, noted under sec. 244; 9 Al. 36, noted under sec. 623; 10 Al. 71, noted under Art. 179 Sch. II of Act XV of 1877 (Limitation Act); 12 Al. 179 12 Al. 392, 15 Madr. 240, noted under sec. 373; 11 Al. 228, noted under sec. 257A; 13 Al. 533, noted under sec. 203.

**648.** Where any Court desires that any person shall be arrested, or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or property is situate outside the local limits of its jurisdiction, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment:

and the Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the

latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or (where the case is one under Chapter XXXIV) for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.\*

Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or Bombay, or of the Court of the Recorder of Rangoon, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay, or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.†

#### Notes.

This section applies to Provincial Small Cause Courts.

Where an officer proceeding from Burmah to England on leave resided a few days in Madras on the way, *held*, that such residence was sufficient, for the purpose of sec. 648 of the Code of Civil Procedure, to render him liable to arrest before judgment.—I. L. R., 8 Madr. 205.

A decree of a Small Cause Court can be executed by it at any place within the local limits of the District Court to which it is subordinate, as defined by Act X of 1877, sec. 2, without having recourse to the procedure under sec. 648, which applies only to cases in which a decree passed in one district has to be executed in another district.—4 Cal. 823.

Act X of 1877, sec. 223, does not apply to a Small Cause Court, and sec. 648 does not apply to a case in which the defendant resides within the same district in which the Court issuing a warrant is situate. Consequently, a Small Cause Court may issue a warrant for the arrest of a person residing in another district, but not if he resides within the same district in which the Court is situate, but outside its local jurisdiction.—2 Bom. 560.

**649.** The rules contained in Chapter XIX shall apply to the execution of any judicial process for the arrest of a person or the sale of property or payment of money, which may be desired or ordered by a Civil Court in any civil proceeding.

In the same chapter, the expression “Court which passed a decree,” or words to that effect, shall, unless there is something repugnant in the context be deemed to include,

\* This paragraph has been substituted for the original by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 61.

† This paragraph has been added by the same Act and section.

where the decree to be executed is passed in appeal, the Court which passed decree against which the appeal was preferred, and, where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making application for execution of the decree, would have jurisdiction to try such suit.

**Notes.**

This section applies to Provincial Small Cause Courts.

Under secs. 210 and 296 of Act VIII of 1859, the representative of a deceased plaintiff in an abated suit is liable for costs of interlocutory orders in the suit.—Bourke's Rep., (O. C.) 154.

Although the High Court, in its appellate side, does not, as a general rule, execute its own decrees or orders, yet this circumstance in no way affects the vitality of its jurisdiction in this respect, and it cannot therefore be included among Courts which have ceased to have jurisdiction to execute decrees as specified under sec. 649 of the Code of Civil Procedure.—I. L. R., 6 Cal. 201.

*Per* GARTH, C. J.—Sec. 649 of the Civil Procedure Code, as amended by Act XII of 1879, which explains the meaning of the expression, the "Court which passed the decree," does not exclude the Court which originally passed the decree as being a Court in which an application for execution should be made, but merely includes another Court. When, therefore, a Court which has passed a decree has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it has ceased to have jurisdiction to execute the decree, or to the Court which (if the suit wherein the decree was passed were instituted at the time of making application to execute it) would have jurisdiction to try the suit. *Per* FIELD J.—A Court does not cease to be "the Court which passed the decree" merely by reason that the headquarters of such Court are removed to another place, or merely because the local limits of the jurisdiction of such Court are altered. An application for the transfer of a decree under the provisions of sec. 223 and the following section of Act X of 1887 is a step in aid of the execution of the decree within the meaning of cl. 4, art. 179, sch. ii. of Act XV of 1877.—6 Cal. 513.

A in 1839 obtained a decree against B, a sardar in the Court of the Agent for Sardars. The decree was executed in the Agent's Court until B's death in 1868. B's status as a sardar under exclusive jurisdiction of the Agent did not descend to his sons, and the decree was transferred to the Court of the First-class Subordinate Judge at Ahmednagar for execution. Various objections were taken to the execution of the decree by that Court, but none on the ground that the Agent's decree could not be executed by a mere transfer to an ordinary Civil Court. The case went up twice to the High Court, under whose orders the execution was for several years continued in favour of A's representatives against the estate of B's sons. In 1885, one of A's representatives assigned his interest under the decree to C & D. Thereupon the transferees C & D applied to the First-class Subordinate Judge at Ahmednagar to have their names substituted in the place of the transferor in the execution proceedings. The Subordinate Judge rejected this application, on the ground that he could not recognise the transfer of the decree either under sec. 372 or sec. 232 of the Civil Procedure

Code (Act XIV of 1882). He also found that execution had been going on for several years contrary to the ruling in *Khusaldas v. Sakharam Ramachandra* (12 Bom. H. C. R., 212), which laid down that the Agent's decree could not be executed by a mere transfer to an ordinary Court—the remedy in such cases being by a suit on the decree. On this ground, also, he refused to recognize the transfer of the decree. *Held*, reversing the order of the lower Court, that the assignment of the decree-holder's rights to execution in this case was one approved by the law as contained in sec. 232 of the Code of Civil Procedure (Act XIV of 1882). The transferee of a decree gains by the transfer the rights of the transferor. *Held* also that, though the execution-proceedings in this case had been for many years irregularly conducted by a mere transfer of the Agent's decree to an ordinary Civil Court, still, as the Court which carried on the execution had jurisdiction to grant the same relief if a suit had been brought upon the decree, the irregularity, having been acquiesced in, did not vitiate the former proceedings in execution. Where jurisdiction over the subject-matter exists, requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards challenge the legality of the proceedings due to his own invitation or negligence. But if there is no jurisdiction over the subject-matter, the acquiescence of the parties concerned cannot create it. Where a decree is one of continuous operation, taking effect as each year furnishes proceeds for its satisfaction, it must be executed each year according to the law of procedure then in force.—11 Bom. 153.

See I. L. R., 17 Cal. 699, noted under sec. 16.

**650.** The provisions of Chapter XIV & XV, relating to witnesses, shall apply to all persons required to give evidence or to produce documents in any proceeding under this Code.

NOTE.—This section applies to Provincial Small Cause Courts.

**650A.** Summons issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India, and served as if they had been issued by such Courts: Provided that the Courts issuing such summonses have been established “or continued”\* by the authority of the Governor-General in Council or that the Governor-General in Council has, by notification in the *Gazette of India*, declared the provisions of this section to apply to such Courts.

The Governor-General in Council may, by like notification, cancel any notification made under this section, but not so as to invalidate the service of any summons served previous to such cancellation.

**651.** [Repealed by Act X of 1886, sec. 24, and inserted in the Penal Code as sec. 225B.]

\* The words quoted have been inserted by the Civil Procedure Code Amendment Act (VII. of 1888), sec. 62.



**652.** The High Court may, from time to time, make rules consistent with this Code to regulate any matter connected with its own procedure or the procedure of the Courts of Civil Judicature subject to its superintendence. All such rules shall be published in the local official Gazette, and shall thereupon have the force of law.

A High Court not established under the Statute 24 & 25 Victoria, chapter 104 (*An Act for establishing High Courts of Judicature in India*), may, from time to time, with the previous sanction of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might under section 15 of that Statute make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a presidency-town. Rules so made shall be published in the same manner, and shall thereupon have the same force, as rules made and published under this section for the regulation of matters connected with procedure.\*

**653.†** (1) At any time after a warrant of arrest has been issued under this Code, the Court may cancel it on the ground of the serious illness of the person against whom the warrant was issued.

(2) When a judgment-debtor has been arrested under this Code, the Court may release him if in its opinion he is not in a fit state of health to undergo imprisonment.

(3) When a judgment-debtor has been committed to jail, he may be released therefrom—

(a) by the Local Government, on the ground of his suffering from any infections or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his imprisonment shall not, in the aggregate, exceed that prescribed in section 342 or section 481, as the case may be.

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\* This para has been added by the Civil Procedure Code Amendment Act (VII. 1888), sec. 63.

† This section has been added by the Debtors Act (VI. of 1888), sec. 8.



## THE FIRST SCHEDULE.

(See section 3.)

### ACTS REPEALED.

Number and year.	Subject or title.	Extent of repeal.
X. of 1877	The Code of Civil Procedure.	So much as has not been repealed.
XII. of 1879	Amending Act X. of 1887,	Sections one to one hundred and three (both inclusive).
VII. of 1880	Merchant Shipping	Section eighty-five.

## THE SECOND SCHEDULE.\*

(See section 5.)

*Chapters and Sections of this Code extending to Provincial Courts of Small Causes.*

PRELIMINARY : Sections 1, 2, 3, and 5.

CHAPTER	I.—Of the Jurisdiction of the Courts and <i>Res Judicata</i> , except section 11 and the last paragraph of section 14.
CHAPTER	II.—Of the Place of Suing, except section 20, paragraph 4, and sections 22 to 24 (both inclusive).
CHAPTER	III.—Of Parties and their Appearances, Applications, and Acts.
CHAPTER	IV.—Of the Frame of the Suit, except section 42 and section 44, rule <i>a</i> .
CHAPTER	V.—Of the Institution of Suits.
CHAPTER	VI.—Of the Issue and Service of Summons, except section 77.
CHAPTER	VII.—Of the Appearance of the Parties and Consequence of Non-appearance.
CHAPTER	VIII.—Of Written Statements and Set-off.
CHAPTER	IX.—Of the Examination of the Parties by the Court, except section 119.
CHAPTER	X.—Of Discovery and the Admission, &c., of Documents.
CHAPTER	XII.—Section 155, first paragraph, Judgment where either party fails to produce his evidence.
CHAPTER	XIII.—Of Adjournments.
CHAPTER	XIV.—Of the Summoning and Attendance of Witnesses.

\* This schedule has been substituted for the one originally enacted by (Act No. X of 1880.

## THE SECOND SCHEDULE.

CHAPTER	XV.—Of the Hearing of the Suit and Examination of Witnesses, except sections 182 to 188 (both inclusive).
CHAPTER	XVI.—Of Affidavits.
CHAPTER	XVII.—Of Judgment and Decree, except sections 204, 207, 211, 212, 213, 214, and 215.
CHAPTER	XVIII.—Of Costs, sections 220, 221, and 222.
CHAPTER	XIX.—Of the Execution of Decrees, sections 223 to 236 (both inclusive), 239 to 258 (both inclusive), 259 (except so far as relates to the recovery of wives), 266 (except so far as relates to immoveable property), 267 to 272 (both inclusive), 273 (so far as relates to decree for moveable property), 275 to 283 (both inclusive), 284 (so far as relates to moveable property), 285, 286, 287, 288, 289, 290, (so far as relates to moveable property, 291, 292, 293 (so far as relates to resales under 297), 294 to 303 (both inclusive), 328 to 333 (both inclusive, so far as relates to moveable property), 336 to 343 (both inclusive).
CHAPTER	XX.—Section 360, Power to invest certain Courts with Insolvency-jurisdiction.
CHAPTER	XXI.—Of the Death, Marriage, and Insolvency of Parties.
CHAPTER	XXII.—Of the Withdrawal and Adjustment of Suits.
CHAPTER	XXIII.—Of Payment into Court.
CHAPTER	XXIV.—Of requiring Security for Costs.
CHAPTER	XXV.—Of Commissions, except section 396.
CHAPTER	XXVI.—Suits by Paupers.
CHAPTER	XXVII.—Suits by and against Government or Government Servants.
CHAPTER	XXVIII.—Suits by Aliens and by and against Foreign and Native Rulers.
CHAPTER	XXIX.—Suits by and against Corporations and Companies.
CHAPTER	XXX.—Suits by and against Trustees, Executors, and Administrators.
CHAPTER	XXXI.—Suits by and against Minors and Persons of unsound Mind.
CHAPTER	XXXII.—Suits by and against Military Men.
CHAPTER	XXXIII.—Interpleader.
CHAPTER	XXXIV.—Of Arrest and Attachment before Judgment, except as regards Immoveable Property.
CHAPTER	XXXVI.—Appointment of Receivers.
CHAPTER	XXXVII.—Reference to Arbitration.
CHAPTER	XXXVIII.—Of Proceedings on Agreement of Parties.
CHAPTER	XLVI.—Reference to and Revision by High Court.
CHAPTER	XLVII.—Of Review of Judgment, sections 623, 626, and 630.
CHAPTER	XLIX.—Miscellaneous.

## THE THIRD SCHEDULE.

(See Section 7.)

### *Bombay Enactments.*

Bombay Regulation XXIX., 1827.  
 „ „ VII., 1830.  
 „ „ I., 1831.  
 „ „ XVI., 1831.  
 Act XIX. of 1835.  
 „ XIII. of 1842.

## THE FOURTH SCHEDULE.

(See section 644.)

## FORMS OF PLEADINGS AND DECREES.

### A.—PLAINTS. PART I.

#### **No. 1.**

#### **FOR MONEY LENT.**

IN THE COURT OF \_\_\_\_\_, AT  
*Civil Suit No.*  
 A. B., of  
*against*  
 C. D., of

A. B., the above-named plaintiff, states as follows :—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_, he lent the defendant rupees, repayable on demand [or on the \_\_\_\_\_ day of \_\_\_\_\_].
2. That the defendant has not paid the same, except \_\_\_\_\_ rupees, paid on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_.
- [If the plaintiff claims exemption from any law of limitation, say :—
3. The plaintiff was a minor [or insane] from the \_\_\_\_\_ day of \_\_\_\_\_ till the \_\_\_\_\_ day of \_\_\_\_\_].
4. The plaintiff prays judgment for \_\_\_\_\_ rupees, with interest at \_\_\_\_\_ per cent. from the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_.

[NOTE.—The object of stating when the debt is to be repaid is merely to fix a date for interest. If, therefore, interest is not claimed, the statement may be omitted.]

#### **No. 2.**

#### **FOR MONEY RECEIVED TO PLAINTIFF'S USE.**

(Title.)

A. B. and G. H., the above-named plaintiffs, state as follows :—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_, the defendant received \_\_\_\_\_ rupees [or a cheque on the \_\_\_\_\_ Bank for \_\_\_\_\_ rupees] from one E. F. for the use of the plaintiffs.

## THE FOURTH SCHEDULE.

2. That the defendant has not paid [*or delivered*] the same accordingly.

3. The plaintiff's pray judgment for                      rupees, with interest at per cent. from the           day of           18           .

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**No. 3.**

FOR PRICE OF GOODS SOLD BY A FACTOR.

(Title.)

A. B.; the above-named plaintiff, states as follows :—

1. That on the           day of           18           , at           , he and E. F., since deceased, delivered to the defendant [*one thousand barrels of flour, five hundred maunds of rice, or as the case may be*] for sale upon commission.

2. That on the           day of           18           , [*or on some day unknown* to the plaintiff, before the           day of           18           ], the defendant sold the said merchandise for           rupees.

3. That the commission and expenses of the defendant thereon amount to rupees.

4. That on the           day of           18           , the plaintiff demanded from the defendant the proceeds of the said merchandise.

5. That he has not paid the same.

[Demand of judgment.]

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**No. 4.**

FOR MONEY RECEIVED BY DEFENDANT THROUGH THE PLAINTIFF'S MISTAKE OF FACT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the           day of           18           , at           , the plaintiff agreed to buy and the defendant agreed to sell           bars of silver at annas per tola of fine silver.

2. That the plaintiff procured the said bars, to be assayed by one E, F., who was paid by the defendant for such assay, and that the said E. F., declared each of the said bars to contain 1,500 tolas of fine silver, and that the plaintiff accordingly paid the defendant           rupees           annas therefor.

3. That each of the said bars did contain only 1,200 tolas of fine silver.

4. That the defendant has not repaid the sum so overpaid.

[Demand of judgment.]

[NOTE.—A demand of repayment is not necessary, but it may affect the question of interest or the costs.]

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**No. 5.**

FOR MONEY PAID TO A THIRD PARTY AT THE DEFENDANT'S REQUEST.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the           day of           18           , at           , the request [*or by the authority*] of the defendant, the plaintiff paid to one E. F.           rupees.

2. That, in consideration thereof, the defendant promised [*or became bound*] to pay the same to the plaintiff on demand [*or as the case may*]



## THE FOURTH SCHEDULE.

v

3. That [on the       day of       18       , the plaintiff demanded payment of the same from the defendant, but] he has not paid the same.

[Demand of judgment.]

[NOTE.—If the request or authority is implied, the plaint should state facts raising the implication.]

### No. 6.

FOR GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , at       E. F., of       , deceased, sold and delivered to the defendant [one hundred barrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods].

2. That the defendant promised to pay       rupees for the said goods on delivery [or on the       day of       some day before the plaint was filed.]

3. That he has not paid the same.

4. That the said E. F. in his lifetime made his will, whereby he appointed the plaintiff executor thereof.

5. That on the       day of       18       , the said E. F. died.

6. That on the       day of       probate of the said will was granted to the plaintiff by the Court of       .

7. The plaintiff as executor as aforesaid.

[Demand of judgment.]

[NOTE.—If a day was fixed for payment, it should be stated as shing a date for the commencement of interest.]

### No. 7.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , at       , plaintiff sold and delivered to the defendant [*sundry articles of house-furniture*], but no express agreement was made as to the price.

2. That the same were reasonably worth       rupees.

3. That the defendant has not paid the same.

[Demand of judgment.]

[NOTE.—The law implies a promise to pay so much as the goods are reasonably worth.]

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### No. 8.

FOR GOODS DELIVERED TO A THIRD PARTY AT DEFENDANT'S REQUEST  
AT A FIXED PRICE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , at       , plaintiff sold to the defendant [*one hundred barrels of flour*], and, at the request of the defendant, delivered the same to one E. F.

rupees

[Demand of judgment.]

## No. 9.

WITHOUT HIS EXPRESS REQUEST, AT A REASONABLE PRICE.

(Title.)

**A. B., the above-named plaintiff, states as follows:—**

1. That on the       day of       18       , at       , plaintiff furnished to [Mary Jones] the wife of [James Jones], deceased, at her request, sundry articles of [food and clothing], but no express agreement was made as to the price.

**2. That the same were necessary for her.**

**3. That the same were reasonably worth                  rupees.**

4. That the said *James Jones* refused to pay the same.

5. That the defendant is the executor of the last will of the said *James Jones*.

[Demand of judgment.]

**No. 10.**

**FOR GOODS SOLD AT A FIXED PRICE.**

**(Title.)**

**A. B., the above-named plaintiff, states as follows :—**

1. That on the            day of            18    , at            , the plaintiff sold to E. F., of            , deceased [*all the crops then growing on his farm in*].

2. That the said E. F., promised to pay the plaintiff                  rupees for  
the same.

**3. That he did not pay the same.**

**4. That the defendant is administrator of the estate of the said E. F.**

[Demand of judgment.]

**No. 11.**

**FOR GOODS SOLD AT A REASONABLE PRICE.**

(Title.)

**A. B., the above-named plaintiff, states as follows :—**

That on the            day of            18    , at            E. F., of            , sold to the defendant [*all the fruit growing in his orchard in*            ], but no express agreement was made as to the price.

**2. That the same was reasonably worth                  rupees.**

3. That the defendant has not paid the same.

4. That on the       day of       18       ,       the High Court of Judicature at Fort William duly adjudged the said E. F. to be a lunatic, and appointed the plaintiff committee of his estate, with the usual powers for the management thereof.

**5. The plaintiff as committee as aforesaid.**

[Demand of judgment.]

[NOTE.—When the lunatic's estate is not subject to the ordinary original jurisdiction of a High Court, for paragraphs 4 and 5 substitute the following :—

4. That on the            day of        18        , the Civil Court of        duly adjudged the said E. F. to be of unsound mind and incapable of managing his affairs, and appointed the plaintiff manager of his estate.

5. The plaintiff as manager as aforesaid.

[Demand of judgment.]

**No. 12.**

FOR GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(Title.)

A. B., the above-named plaintiffs, states as follows :—

1. That on the            day of            18        , at E. F., of        , agreed with the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that the said E. F. should pay for the same upon the delivery thereof        rupees.

2. That the plaintiff made the said goods, and on the        day of 18        , offered to deliver the same to the said E. F., and has ever since been ready and willing so to do.

3. That the said E. F. has not accepted the said goods or paid for the same.

4. That on the            day of            18        , the High Court of Judicature at Fort William duly adjudged the said E. F. to be a lunatic, and appointed the defendant committee of his estate.

5. The plaintiff prays judgment for        rupees with interest from the        day of        at the rate of        per cent. per annum, to be paid out of the estate of the said E. F. in the hands of the defendant.

**No. 13.**

FOR DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION.]

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the        day of        18        , at        , plaintiff put up at auction sundry [*articles of merchandise*], subject to the condition that all goods not paid for and removed by the purchaser thereof within [*ten days*] after the sale should be re-sold by auction, on his account, of which condition the defendant had notice.

2. That the defendant purchased [*one crate of crockery*] at the said auction at the price of        rupees.

3. That the plaintiff was ready and willing to deliver the same to the defendant on the said day and for [*ten days*] thereafter, of which the defendant had notice.

4. That the defendant did not take away the said goods purchased by him, nor pay therefor, within [*ten days*] after the sale, nor afterwards.

5. That on the        day of        18        , at        , the plaintiff re-sold the said [*crate of crockery*], on account of the defendant, by public auction, for        rupees.

6. That the expenses attendant upon such re-sale amounted to        rupees.

## THE FOURTH SCHEDULE.

7. That the defendant has not paid the deficiency thus arising, amounting to                      rupees.

[Demand of judgment.]

[NOTE to § 4.—Unless the seller agreed to deliver, the purchaser must fetch the goods. See Act IX of 1872, sec. 93.]

### No. 14.

FOR THE PURCHASE-MONEY OF LANDS CONVEYED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the                      day of                      18                      , at                      , the plaintiff sold [and conveyed] to the defendant [the house and compound, No.                      , in the city of                      , or a farm known as                      , in                      , or a piece of land lying, &c.]

2. That the defendant promised to pay the plaintiff                      rupees for the said the [house and compound, or farm, or land].

3. That he has not paid the same.

[Demand of judgment.]

[NOTE.—Where there has been no actual conveyance, say, in § 1, “sold to defendant the house, &c., and placed him in possession of the same.”]

### No. 15.

FOR THE PURCHASE-MONEY OF IMMOVEABLE PROPERTY CONTRACTED TO BE SOLD, BUT NOT CONVEYED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the                      day of                      18                      , at                      , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [the house, No.                      , in the town of                      , or one hundred bighas of land in                      , bounded by the East Indian railroad, and by the other lands of the plaintiff] for                      rupees.

2. That on the                      day of                      18                      , at                      , the plaintiff tendered [or was ready and willing, and offered to execute] a sufficient instrument of conveyance of the said property to the defendant, on payment of the said sum, and still is ready and willing to execute the same.

[Demand of judgment.]

3. That the defendant has not paid the said sum.

[Demand of judgment.]

### No. 16.

FOR SERVICES AT A FIXED PRICE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the                      day of                      18                      , at                      , the defendant [hired plaintiff as a clerk, at the salary of                      rupees per year.]

2. That from the [said day], until the                      day of                      18                      , the plaintiff served the defendant as his [clerk.]

3. That the defendant has not paid the said salary.  
[Demand of judgment.]

**No. 17.**

FOR SERVICES AT A REASONABLE PRICE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That between the       day of       18       , and the       day of  
18       , at       , plaintiff [executed sundry drawings, designs, and  
diagrams] for the defendant, at his request; but no express agreement was  
made as to the sum to be paid for such services.
2. That the said services were reasonably worth       rupees.
3. That the defendant has not paid the same.  
[Demand of judgment.]

**No. 18.**

FOR SERVICES AND MATERIALS AT A FIXED PRICE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , at       , plaintiff [fur-  
nished the paper for and printed one thousand copies of a book called       ]  
for the defendant, at his request [and delivered the same to him.]
2. That the defendant promised to pay       rupees therefor.
3. That he has not paid the same.  
[Demand of judgment.]

**No. 19.**

FOR SERVICES AND MATERIALS AT A REASONABLE PRICE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , at       , plaintiff build a  
house [known as No.       , in       ], and furnished the materials therefor,  
for the defendant, at his request, but no express agreement was made as to  
the price to be paid for such work and materials.
2. That the said work and materials were reasonably worth  
rupees.
3. That the defendant has not paid the same.  
[Demand of judgment.]

**No. 20.**

FOR RENT RESERVED IN A LEASE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , at       , the defen-  
dant entered into a contract with the plaintiff, under their hands, a copy of  
which is hereto annexed.  
*Or state the substance of the contract.*
2. That the defendant has not paid the rent of the [month] ending  
on the day       18       , amounting to       rupees.  
[Demand of judgment.]

## THE FOURTH SCHEDULE.

### *Another Form.*

1. That the plaintiff let to the defendant a house, No. 27, Chowring-  
hee, for seven years, to hold from the      day of      18      , at  
rupees a year, payable quarterly.

2. That of such rent      quarters are due and unpaid.  
[Demand of judgment.]

### No. 21.

#### FOR USE AND OCCUPATION AT A FIXED RENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the      day of      18      , at      , the defendant hired  
from the plaintiff [the house No.      ,      Street], at the rent of      rupees,  
payable      on the first day of      .

2. That the defendant occupied the said premises from the      day of  
18      , to the      day of      18      .

3. That the defendant has not paid      rupees, being the part of said  
rent due on the first day of      18      .

[Demand of judgment.]

### No. 22.

#### FOR USE AND OCCUPATION AT A REASONABLE RENT.

(Title.)

A. B., the above-named plaintiff, executor of the will of X. Y., deceased,  
states as follows :—

1. That the defendant occupied [the house, No.      ,      Street] by  
permission of the said X. Y., from the      day of      18      , until the  
day of      18      , and no agreement was made as to payment for  
the use of the said premises.

2. That the use of the said premises for the said period was reason-  
ably worth      rupees.

3. That the defendant has not paid the same.

4. The plaintiff as such executor as aforesaid prays judgment for  
rupees.

### No. 23.

#### FOR BOARD AND LODGING.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That from the      day of      18      , until the      day of  
18      , the defendant occupied certain rooms in the house [No.      , Street],  
by permission of the plaintiff, and was furnished by the plaintiff, at his re-  
quest, with meat, drink, attendance, and other necessaries.

2. That, in consideration thereof, the defendant promised to pay [or  
that no agreement was made as to payment for such meat, drink, attend-  
ance, or necessaries, but the same were reasonably worth] the sum of  
rupees.

3. That the defendant has not paid the same.

[Demand of judgment.]



## THE FOURTH SCHEDULE.

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### No. 24.

#### FOR FREIGHT OF GOODS.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , at       , plaintiff transported in [his barge, or otherwise] [one thousand barrels of flour or sundry goods], from       to       , at the request of the defendant.

2. That the defendant promised to pay the plaintiff the sum of [one rupee per barrel] as freight thereon [or that no agreement was made as to payment for such transportation, but such transportation was reasonably worth rupees.]

3. That the defendant has not paid the same.

[Demand of judgment.]

### No. 25.

#### FOR PASSAGE-MONEY.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , plaintiff conveyed the defendant [in his ship, called the       ] from       to       at his request.

2. That the defendant promised to pay the plaintiff       rupees therefor [Or that no agreement was made as to the price of the said passage, but the said passage was reasonably worth       rupees.]

3. That the defendant has not paid the same.

[Demand of judgment.]

### No. 26.

#### ON AN AWARD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That, on the       day of       18       , at       , the plaintiff and defendant having a controversy between them concerning [a demand of the plaintiff for the price of ten barrels of oil, which the defendant refused to pay], agreed to submit the same to the award of E. F. and G. H., as arbitrators [or entered into an agreement, a copy of which is hereto annexed.]

2. That on the       day of       18       , at       , the said arbitrators awarded that the defendant should [pay the plaintiff       rupees].

3. That the defendant has not paid the same.]

[Demand of judgment.]

[NOTE.—This will apply where the agreement to refer is not filed in Court.]

### No. 27.

#### ON A FOREIGN JUDGMENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That, on the       day of       18       , at       , in the State [or Kingdom] of       , the       Court of that State [or Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged

that the defendant should pay to the plaintiff rupees, with interest from the said date.

2. That the defendant has not paid the same.  
[Demand of judgment.]

## PLAINTS UPON INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.

### No. 28.

#### ON AN ANNUITY BOND.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That, on the            day of            18   , at           , the defendant, by his bond became bound to the plaintiff in the sum of            rupees to be paid by the defendant to the plaintiff, subject to a condition that, if the defendant should pay to the plaintiff            rupees half-yearly on the day of            and the            day of            in every year during the life of the plaintiff, the said bond should be void.

2. That afterwards, on the            day of            18   , the sum of            rupees for            of the said half-yearly payments of the said annuity became due to the plaintiff, and is still unpaid.

[Demand of judgment.]

### No. 29.

#### PAYEE AGAINST MAKER.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of            18   , at           , the defendant, by his promissory note, now overdue, promised to pay to the plaintiff            rupees [days] after date.

2. That he has not paid the same [except            rupees paid on the day of            18   ].

[Demand of judgment.]

[NOTE.—Where the note is payable after notice, for paragraphs 1 and 2 substitute:—]

1. That on the            day of            18   , at           , the defendant, by his promissory note, promised to pay to the plaintiff            rupees            months after notice.

2. That notice was afterwards given by the plaintiff to the defendant to pay the same            months after the said notice.

3. That the said time for payment has elapsed, but the defendant has not paid the same.

[Where the note is payable at a particular place, say—]

1. That on the            day of            18   , at           , the defendant, by his promissory note, now overdue, promised to pay to the plaintiff [at Messrs. A & Co.'s Madras            rupees            months after date.

2. That the said note was duly presented for payment [at Messrs A. and Co.'s] aforesaid, but has not been paid.

*Written Statement of the Defendant.*

In the Court, &c.

C. D., the above-named defendant, states as follows :—

1, The defendant made the note sued upon under the following circumstances : The plaintiff and defendant had for some years been in partnership as indigo manufacturers, and it had been agreed between them that they should dissolve partnership, that the plaintiff should retire from the business, and that the defendant should take over the whole of the partnership-assets and liabilities, and should pay the plaintiff the value of his share in the assets after deducting the liabilities.

2. The plaintiff thereupon undertook to examine the partnership-books, and enquire into the state of the partnership-assets and liabilities ; and he did accordingly examine the said books and make the said inquiries, and he thereupon represented to the defendant that the assets of the firm exceeded Rs. 1,00,000, and that the liabilities of the firm were less than Rs. 30,000, whereas the fact was that the assets of the firm were less than Rs. 50,000, and the liabilities of the firm largely exceeded the assets.

3. The misrepresentations mentioned in the second paragraph of this statement induced the defendant to make the note now sued on, and there never was any other consideration for the making of such note.

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**No. 30.**

FIRST INDORSEE AGAINST MAKER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       , 18       , at       , the defendant, by his promissory note, now overdue, promised to pay to the order of E. F., [*or to E. F. or order*] rupees       [       days after date].

2. That the said E. F. indorsed the same to the plaintiff.

3. That the defendant has not paid the same.

[Demand of judgment.]

**No. 31.**

SUBSEQUENT INDORSEE AGAINST MAKER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. [*As in the last preceding form.*]

2. That the same was, by the indorsement of the said E. F. and of G. H. and I. J. [*or and others*] transferred to the plaintiff.

3. That the defendant has not paid the same.

[Demand of judgment.]

**No. 32.**

FIRST INDORSEE AGAINST FIRST INDORSER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That E. F., on the       day of       18       , at       , by his promissory note, now overdue, promised to pay to the defendant or order rupees       months after date.

## THE FOURTH SCHEDULE.

2. That the defendant indorsed the same to the plaintiff.
3. That on the            day of            18    , the same was duly presented for payment, but was not paid.

[Or state facts excusing want of presentment.]

4. That the defendant had notice thereof.

5. That he has not paid the same.

[Demand of judgment.]

### No. 33.

#### SUBSEQUENT INDORSEE AGAINST FIRST INDORSER ; THE INDORSEMENT BEING SPECIAL.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to one E. F. a promissory note, now overdue, made [or purporting to have been made] by one G. H., on the day of    18    , at    , to the order of the defendant, for the sum of rupees [payable    days after date].

2. That the same was, by the indorsement of the said E. F. [and others], transferred to the plaintiff. [Or that the said E. F. indorsed the same to the plaintiff.]

- 3, 4, and 5. [Same as 3, 4, and 5 of the last preceding form.]

[Demand of judgment.]

### No. 34.

#### SUBSEQUENT INDORSEE AGAINST HIS IMMEDIATE INDORSER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to him a promissory note, now overdue, made or purporting to have been made] by one E. F., on the    day of    18    , at    , to the order of one G. H., for the sum of    rupees [payable    days after date], and indorsed by the said G. H. to the defendant.

- 2, 3, and 4. [Same as in 3, 4, and 5 in Form No. 33.]

[Demand of judgment.]

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### No. 35.

#### SUBSEQUENT INDORSEE AGAINST INTERMEDIATE INDORSER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That a promissory note, now overdue, made, [or purporting to have been made] by one E. F., on the    day of    18    , at    , to the order of one G. H., for the sum of    rupees [payable    days after date], and indorsed by the said G. H. to the defendant, was, by the indorsement of the defendant [and others], transferred to the plaintiff.

- 2, 3, and 4. As in No. 33.

[Demand of judgment.]

## THE FOURTH SCHEDULE.

### No. 36.

SUBSEQUENT INDORSEE AGAINST MAKER, AND FIRST AND SECOND INDORSER.

IN THE COURT OF , AT .

Civil Suit No.

A. B., of

against

C. D., of

E. F., of

and

G. H., of

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , the defendant, C. D., by his promissory note, now overdue, promised to pay to the order of the defendant, E. F., rupees [ months after date].

2. That the said E. F., indorsed the same to the defendant, G. H., who indorsed it to the plaintiff.

3. That on the day of 18 , the same was presented [*or state facts excusing want of presentment*] to the said C. D. for payment, but was not paid.

4. That the said E. F. and G. H. had notice thereof.

5. That they have not paid the same.

[Demand of judgment.]

### No. 37.

DRAWER AGAINST ACCEPTOR.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , at , by his bill of exchange, now overdue, the plaintiff required the defendant to pay him rupees [ days after date, or sight, thereof.]

2. That the defendant accepted the said bill. [*If the bill is payable at a certain time after sight, the date of acceptance should be stated; otherwise it is not necessary.*]

3. That he has not paid the same.

4. That by reason thereof the plaintiff incurred expenses in and about the presenting and nothing of the bill, and incidental to the dishonour thereof.

[Demand of judgment.]

[NOTE.—Where the bill is payable to a third party, for paragraphs 1, 2, 3, say—]

1. That on, &c., at, &c., by his bill of exchange, now overdue, directed to the defendant, the plaintiff required the defendant to pay to E. F. or order rupees months after date.

2. That the plaintiff delivered the said bill to the said E. F. on

3. That the defendant accepted the said bill, but did not pay the same, whereupon the same was returned to the plaintiff.

### No. 38.

PAYEE AGAINST ACCEPTOR.

(Title.)

A. B., the above-named plaintiff, states as follows:—

## THE FOURTH SCHEDULE.

1. That on the       day of       18    , the defendant accepted a bill of exchange, now overdue, made [or purporting to have been made] by one E. F., on the       day of       18    , at       , requiring the defendant to pay to the plaintiff       rupees       after sight thereof.

2. That he has not paid the same.

[Demand of judgment.]

## No. 39.

FIRST INDORSEE AGAINST ACCEPTOR.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18    , the defendant accepted a bill of exchange, now overdue, made [or purporting to have been made] by one E. F., on the       day of       18    , at       , requiring the defendant to pay to the order of one G. H.       rupees       after sight thereof.

2. That the said G. H. indorsed the same to the plaintiff.

3. That the defendant has not paid the same.

[Demand of judgment.]

## No. 40.

SUBSEQUENT INDORSEE AGAINST ACCEPTOR.

(Title.)

A. B., the above-named plaintiffs, states as follows :—

1. [*As in the last preceding form, to the end of article 1.*]

2. That by the endorsement of the said G. H. [and others], the same was transferred to the plaintiff.

3. That the defendant has not paid the same.

[Demand of judgment.]

## No. 41.

PAYEE AGAINST DRAWER FOR NON-ACCEPTANCE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18    , at       , the defendant, by his bill of exchange, directed to E. F., required the said E. F., to pay to the plaintiff       rupees [       days after sight].

2. That on the       day of       18    , the same was duly presented to the said E. F. for acceptance, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[Demand of judgment.]

## No. 42.

FIRST INDORSEE AGAINST FIRST INDORSER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to the plaintiff a bill of exchange, now overdue, made [or purporting to have been made] by one E. F., on the



day of 18 , at , requiring one G. H. to pay to the order of the defendant rupees [ days] after sight [or after date, or at sight] thereof [and accepted by the said G. H. on the day of 18 ].

2. That on the day of 18 , the same was presented to the said G. H. for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[Demand of judgment.]

**No. 43.**

SUBSEQUENT INDORSEE AGAINST FIRST INDORSER ; THE INDORSEMENT BEING SPECIAL.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to one E. F. a bill of exchange, now overdue, made [or purporting to have been made] by one G. H., on the day of 18 , at , requiring one I. J. to pay to the order of the defendant rupees days after sight thereof [or otherwise], and accepted by the said I. J. on the day of 18 . [ *This clause may be omitted, if not according to the fact.* ]

2. That the same was, by the indorsement of the said E. F. [and others], transferred to the plaintiff.

3. That on the day of 18 the same was presented to the said I. J. for payment, and was dishonoured.

4. That the defendant had due notice thereof.

5. That he has not paid the same.

[Demand of judgment.]

**No. 44.**

SUBSEQUENT INDORSEE AGAINST HIS IMMEDIATE INDORSER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That the defendant indorsed to plaintiff a bill of exchange, now overdue, made [or purporting to have been made] by one E. F. on the day of 18 , at , requiring one G. H. to pay to the order of I. J. rupees days after sight thereof [or otherwise]. [accepted by the said G. H.], and indorsed by the said I. J. to the defendant.

2. That on the day of 18 , the same was presented to the said G. H. for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[Demand of judgment.]

**No. 45.**

SUBSEQUENT INDORSEE AGAINST INTERMEDIATE INDORSER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That a bill of exchange, now overdue, made [or purporting to have

## THE FOURTH SCHEDULE.

been made] by one E. F., on the            day of            18    , at            , requiring one G. H. to pay to the order of one I. J.            rupees            days after sight thereof [*or otherwise*], [accepted by the said G. H.], and indorsed by the said I. J. to the defendant, was, by the indorsement of the defendant [and others], transferred to the plaintiff.

2- That on the            day of            18    , the same was presented to the said G. H. for payment, and was dishonoured.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[Demand of judgment.]

### No. 46.

INDORSEE AGAINST DRAWER, ACCEPTOR, AND INDORSER.

IN THE COURT OF            , AT            .

*Civil Suit No.*

A. B., of

*against*

C. D., of

E. F., of

and

G. H., of

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , at            , the defendant C. D., by his bill of exchange, now overdue directed to the defendant E. F., required the said E. F., to pay to the order of the defendant G. H. rupees            [            days after sight thereof.]

2. That on the            day of            18    , the said E. F. accepted the same.

3. That the said G. H. indorsed the same to the plaintiff.

4. That on the            day of            18    , the same was presented to the said E. F. for payment, and was dishonoured.

5. That the other defendants had due notice thereof.

6. That they have not paid the same.

[Demand of judgment.]

### No. 47.

PAYEE AGAINST DRAWER FOR NON-ACCEPTANCE OF A FOREIGN BILL.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , at            , the defendant, by his bill of exchange, drawn in Calcutta, required one E. F. to pay to the plaintiff in [London]            pounds sterling [sixty days] after sight thereof.

2. That on the            day of            18    , the same was presented to the said E. F. for acceptance, and was dishonoured, and was thereupon duly protested.

3. That the defendant had due notice thereof.

4. That he has not paid the same.

[5. That the value of            pounds sterling, at the time of the service of notice of protest on the defendant, was            rupees            annas.

Wherefore the plaintiff demands judgment against the defendant for rupees, with [ten per centum] compensation and interest from the day of 18 .

**No. 48.**

PAYEE AGAINST ACCEPTOR.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of            18 , at            , one E. F., by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the plaintiff            rupees after date [or            days after sight] thereof.
2. That on the            day of            18 , the defendant accepted the said bill.
3. That he has not paid the same.

[Demand of judgment.]

**No. 49.**

ON A MARINE [OPEN] POLICY ON VESSEL LOST BY PERILS OF THE SEA, &c.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff was the owner of [or had an interest in] the ship at the time of her loss, as hereinafter mentioned.
2. That on the            day of            18 , at            , the defendants, in consideration of            rupees to them paid [or which the plaintiff then promised to pay], executed to him a policy of insurance upon the said ship, a copy of which is hereto annexed; [or whereby they promised to pay to the plaintiff, within            days after proof of loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the said ship, during her next voyage from            to            , whether by perils of the sea or by fire, or by other causes therein mentioned, not exceeding rupees.]
3. That the said ship, while proceeding on the voyage mentioned in the said policy, was, on the            day of            18 , totally lost by the perils of the sea [or otherwise.]
4. That the plaintiff's loss thereby was            rupees.
5. That on the            day of            18 , he furnished the defendants with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

That the defendants have not paid the said loss.

[Demand of judgment.]

**No. 50.**

ON CARGO LOST BY FIRE:—VALUED POLICY.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That plaintiff was the owner of [or had an interest in] [one hundred bales of cotton] on board the ship            at the time of her loss as hereinafter mentioned.
2. That on the            day of            18 , at            , the defendants, in consideration of            rupees which the plaintiff then paid [or promised to

## THE FOURTH SCHEDULE.

pay], executed to him a policy of insurance upon the said goods, a copy of which is hereto annexed; [or whereby they promised to pay to the plaintiff rupees in case of the total loss, by fire or other causes mentioned, of the said goods before their landing at ; or, in case of partial loss, such damage as the plaintiff might sustain thereby, provided the same should not exceed per centum of the whole value of the goods].

3. That on the day of 18 , at , while proceeding on the voyage mentioned in the said policy, the said goods were totally destroyed by fire (or as the case may be).

4, 5 and 6. [As in paragraphs 4, 5 and 6, of the last preceding form ]  
[Demand of judgment.]

## No. 51.

ON FREIGHT:—VALUED POLICY.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff had an interest in the freight to be earned by the ship on her voyage from to , at the time of her loss, as hereinafter mentioned, and that a large quantity of goods was shipped upon freight in her at the time.

2. That on the day of 18 , at , the defendant, in consideration of rupees to him paid, executed to the plaintiff a policy of insurance upon the said freight, a copy of which is hereto annexed [or state its tenor, as before].

3. That the said ship, while proceeding upon the voyage mentioned in the said policy, was, on the day of 18 , totally lost by the perils of the sea.

4. That the plaintiff has not received any freight from the said ship, nor did she earn any on the said voyage, by reason of her loss as aforesaid.

5 and 6. [As in form No. 49].

[Demand of judgment.]

## No. 52.

FOR A LOSS BY GENERAL AVERAGE.

(Title.)

A. B., the above named plaintiff, states as follows:—

1. That plaintiff was the owner of [or had an interest in] [one hundred bales of cotton] shipped on board a vessel called the Y. Z , from to , at the time of the loss hereafter mentioned.

2. That on the day of 18 , at in consideration of rupees [which the plaintiff then promised to pay], the defendant executed to the plaintiff a policy of insurance upon his said goods, a copy of which is hereto annexed [or state its tenor, as before.]

3. That on the day of 18 , while proceeding on the voyage mentioned in the said policy, the said vessel was so endangered by perils of the sea, that the master and crew thereof were compelled to, and did, cast into the sea a large part of her rigging and furniture.

4. That the plaintiff was, by reason thereof, compelled to, and did, pay a general average loss of rupees.

## THE FOURTH SCHEDULE.

5. That on the            day of            18    , he furnished the defendant with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendant has not paid the said loss.  
[Demand of judgment.]

### No. 53.

#### FOR A PARTICULAR AVERAGE LOSS.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1 and 2. [*As in the last preceding form.*]

3. That on the            day of            18    , while on the high seas, the sea-water broke into the said ship, and damaged the said [cotton] to the amount of            rupees.

4 and 5. [*As in paragraphs 5 and 6 of the last preceding form.*]  
[Demand of judgment.]

### No. 54.

#### ON A FIRE INSURANCE POLICY.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That plaintiff [was the owner of, or] had an interest in a [dwelling-house known as No.            ,            Street, in the city of            ], at the time of its destruction [or injury] by fire as hereinafter mentioned.

2. That on the            day of            18    , at            , in consideration of            rupees [to them paid] the defendants executed to the plaintiff a policy of insurance on the said [premises], a copy of which is hereto annexed [*or state its tenor*].

3. That on the            day of            18    , the said [dwelling-house] was totally destroyed [*or greatly damaged*] by fire.

4. That the plaintiff's loss thereby was            rupees.

5. That on the            day of            18    , he furnished the defendants with proof of his said loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendants have not paid the said loss.  
[Demand of judgment.]

### No. 55.

#### AGAINST SURETY FOR PAYMENT OF RENT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of            18    , at            , one E. F. hired from the plaintiff, for the term of            years, the [house No.            , Street            ], at the annual rent of            rupees, payable [monthly].

2. That [at the same time and place] the defendant agreed, in [consideration of the letting of the said premises to the said E. F., to guarantee the punctual payment of the said rent.

3. That the rent aforesaid for the month of            18    , amounting to            rupees, has not been paid.

## THE FOURTH SCHEDULE.

[If, by the terms of the agreement, notice is required to be given to the surety, add:—]

4. That on the            day            18    , the plaintiff gave notice to the defendant of the non-payment of the said rent, and demanded payment thereof.

5. That he has not paid the same.

[Demand of judgment.]

### B.—PLAINTS FOR COMPENSATION FOR BREACH OF CONTRACT.

#### No. 56.

FOR BREACH OF AGREEMENT TO CONVEY LAND.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day            18    , at            , the plaintiff and defendant entered into an agreement, under their hands, of which a copy is hereto annexed.

[Or, That on, &c., the defendant agreed with the plaintiff that, in consideration of a deposit of            rupees then paid, and of the further sum of [ten thousand] rupees payable as hereinafter mentioned, he would, on the            day of            18    , at            , execute to the plaintiff a sufficient conveyance of [the house No.            ,            Street, in the city of            , free from all incumbrances; and the plaintiff agreed to pay [ten thousand] rupees for the same on delivery thereof.]

2. That on the            day of            18    , the plaintiff demanded the conveyance of the said property from the defendant, and tendered            rupees to the defendant [or that all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part].

3. That the defendant has not executed any conveyance of the said property to the plaintiff [or that there is a mortgage upon the said property, made by            to            , for            rupees, registered in the office of            , on the            day of            18    , and still unsatisfied, or any other defect of title.]

4. That the plaintiff has thereby lost the use of the money paid by him as such deposit as aforesaid and of other moneys provided by him for the completion of the said purchase, and has lost the expenses incurred by him in investigating the title of the defendant and in preparing to perform the agreement on his part, and has incurred expense in endeavouring to procure the performance thereof by the defendant.

5. The plaintiff prays judgment for            rupees compensation.

#### No. 57.

FOR BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of            18    , at            , the plaintiff and defendant entered into an agreement, under their hands, of which a copy is hereto annexed.



[Or, That on the            day of            18    , at            , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff, forty bighas of land in the village of            for            rupees.]

2. That on the            day of            18    , at            , the plaintiff, being then the absolute owner of the said property [and the same being free from all incumbrances, as was made to appear to the defendant], tendered to the defendant a sufficient instrument of conveyance of the same [or was ready and willing, and offered, to convey the same to the defendant by a sufficient instrument], on the payment by the defendant of the said sum.

3. That the defendant has not paid the same.  
[Demand of judgment.]

**No. 58.**

*Another Form.*

**FOR NOT COMPLETING PURCHASE OF IMMOVEABLE PROPERTY.  
(Title.)**

A. B., the above-named plaintiff, states as follows :—

1. That by an agreement dated the            day of            18    , it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant and the defendant should purchase from the plaintiff a house and land at the price of            rupees, upon the terms and conditions following (that is to say):—

(a) That the defendant should pay the plaintiff a deposit of            rupees in part of the said purchase-money on the signing of the said agreement, and the remainder on the            day of            18    , on which day the said purchase should be completed.

(b) That the plaintiff should deduce and make a good title to the said premises on or before the            day of            18    , and on payment of the said remainder of the said purchase money as aforesaid should execute to the defendant a proper conveyance of the said premises, to be prepared at the defendant's expense.

2. That all conditions were fulfilled, and all things happened, and all times elapsed, necessary to entitle the plaintiff to have the said agreement performed by the defendant on his part, yet the defendant did not pay the plaintiff the remainder of the said purchase-money as aforesaid on his part.

3. That the plaintiff has thereby lost the expense which he incurred in preparing to perform the said agreement on his part, and has been put to expense in endeavouring to procure the performance thereof by the defendant.

[Demand of judgment.]

**No. 59.**

**FOR NOT DELIVERING GOODS SOLD.  
(Title.)**

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , at            , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred

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barrels of flour] to the plaintiff [on the            day of            18    ,] and that the plaintiff should pay therefor            rupees on delivery.

2. That on the [said] day the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the said goods.

3. That the defendant has not delivered the same, whereby the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[Demand of judgment.]

### No. 60.

FOR BREACH OF CONTRACT TO EMPLOY.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of            18    , at            , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant or in the capacity of foreman, or as the case may be], and that the defendant should employ the plaintiff as such, for the term of [one year], and pay him for his services            rupees [monthly].

2. That on the            day of            18    , the plaintiff entered upon the service of the defendant, as aforesaid, and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year, whereof the defendant always had notice.

3. That on the            day of            18    , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[Demand of judgment.]

### No. 61.

FOR BREACH OF CONTRACT TO EMPLOY, WHERE THE EMPLOYMENT NEVER TOOK EFFECT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. [As in the last preceding form.]

2. That on the            day of            18    , at            the plaintiff offered to enter upon the service of the defendant, and has ever since been ready and willing so to do.

3. That the defendant refused to permit the plaintiff to enter upon such service, or to pay him for his services.

[Demand of judgment.]

### No. 62.

FOR BREACH OF CONTRACT TO SERVE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of            18    , at            , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] compensation of            rupees, and that defendant should serve the plaintiff as [an artist] for the term of [one year.]

2. That the plaintiff has always been ready and willing to perform

his part of the said agreement [and on the                      day of                      18                      , offered so do.]

3. That the defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards on the                      day of                      18                      , he refused to serve the plaintiff as aforesaid.

[Demand of judgment.]

**No. 63.**

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the                      day of                      18                      , at                      , the plaintiff and defendant entered into an agreement, of which a copy is hereto annexed.

[Or state the tenor of the contract.]

2. [That the plaintiff duly performed all the conditions of the said agreement on his part.]

3. That the defendant [built the house referred to in the said agreement in a bad and unworkmanlike manner.]

[Demand of judgment.]

**No. 64.**

BY THE MASTER AGAINST THE FATHER OR GUARDIAN OF AN APPRENTICE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the                      day of                      18                      , at                      , the defendant entered into an agreement, under his hand and seal,\* a copy of which is hereto annexed.

[Or state the tenor of the contract.]

2. That after the making of the said agreement, the plaintiff received the said [apprentice] into his service as such apprentice for the term aforesaid, and has always performed, and been ready and willing to perform, all things in the said agreement on his part to be performed.

3. That on the                      day of                      18                      , the said [apprentice] wilfully absented himself from the service of the plaintiff, and continues so to do.

[Demand of judgment.]

**No. 65.**

BY THE APPRENTICE AGAINST THE MASTER.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the                      day of                      18                      , at                      , the defendant entered into an agreement with the plaintiff and his [father], E. F., under their hands and seals, a copy of which is hereto annexed.

2. That, after the making of the said agreement, the plaintiff entered into the service of the defendant with him after the manner of an apprentice to serve for the term mentioned in the said agreement, and has always performed all things in the said agreement contained on his part to be performed.

\* The form given in Act XIX. of 1850 requires the seal of the father or guardian.

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3. That the defendant has not [instructed the plaintiff in the business of \_\_\_\_\_, or state any other breach, such as cruelty, failure provide sufficient food, or other ill-treatment.]

[Demand of judgment.]

### No. 66.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_, plaintiff employed one E. F. as a clerk.

2. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_, the defendant agreed with the plaintiff, that if the said E. F. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt, or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding \_\_\_\_\_ rupees.

[Or, 2. That at the same time and place, the defendant bound himself to the plaintiff, by a writing under his hand, in the penal sum of \_\_\_\_\_ rupees, conditioned that, if the said E. F. should faithfully perform his duties as clerk and cashier to the plaintiff, and should justly account to the plaintiff for all moneys, evidences of debt, or other property which should be at any time held by him in trust for plaintiff, the same should be void, but not otherwise.]

[Or, 2. That at the same time and place, the defendant executed to the plaintiff a bond; a copy of which is hereto annexed.]

3. That between the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, and the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, the said E. F. received money and other property, amounting to the value of \_\_\_\_\_ rupees, for the use of the plaintiff, for which he has not accounted to him, and the same still remains due and unpaid.

[Demand of judgment.]

### No. 67.

BY TENANT AGAINST LANDLORD WITH SPECIAL DAMAGE.

(Title.)

A. B., the above-named plaintiffs, states as follows:—

1. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, at \_\_\_\_\_, the defendant, by an instrument in writing, let to the plaintiff [the house No. \_\_\_\_\_, Street] for the term of \_\_\_\_\_ years, contracting with the plaintiff that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. That all conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. That on the \_\_\_\_\_ day of \_\_\_\_\_, during the said term, one E. F., who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. That the plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend \_\_\_\_\_ rupees in moving, and lost the custom of G. H. and I. J. by such removal.

[Demand of judgment.]

## THE FOURTH SCHEDULE,

### No. 68.

#### FOR BREACH OF WARRANTY OF MOVEABLES.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , at            , the defendant warranted a steam-engine to be in good working order, and thereby induced the plaintiff to purchase the same of him, and to pay him            rupees therefor.

2. That the said engine was not then in good working order, whereby the plaintiff incurred expense in having the said engine, repaired and lost the profits which could otherwise have accrued to him while the engine was under repair.

[Demand of judgment.]

### No. 69.

#### ON AN AGREEMENT OF INDEMNITY.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , at            , the plaintiff and defendant, being partners in trade under the firm of A. B. and C. D., dissolved the said partnership, and mutually agreed that the defendant should take and keep all the partnership-property, pay all the debts of the firm, and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the said firm.

2. That the plaintiff duly performed all the conditions of the said agreement on his part.

3. That on the            day of            18    , [a judgment was recovered against the plaintiff and defendant by one E. F., in the High Court of Judicature at            upon a debt due from the said firm to the said E. F., and on the            day of            18    ], the plaintiff paid            rupees [in satisfaction the same.]

4. That the defendant has not paid the same.

[Demand of judgment.]

### No. 70.

#### BY SHIP-OWNER AGAINST FREIGHT OR FOR NOT LEADING.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , at            , the plaintiff and defendant entered into an agreement, a copy of which is hereto annexed.

[Or, 1. That on            , at            , the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship "            " at            , on the            day of            18    , five hundred tons of merchandise, which she should carry to            , and there deliver, on payment of            freight ; and that the defendant should have            days for loading,            days for discharge, and            days for demurrage, if required, at            rupees per day.]

2. That at the time fixed by the said agreement the plaintiff was ready and willing, and offered to receive [the said merchandise, or the merchandise mentioned in the said agreement] from the defendant.

3. That the period allowed for loading and demurrage has elapsed, but the defendant has not delivered the said merchandise to the said vessel.

## THE FOURTH SCHEDULE.

Wherefore, the plaintiff demands judgment for murrage and rupees additional for compensation.] rupees for de-  
[Demand of judgment.]

### C.—PLAINTS FOR COMPENSATION UPON WRONGS.

**No. 71.**

**FOR TRESPASS ON LAND.**

(Title.)

**A. B., the above-named plaintiff, states as follows:—**

1. That on the       day of       18   , at       , the defendant entered upon certain land of the plaintiff, known as       [and depastured the same with cattle, trod down the grass, cut the timber, and otherwise injured the same.]

[Demand of judgment.]

**No. 72.**

**FOR TRESPASS IN ENTERING A DWELLING-HOUSE.**

(Title.)

**A. B., the above-named plaintiff, states as follows :—**

1. That the defendant entered a dwelling house of the plaintiff called \_\_\_\_\_ and made noise and disturbance therein for a long time, and broke open the doors of the said dwelling-house, and removed, took, and carried away the fixtures and goods of the plaintiff therein, and disposed of the same to the defendant's own use, and expelled the plaintiff and his family from the possession of the said dwelling-house, and kept them so expelled for a long time.

2. That the plaintiff was thereby prevented from carrying on his business, and incurred expense in procuring another dwelling-house for himself and family.

[Demand of judgment.]

**No. 73.**

**FOR TRESPASS ON MOVEABLES.**

(Title.)

**A. B., the above-named plaintiff, states as follows :—**

1. That on the            day of            18    , at            , the defendant broke open ten barrels of rum belonging to the plaintiff, and emptied their contents into the street [ or seized and took the plaintiff's goods, that is to say, iron, rice, and house-hold furniture, or *as the case may be*, and carried away the same, and disposed of them to his own use ] :

or seized and took the plaintiff's cows and bullocks, and impounded them, and kept them impounded for a long time.

2. That the plaintiff was thereby deprived of the use of the cows and bullocks during that time, and incurred expense in feeding them and in getting them restored him; and was also prevented from selling them at fair, as he otherwise would have done, and the said cows and bullocks are diminished in value to the plaintiff [*otherwise state the injury according to the facts.*]

[Demand of judgment.]



**No. 74.**

**. FOR THE CONVERSION OF MOVEABLE  
(Title.)**

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , plaintiff was in possession of certain goods described in the schedule hereto annexed [or of one thousand barrels of flour].

2. That on that day, at            , the defendant converted the same to his own use, and wrongfully deprived the plaintiff of the use and possession of the same.

[ Demand of judgment.]

*The Schedule.*

**No. 75.**

**AGAINST A WAREHOUSMAN FOR REFUSAL TO DELIVER GOODS.  
(Title.)**

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , at            , the defendant in consideration of the payment to him of            rupees [ or            rupees per barrel, per month, &c.], agreed to keep in his godown [one hundred barrels of flour], and to deliver the same to the plaintiff on payment of the said sum.

2. That thereupon the plaintiff deposited with the defendant the said [hundred barrels of flour.]

3. That on the            day of            18    , the plaintiff requested the defendant to deliver the said goods, and tendered him            rupees [or the full amount of sotrage due thereon], but the defendant refused to deliver the same.

4. That the plaintiff was thereby prevented from selling the said goods to E. F., and the same are lost to the plaintiff.

[Demand of judgment.]

**No. 76.**

**FOR PROCURING PROPERTY BY FRAUD.  
(Title.)**

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , at            , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth            rupees over all his liabilities].

2. That the plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of            rupees.

3. That the said representations were false [or state the particular falsehoods], and were then known by the defendant to be so.

4. That the defendant has not paid for the said goods. [Or, if the goods were not delivered. That the plaintiff, in preparing and shipping the said goods, and procuring their restoration, expended            rupees.

[Demand of judgment.]

## THE FOURTH SCHEDULE.

### No. 77.

FOR FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the       day of       18       , at       , the defendant represented to the plaintiff that one E. F. was solvent and in good credit, and worth       rupees over all his liabilities [or that E. F. then held a responsible situation, and was in good circumstances, and might safely be trusted with goods on credit].

2. That the plaintiff was thereby induced to sell to the said E. F. [rice] of the value of       rupees [on       month's credit].

3. That the said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff].

[Demand of judgment.]

4. That the said E. F. [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same by reason of the premises.

[Demand of judgment.]

### No. 78.

FOR POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That he is, and at all the times hereinafter mentioned was, possessed of certain land called       and situate in       , and of a well therein, and of water in the said well, and was entitled to the use and benefit of the said well and of the said water therein, and to have certain springs and streams of water which flowed and ran into the said well to supply the same to flow or run without being fouled or polluted.

2. That on the       day of       18       , the defendant wrongfully fouled and polluted the said well and the said water therein, and the said springs and streams of water which flowed into the said well.

3. That by reason of the premises the said water in the said well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the said well and water.

[Demand of judgment.]

### No. 79.

FOR CARRYING ON A NOXIOUS MANUFACTURE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called       situate in       .

2. That ever since the       day of       18       , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the said lands.

3. That thereby the trees, hedges, herbage, and crops of the plaintiff growing on the said lands, were damaged and deteriorated in value, and the

cattle and live-stock of the plaintiff on the said lands became unhealthy and divers of them were poisoned and died.

4. That by reason of the premises, the plaintiff was unable to depasture the said lands which cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep, and farming-stock therefrom and has been prevented from having so beneficial and healthy a use and occupation of the said lands as he otherwise would have had.

[Demand of judgment.]

**No. 80.**

FOR OBSTRUCTING A WAY.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of ].

2. That he was entitled to a right of way from the said [house] over a certain field to a public highway and back again from the said highway over the said field to the said house for himself and his servants [with vehicles, or on foot] at all times of the year.

3. That on the day of 18, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles or on foot, or in any manner] along the said way [and has ever since wrongfully obstructed the same].

4. [State special damage if any.]

[Demand of judgment.]

*Another Form.*

1. That the defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it.

2. That thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench], and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[Demand of judgment].

**No. 81.**

FOR DIVERTING A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the, in the village of, district of.

2. That by reason of such possession the plaintiff was entitled to the flow or the said stream for working the said mill.

3. That on the day of 18, the defendant, by cutting the bank of the said stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. That, by reason thereof, the plaintiff has been unable to grind more than sacks per day, whereas, before the said diversion of water, he was able to grind sacks per day.

[Demand of judgment.]

## THE FOURTH SCHEDULE.

## No. 82.

FOR OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That the plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands, situate, &c., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. That on the            day of            the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[Demand of judgment.]

## No. 83.

FOR WASTE BY A LESSEE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of            18   , [the defendant hired from him [the house No.   ,            Street], for the term of           .

2. That the defendant occupied the same under such hiring.

3. That, during the period of such occupation, the defendant greatly injured the premises [defaced the walls, tore up the floors, and broke down the doors; or otherwise specify the injuries as far as possible].

The plaintiff prays judgment for            rupees compensation.

## No. 84.

FOR ASSAULT AND BATTERY.

(Title.)

A. B., the above-named plaintiff, states as follows:—

That on the            day of            18   , at           , the defendant assaulted and beat him.

The plaintiff prays judgment for            rupees compensation.

## No. 85.

FOR ASSAULT AND BATTERY WITH SPECIAL DAMAGE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of 18   , at           , the defendant assaulted and beat him until he became insensible.

2. That the plaintiff was thereby disabled from attending to his business for [six weeks thereafter], and was compelled to pay            rupees for medical attendance, and has been ever since disabled [from using his right arm]. [Or otherwise state the damage, as the case may be.]

[Demand of judgment.]

## No. 86.

FOR ASSAULT AND FALSE IMPRISONMENT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the            day of            18   , at           , the defendant as-

saulted the plaintiff and imprisoned him for                      days [or hours] ; [state special damage, if any, thus :—]

2. That, by reason thereof, the plaintiff suffered great pain of body and mind, and was exposed and injured in his credit and circumstances, and was prevented from carrying on his business and from providing for his family by his personal care and attention, and incurred expense in obtaining his liberation from the said imprisonment [or otherwise, as the case may be].

[Demand of judgment.]

**No. 87.**

FOR INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the                      day of                      18                      , the defendants were common carries of passengers by railway between                      and                      .

2. That on that day the plaintiff was a passenger in one of the carriages of the defendants on the said road.

3. That while he was such passenger, at                      [or near the station of                      ; or between the stations of                      and                      ], a collision occurred on the said railway, caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, &c., and state the special damage, if any, as], and incurred expense for medical attendance, as is permanently disabled from carrying on his former business as [a sales-man].

[Demand of judgment.]

[Or thus :—2. That on that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven struck against the plaintiff, whereby, &c, as in § 3.]

**No. 88.**

FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is a shoemaker, carrying on business at                      . The defendant is a merchant of                      .

2. On the [23rd May, 1875], the plaintiff was walking eastward along Chowringhee, in the city of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Harrington Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's, drawn by two horses, under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Harrington Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him, down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy

medical and other expenses, and sustained great loss of business and profits.

The plaintiff claims                      rupees damages.

(Title.)

*Written Statement of Defendant.*

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, or that it was under the charge or control of the defendant's servants. The carriage belonged to [Messrs. E. F. and G. H.] of                      Street, Calcutta, livery stable-keepers, employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said [Messrs. E. F. and G. H.]

2. The defendant does not admit that the said carriage was turned out of Harrington Street either negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says that the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements of the third paragraph of the plaint.

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**No. 89.**

FOR LIBEL ; THE WORDS BEING LIBELLOUS IN THEMSELVES.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the                      day of                      18                      , at                      , the defendant published in a newspaper, called the                      [or in a letter addressed to E. F.], the following words concerning the plaintiff :—

[Set forth the words used.]

2. That the said publication was false and malicious.

[Demand of judgment.]

NOTE.—If the libel was in a language not the language of the Court, set out the libel *verbatim* in the foreign language in which it was published, and then proceed thus :—“ Which said words, being translated into the                      language, have the meaning and effect following, and were so understood by the persons to whom they were so published, that is to say [*here set out a literal translation of the libel in the language of the Court.*]

**No. 90.**

FOR LIBEL ; THE WORDS NOT BEING LIBELLOUS IN THEMSELVES.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That the plaintiff [is, and] was, on and before the                      day of                      18                      , a merchant doing business in the city of                      .

2. That on the                      day of                      18                      , at                      , the defendant published in a newspaper, called the                      [or in a letter addressed to E. F., or otherwise how published], the following words concerning the plaintiff :—

[“A. B. of this city has modestly retired to foreign lands. It is said that creditors to the amount of                      rupees are anxiously seeking his address.”]



3. That the defendant meant thereby that [the plaintiff had absconded to avoid his creditors, and which intent to defraud them].

4. That the said publication was false and malicious.

[Demand of judgment.]

**No. 91.**

FOR SLANDER ; THE WORDS BEING ACTIONABLE IN THEMSELVES.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the        day of        18    , at        , the defendant falsely and maliciously spoke, in the hearing of E. F. [or sundry persons], the following words concerning the plaintiff : [“ He is a thief.”]

2. That, in consequence of the said words, the plaintiff lost his situation as        in the employ of        .

[Demand of judgment.]

**No. 92.**

FOR SLANDER ; THE WORDS NOT BEING ACTIONABLE IN THEMSELVES.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the        day of        18    , at        , the defendant falsely and maliciously said to one E. F. concerning the plaintiff : [“ He is a young man of remarkably easy conscience.”]

2. That the plaintiff was then seeking employment as a clerk, and the defendant meant, by the said words, that the plaintiff was not trustworthy as a clerk.

3. That in consequence of the said words [the said E. F. refused to employ the plaintiff as a clerk].

[Demand of judgment.]

**No. 93.**

FOR MALICIOUS PROSECUTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the        day of        18    , at        , the defendant obtained a warrant of arrest from        [a magistrate of the said city, or, as the case may be] on a charge of        , and the plaintiff was arrested thereon, and imprisoned for [        days or hours, and gave bail in the sum of        rupees to obtain his release].

2. That, in so doing, the defendant acted maliciously and without reasonable or probable cause.

3. That on the        day of        18    , the said magistrate dismissed the complaint of the defendant, and acquitted the plaintiff.

4. That many persons, whose names are unknown to the plaintiff, hearing of the said arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him ; or, that, in consequence of the said arrest, the plaintiff lost his situation as clerk to one E. F., or, that by reason of the premises the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and in-

## THE FOURTH SCHEDULE.

curring expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[Demand of judgment.]

### D.—PLAINTS IN SUITS FOR SPECIFIC PROPERTY.

#### No. 94.

BY THE ABSOLUTE OWNER FOR THE POSSESSION OF IMMOVEABLE PROPERTY.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That X. Y. was the absolute owner [of the estate, or the share of the estate called , situate in the district of , the Government-revenue of which is rupees , and the estimated value rupees, or of the house No. , Street, in the town of Calcutta, the estimated value of which is rupees ].

2. That on the day of 18 , Z. illegally dispossessed the said X. Y. of the said estate [or share or house].

3. That the said X. Y. has since died intestate, leaving the plaintiff, the said A. B., his heir him surviving.

4. That the defendant withholds the possession of the estate [or share or house] from the plaintiff.

The plaintiff prays judgment :

(1) for the possession of the said premises ;

(2) for rupees compensation for withholding the same.

#### *Another Form.*

A. B., the above-named plaintiff, states as follows :—

1. On the day of , the plaintiff, by an instrument in writing, let to the defendant a house and premises [No. 52, Russell Street, in the ] for a term of five years from the day of , at the monthly rent of 300 rupees.

2. By the said instrument the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said instrument also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises, in case the rent thereby reserved, whether demanded or not, should be in arrear for twenty-one days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the day of 18 , a month's rent became due, and on the day of 18 , another month's rent became due ; on the day of 18 , both had been in arrear for twenty-one days, and both or still due.

5. On the same day of 18 , the house and premises were not and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value. The plaintiff claims :

(1) possession of the said house and premises ;

(2) rupees for arrears of rent ;

(3) rupees compensation for the defendant's breach of his covenant to repair ;

## THE FOURTH SCHEDULE.

(4) rupees for the occupation of the house and premises from  
the day of 18 , to the day of recovering possession.

### No. 95.

BY THE TENANT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That one E. F. is the absolute owner of [a piece of land in the town of Calcutta , bounded as follows : ], the estimated value of which is rupees .

2. That on the day of 18 , the said E. F. let the said premises to the plaintiff for years, from .

3. That the defendant withholds the possession thereof from the plaintiff.

[Demand of judgment.] .

### No. 96.

FOR MOVEABLE PROPERTY WRONGFULLY TAKEN.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of , 18 , plaintiff owned [or was possessed of] one hundred barrels of flour, the estimated value of which is rupees.

2. That on that day, at , the defendant took the same.

The plaintiff prays judgment:

(1) for the possession of the said goods, or for rupees, in case such possession cannot be had ;

(2) for rupees compensation for the detention thereof.

### No. 97.

FOR MOVEABLES WRONGFULLY DETAINED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. That on the day of 18 , plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule here to annexed [or describe the goods], the estimated value of which is rupees.

2. That, from that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3. That before the commencement of this suit, to wit, on the day of 18 , the plaintiff demanded the same from the defendant, but he refused to liver them.

The plaintiff prays judgment ;

(1) for the possession of the said goods, or for rupees, in case such possession cannot be had ;

(2) for rupees compensation for the detention thereof.

*The Schedule.*

## THE FOURTH SCHEDULE.

### No. 98.

AGAINST A FRAUDULENT PURCHASER-AND HIS TRANSFERREE WITH NOTICE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , at       , the defendant [C. D.] for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth       rupees over all his liabilities].

2. That the plaintiff was thereby induced to sell and deliver to the said C. D. [one hundred boxes of tea], the estimated value of which is       rupees.

3. That the said representations were false, and were then known by the said C. D. to be so. [Or, That at the time of making the said representations, the said C. D. was insolvent, and knew himself to be so.]

4. That the said C. D. afterwards transferred the said goods to the defendant E. F. without consideration [or who had notice of the falsity of the representation].

The plaintiff prays judgment :

(1) for the possession of the said goods, or for       rupees, in case such possession cannot be had ;

(2) for       rupees compensation for the detention thereof.

### E.—PLAINTS IN SUITS FOR SPECIAL RELIEF.

### No. 99.

FOR RECISION OF A CONTRACT ON THE GROUND OF MISTAKE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the       day of       18       , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at       , contained [ten bighas].

2. That the plaintiff was thereby induced to purchase the same at the price of       rupees in the belief that the said representation was true, and signed an instrument of agreement, of which a copy is hereto annexed. But on conveyance of the same has been executed to him.

3. That on the       day of       18       , the plaintiff paid the defendant       rupees as part of such purchase-money.

4. That the said piece of ground contained in fact only [five bighas].

The plaintiff prays judgment :

(1) for       rupees, with interest from the day of       18       ;

(2) that the said agreement of purchase be delivered up and cancelled.

### No. 100.

FOR AN INJUNCTION RESTRAINING WASTE.

(Title.)

A. B., the above named plaintiff, states as follows :—

1. That plaintiff is the absolute owner of [*describe the property*].

2. That the defendant is in possession of the same under a lease from the plaintiff.

3. That the defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

The plaintiff prays judgment, that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[*Pecuniary compensation might also be prayed.*]

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**No. 101.**

FOR ABATEMENT OF A NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house, No. , Street, Calcutta].

2. That the defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street ].

3. That on the day of 18 , the defendant erected upon his said plot slaughter-house, and still maintains the same ; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and affal to be thrown into the street opposite the said house of the plaintiff].

4. That [the plaintiff has been compelled, by reason of the premises, to abandon the said house, and has been unable to rent the same].

The plaintiff prays judgment, that the said nuisance be abated.

**No. 102.**

FOR AN INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

(*As in Form No. 81.*)

The plaintiff prays judgment that the defendant be restrained by injunction from diverting the water as aforesaid.

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**No. 103.**

FOR RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION,  
AND FOR AN INJUNCTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather, which was executed by an eminent painter], and of which no duplicate exists [*or state any facts showing that the property is of a kind that cannot be replaced by money*].

2. That on the day of 18 , he deposited the same for safe keeping with the defendant.

3. That on the day of 18 , he demanded the same from the defendant, and offered to pay all reasonable charges for the storage of the same.

4. That the defendant refuses to deliver the same to the plaintiff, and threatens to conceal, dispose of, cut, or injure the same if required to deliver it up.

## THE FOURTH SCHEDULE.

5. That no pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the said [painting].

The plaintiff prays judgment :

- (1) that the defendant be restrained by injunction from disposing of, injuring, or concealing the said [painting];
- (2) that the return the same to the plaintiff.

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**No. 104.**

INTERPLEADER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That before the date of the claims hereinafter mentioned one G. H. deposited with the plaintiff *describe the property* for [safe keeping.]
2. That the defendant, C. D., claims the same [under an alleged assignment thereof to him from the said G. H.]
3. That the defendant, E. F., also claims the same [under an order of the said G. H. transferring the same to him].
4. That the plaintiff is ignorant of the respective rights of the defendants.
5. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the Court shall direct.
6. That this suit is not brought by collusion with either of the defendants.

The plaintiff prays judgment :

- (1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto ;
- (2) that they be required to interplead together concerning their claims to the said property ;
- [(3) that some person be authorized to receive the said property pending such litigation ;]
- (4) that upon delivering the same to such [person], the plaintiff be discharged from all liability to either of the defendants in relation thereto.

**No. 105.**

ADMINISTRATION BY CREDITOR.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. E. F., late of \_\_\_\_\_, was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of \_\_\_\_\_ [here insert nature of debt and security, if any].
2. The said E. F. made his will, dated the \_\_\_\_\_ day of \_\_\_\_\_, and thereof appointed C. D. executor [or devised his estate in trust, &c., or died intestate, as the case may be].
3. The said will was proved by the said C. D. [or letters of administration were granted, &c.].
4. The defendant has possessed himself of the moveable, [and immoveable, or the proceeds of the immoveable] property of the said E. F., and has not paid the plaintiff his said debt.
5. The said E. F. died on or about the \_\_\_\_\_ day of \_\_\_\_\_.
6. The plaintiff prays that an account may be taken of the moveable



**No. 106.**

(Title.)

[Omit paragraph 1, and commence paragraph 2—] E. F., late of \_\_\_\_\_, duly made his last will, dated the \_\_\_\_\_ day of \_\_\_\_\_, and thereof appointed C. D. executor, and by such will bequeathed to the plaintiff [here state the specific legacy].

The defendant is in possession of the moveable property of the said E. F., and, amongst other things, of the said [here name the subject of the specific bequest].

The plaintiff prays that the defendant may be ordered to deliver to him the said [here name the subject of the specific bequest], or that, &c.

(Title.)

*Omit paragraph 1, and substitute for paragraph 2—*] E. F., late of  
duly made his last will, dated the       day of       , and thereof appointed  
C. D. executor, and by such will bequeathed to the plaintiff a legacy of  
rupees.

*Another Form.*

G. H. ... *Defendant.*

A. B., of K., in the , duly made his last will, dated the [first day of March 1873], whereby he appointed the defendant and M. N. [who died in the testator's life-time] executors thereof, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The testator died on the [first day of July, 1878], and his will was proved by the defendant on the [fourth day of October, 1878]. The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property, and got in the moveable property; he has sold some part of the immoveable property.

**The plaintiff claims—**

- (2) such further or other relief as the nature of the case may require.

*Written Statement of Defendant.*

2. The defendant applied the whole of the said sums and the sum of rupees            which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

## EXECUTION OF TRUSTS.

*Civil Suit No.*

*against*

...*Defendant.*

1. That he is one of the trustees under an instrument of settlement, bearing date on or about the       day of       , made upon the marriage of E. F. and G. H., the father and mother of the defendant [or an instrument of assignment of the estate and effects of E. F. for the benefit of C. D., the defendant, and the other creditors of E. F.]

3. The said C. D. claims to be entitled to a beneficial interest under the before-mentioned deed.

4. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the sale of the said, or of part of the said, immoveable property, or moveable, or the proceeds of the sale of, or of part of, the said moveable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust] ; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust-estate may be administered in the Court for the benefit of the said C. D., the defendant, and all other persons who may be interested in such administration, in the presence of the said C. D. and such other persons so interested as the Court may direct, or that the said C. D. may shew good cause to the contrary.

[N. B.—Where the suit is by a beneficiary, the plaint may be *mutatis mutandis*, on the plaint by a legatee.]

**No. 109.**

FORECLOSURE OR SALE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. By a mortgage-deed, dated the       day of       18       , a house with the garden and appurtenances, situated within the jurisdiction of this Court, were conveyed by the defendant to him, the plaintiff, his heirs [or executors, administrators], and assigns, for securing the principal sum of Rs.       together with interest thereon at the rate of Rs.       per centum per annum, subject to redemption upon payment by the said defendant of the said principal and interest at a day long since past.

2. There is now due from the defendant to the plaintiff the sum of Rs.       for principal and interest on the said mortgage.

The plaintiff prays (a) that the Court will order the defendant to pay him the said sum of Rs.       , with such further interest as may accrue between the filing of the plaint and the day of payment, and also the costs of this suit, on some day to be named by the Court, and in default that the right to redeem the said mortgaged premises may be foreclosed and the plaintiff placed in possession of the same premises ; or (b) that the said premises may be sold, and the proceeds applied in and towards the payment of the amount of the said principal, interest, and costs ; and (c) that if such proceeds shall not be sufficient for the payment in full of such amount, the defendant to pay to the plaintiff the amount of the deficiency with interest, thereon at the rate of six per cent. per annum until realization ; and (d) that for that purpose all proper directions may be given and accounts taken by the Court.

**No. 110.**

REDEMPTION.

(Title.)

[Alter Form No. 109 thus :—]

*Transpose parties and also the facts in paragraph 1.*

*For paragraph 2, substitute—*

2. There is now due from the plaintiff to the defendant, for principal and interest on the said mortgage, the sum of Rs.       , which the plaintiff is ready and willing to pay to the defendant, of which the defendant, before filing this plaint, had notice.

*For paragraph 3, substitute—*

The plaintiff prays that he may redeem the said premises, and that the defendant may be ordered to re-convey the same to him upon payment of the said sum of Rs.       and interest, with such costs (if any) as the Court may order, upon a day to be named by the Court, and that the Court will give all proper directions for the preparation and execution of such re-conveyance and doing such other acts as may be necessary to put him into possession of the said premises, freed from the said mortgage.

## THE FOURTH SCHEDULE.

## No. 111.

## SPECIFIC PERFORMANCE (No. 1).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement, dated the            day of            , and signed by the above-named defendant, C. D., he the said C. D. contracted to buy [or sell to] him certain immoveable property therein described and referred to, for the sum of            rupees.

2. He has applied to the said C. D. specifically to perform the said agreement on his part, but he has not done so.

3. The said A. B. has been and still is ready and willing specifically to perform the agreement on his part, of which the said C. D. has had notice.

4. The plaintiff prays that the Court will order the said C. D. specifically to perform the said agreement and to do all acts necessary to put the said A. B. in full possession of the said property [or to accept a conveyance and possession of the said property], and to pay the costs of the suit.

[N. B.—In suits for delivery up, to be cancelled, of any agreement, omit paragraphs 2 and 3, and substitute a paragraph stating generally the grounds for requiring the agreement to be delivered up to be cancelled—such as that the plaintiff signed it by mistake, under duress, or by the fraud of the defendant—and alter the prayer according to the relief sought.]

## No. 112.

## SPECIFIC PERFORMANCE (No. 2).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. That on the            day of            18    , the defendant was absolutely entitled to certain immoveable property described in the agreement hereto annexed.

2. That on the same day, the plaintiff and defendant entered into an agreement, under their hands, a copy of which is hereto annexed.

3. That on the            day of            18    , the plaintiff tendered rupees to the defendant, and demanded a conveyance of the said property.

4. That on the            day of            18    , the plaintiff again demanded such conveyance. [Or, That the defendant refused to convey the same to the plaintiff.]

5. That the defendant has not executed such conveyance.

6. That the plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

The plaintiff prays judgment :

(1) that the defendant execute to the plaintiff a sufficient conveyance of the said property [following the terms of the agreement];

(2) for            rupees compensation withholding the same.

## No. 113.

## PARTNERSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He and the said C. D., the defendant, have been, for the space of years [or months] last past, carrying on business together at            ,

within the jurisdiction of this Court, under certain articles of partnership in writing, signed by them respectively [or under a certain deed sealed and executed by them respectively, or under a verbal agreement between them, the said plaintiff and defendant.]

2. Divers disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

3 The plaintiff desires to have the said partnership dissolved, and he is ready and willing to bear his share of the debts and obligations of the partnership according to the terms of the said articles [or deed, or agreement.]

4. The plaintiff prays the Court to decree a dissolution of the said partnership and that the accounts of the said partnership-trading may be taken by the Court, and the assets thereof realized, and that may be ordered to pay into Court any balance due from him upon such partnership-account, and that the debts and liabilities of the said partnership may be paid and discharged, and that the costs of the suit may be paid, out of the partnership assets and that any balance remaining of such assets, after such payment and discharge, and the payment of the said costs, may be divided between the plaintiff and defendant, according to the terms of the said articles [or deed, or agreement], or that, if the said assets shall prove insufficient, he the plaintiff and the said defendant may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment and discharge of such debts, liabilities, and costs. And to give such other relief as the Court shall think fit.

This plaint was filed by \_\_\_\_\_ of \_\_\_\_\_ pleader \_\_\_\_\_ for the plaintiff, [or by \_\_\_\_\_ ].

[N. B.—In suits for winding-up of any partnership, omit the prayer for dissolution : but instead thereof insert a paragraph stating the fact of the partnership having been dissolved.]

No. 114.

FORMS OF CONCISE STATEMENTS.

[Code of Civil Procedure, section 58.]

Money lent.	The plaintiff's claim is	rs. for money lent [and interest].
Several demands.	The plaintiff's claim is the price of goods sold, and for interest.	rs. whereof rs. is for rs. for money lent, and rs.
Rent.	The plaintiff's claim is	rs. for arrears of rent.
Salary, &c.	The plaintiff's claim is a clerk [or as the case may be].	rs. for arrears of salary as
Interest.	The plaintiff's claim is lent.	rs, for interest upon money
General average.	The plaintiff's claim is contribution.	rs. for a general average
Freight,	The plaintiff's claim is	rs. for freight and demurrage.

FORMS OF CONCISE STATEMENTS.—*continued.*

Banker's balance.	The plaintiff's claim is the defendant as a banker.	rs. for money deposited with
Fees, &c., as pleader.	The plaintiff's claim is [and rs., money expended] as a pleader.	rs. for fees for work done
Commission.	The plaintiff's claim is as [state character—as auctioneer, cotton-broker, &c.]	rs. for commission earned
Medical attendance.	The plaintiff's claim is	rs. for medical attendances.
Return of premium.	The plaintiff's claim is. paid upon policies of insurance.	rs. for a return of premium
Warehouse-rent.	The plaintiff's claim is goods.	rs. for the warehousing of
Carriage of goods.	The plaintiff's claim is by railway.	rs. for the carriage of goods
Use and occupation of house.	The plaintiff's claim is tion of a house.	rs. for the use and occupa-
Hire of goods.	The plaintiff's claim is ture].	rs. for the hire of [furni-
Work done.	The plaintiff's claim is veyor].	rs. for work done as a [sur-
Board and lodging.	The plaintiff's claim is	rs. for board and lodging.
Schooling.	The plaintiff's claim is and] tuition of X. Y.	rs. for the [board, lodging,
Money received.	The plaintiff's claim is the defendant as pleader [or factor, or collector, or &c.] of the plaintiff.	rs. for money received by
Fees of office.	The plaintiff's claim is defendant under colour of the office of	rs. for fees received by the
Money over-paid.	The plaintiff's claim is overcharged for the carriage of goods by railway.	rs. for a return of money
	The plaintiff's claim is charged by the defendant as	rs. for a return of fees over-
Return of money by stake-holder.	The plaintiff's claim is deposited with the defendant as stake-holder.	rs. for a return of money
Money won from stake-holder.	The plaintiff's claim is the defendant as stake-holder, and become payable to plaintiff.	rs. for money entrusted to
Money entrusted to agent.	The plaintiff's claim is trusted to the defendant as agent of the plaintiff.	rs. for a return of money en-
Money obtained by fraud.	The plaintiff's claim is obtained from the plaintiff by fraud.	rs. for a return of money



FORMS OF CONCISE STATEMENTS.—*continued.*

Money paid by mistake.	The plaintiff's claim is rs. for a return of money paid to the defendant by mistake.
Money paid for consideration which has failed.	The plaintiff's claim is rs. for a return of money paid to be defendant for [work to be done, or work left undone; or a bill to be taken up, or a bill not taken up, or, &c.].
Money paid by surety for defendant.	The plaintiff's claim is rs. for a return of money paid as a deposit upon shares to be allotted.
Rent paid.	The plaintiff's claim is rs. for money paid for the defendant as his surety.
Money paid on accommodation-bill.	The plaintiff's claim is rs. for money paid for the rent due by the defendant.
Contribution by surety.	The plaintiff's claim is rs. upon a bill of exchange accepted [or indorsed] for the defendant's accommodation.
By co-debtor.	The plaintiff's claim is rs. for a contribution in respect of money paid by the plaintiff as surety.
Money paid for calls.	The plaintiff's claim is rs. for a contribution in respect of a joint debt of the plaintiff and the defendant, paid by the plaintiff.
Money payable under award.	The plaintiff's claim is rs. for money paid for calls upon shares against which the defendant was bound to indemnify the plaintiff.
Life-policy.	The plaintiff's claim is rs. for money payable under an award.
Money-bond.	The plaintiff's claim is rs. upon a policy of insurance upon the life of X. Y., deceased.
Foreign judgment.	The plaintiff's claim is rs. upon a bond to secure payment of rs. and interest.
Bills of exchange, &c.	The plaintiff's claim is rs. upon a judgment of the Court in [the Empire of Russia].
	The plaintiff's claim is rs. upon a cheque drawn by the defendant.
	The plaintiff's claim is rs. upon a bill of exchange accepted [or drawn, or indorsed] by the defendant.
	The plaintiff's claim is rs. upon a promissory note made [or indorsed] by the defendant.
	The plaintiff's claim is rs. against the defendant, A. B., as acceptor, and against the defendant, C. D., as drawer [or indorser] of a bill of exchange.
Surety.	The plaintiff's claim is rs. against the defendant as surety for the price of goods sold.
	The plaintiff's claim is rs. against the defendant, A. B., as principal and against the defendant, C. D., as

FORMS OF CONCISE STATEMENTS.—*continued.*

surety, for the price of goods sold [or for arrears of rent, or for money lent, or for money received by the defendant, A. B., as traveller for the plaintiff, or, &c.]

**Calls.** The plaintiff's claim is        rs. for calls upon shares.

*Indorsements for Costs, &c.*

[Add to the above forms] and        rs. for costs; and if the amount claimed be paid to the plaintiff or his pleader within        days [or, if the summons is to be served out of the jurisdiction, insert the time for appearance limited by the order] from the service hereof, further proceedings will be stayed.

*Damages and other Claims.*

**Agent,** The plaintiff's claim is for damages for breach of a contract to employ the plaintiff as traveller.

The plaintiff's claim is for damages for wrongful dismissal from the defendant's employment as traveller [and rs. for arrears of wages.]

The plaintiff's claim is for damages for the defendant's wrongfully quitting the plaintiff's employment as manager.

The plaintiff's claim is for damages for breach of duty as factor [or, &c.] of the plaintiff [and        rs. for money received as factor, or, &c.]

**Apprentices.** The plaintiff's claim is for damages for breach of the terms of a deed of apprenticeship of X. Y. to the defendant [or plaintiff].

**Arbitration.** The plaintiff's claim is for damages for non-compliance with the award of X. Y.

**Assault, &c.** The plaintiff's claim is for damages for assault [and false imprisonment, and for malicious prosecution.]

**By husband and wife.** The plaintiff's claim is for damages for assault and false imprisonment of the plaintiff, C. D.

**Against husband & wife.** The plaintiff's claim is for damages for assault by the defendant, C. D.

**Pleader.** The plaintiff's claim is for damages for injury by the defendant's negligence as pleader of the plaintiff.

**Bailment.** The plaintiff's claim is for damages for negligence in the custody of goods [and for wrongfully detaining the same.]

**Pledge.** The plaintiff's claim is for damages for negligence in the keeping of goods pawned [and for wrongfully detaining the same.]

**Hire.** The plaintiff's claim is for damages for negligence in the custody of furniture [or a carriage] lent on hire [and for wrongfully, &c.]

**Banker.** The plaintiff's claim is for damages for wrongfully neglecting [or refusing] to pay the plaintiff's cheque.

**Bill.** The plaintiff's claim is for damages for breach of a contract to accept the plaintiff's drafts.

## THE FOURTH SCHEDULE.

### FORMS OF CONCISE STATEMENTS.—*continued.*

Bond.	The plaintiff's claim is upon a bond conditioned not to carry on the trade of a .
Carrier.	<p>The plaintiff's claim is for damages for refusing to carry the plaintiff's goods by railway.</p> <p>The plaintiff's claim is for damages for refusing to carry the plaintiff by railway.</p> <p>The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of coals by railway.</p> <p>The plaintiff's claim is for damages for breach of duty in and about the carriage and delivery of machinery by sea.</p>
Charter-party.	The plaintiff's claim is for damages for breach of charter-party of ship [ <i>Mary.</i> ]
Claim for return of goods; damages.	The plaintiff's claim is for return of household furniture [ <i>or, &amp;c.</i> ] of their value, and for damages for detaining the same.
Damages for depriving of goods.	The plaintiff's claim is for wrongfully depriving plaintiff of goods, household furniture, &c.
Defamation.	<p>The plaintiff's claim is for damages for libel.</p> <p>The plaintiff's claim is for damages for slander.</p>
Wrongful distress.	<p>The plaintiff's claim is for damages for improperly distraining.</p> <p>[<i>This Form shall be sufficient, whether the distress complained of be wrongful, or excessive, or irregular.</i>]</p>
Ejectment.	<p>The plaintiff's claim is to recover possession of a house No. ., in Street, or of a farm, called Blackcare, situate in the of in the of .</p>
To establish title and recover rents.	<p>The plaintiff's claim is to establish his title to [<i>here describe property,</i>] and to recover the rents thereof.</p> <p>[<i>The two previous Forms may be continued.</i>]</p>
Fishery.	The plaintiff's claim is for damages for infringement of the plaintiff's right of fishing.
Fraud.	<p>The plaintiff's claim is for damages for fraudulent misrepresentation on the sale of a horse [<i>or a business, or shares, or, &amp;c.</i>]</p> <p>The plaintiff's claim is for damages for fraudulent misrepresentation of the credit of A. B.</p>
Guarantee.	<p>The plaintiff's claim is for damages for breach of a contract of guarantee for A. B.</p> <p>The plaintiff's claim is for damages for breach of a contract to indemnify the plaintiff as the defendant's agent to distrain.</p>
Insurance.	The plaintiff's claim is for a loss under a policy upon the ship [ <i>Royal Charter,</i> ] and freight of cargo [ <i>or for return of premiums</i> ]

## THE FOURTH SCHEDULE.

FORMS OF CONCISE STATEMENTS.—*continued.*

*[This Form shall be sufficient, whether the loss claimed be total or partial.]*

**Fire insurance.**

The plaintiff's claim is for a loss under a policy of fire-insurance upon house and furniture.

The plaintiff's claim is for damages for breach of a contract to insure a house.

**Landlord and tenant.**

The plaintiff's claim is for damages for breach of a contract to keep a house in repair.

**Landlord and tenant.**

The plaintiff's claim is for damages for breach of covenants contained in a lease of a farm.

**Medical man.**

The plaintiff's claim is for damages for injury to the plaintiff from the defendant's negligence as a medical man.

**Mischievous animal.**

The plaintiff's claim is for damages for injury by the defendant's dog.

**Negligence.**

The plaintiff's claim is for damages for injury to the plaintiff by the negligent driving of the defendant or his servants.

The plaintiff's claim is for damages for injury to the plaintiff while a passenger on the defendant's railway by the negligence of the defendant's servants.

The plaintiff's claim is for damages for injury to the plaintiff at the defendant's railway station from the defective condition of the station.

**Act XIII of 1855.**

The plaintiff's claim is as executor of A. B., deceased, damages for the death of the said A. B., from injuries received while a passenger on the defendant's railway, by the negligence of the defendant's servants.

**Promise of marriage.**

The plaintiff's claim is for damages for breach of promise of marriage.

**Sale of goods.**

The plaintiff's claim is for damages for breach of contract to accept and pay for goods.

The plaintiff's claim is for damages for non-delivery [*or short delivery, or defective quality, or other breach of contract of sale*] of cotton [*or, &c.*].

The plaintiff's claim is for damages for breach of warranty of a horse.

**Sale of land.**

The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] land.

The plaintiff's claim is for damages for breach of a contract to let [*or take*] a house.

The plaintiff's claim is for damages for breach of a contract to sell [*or purchase*] the lease, with good-will, fixtures, and stock-in-trade of a public-house.

The plaintiff's claim is for damages for breach of covenant for title [*or for quiet enjoyment, or, &c.*] in a conveyance of land.

FORMS OF CONCISE STATEMENTS.—*continued.*

Trespass on land.	The plaintiff's claim is for damages for wrongfully entering the plaintiff's land and drawing water from his well [or cutting his grass, or felling his timber, or pulling down his fences, or removing his gate, or using his road or path, or crossing his field, or depositing sand there, or carrying away gravel from thence, or carrying away stones from his river].
Support.	The plaintiff's claim is for damages for wrongfully taking away the support of plaintiff's land [or house, or mine.]
Way.	The plaintiff's claim is for damages for wrongfully obstructing a way [public highway or private way.]
Water-course,	The plaintiff's claim is for damages for wrongfully diverting [or obstructing, or polluting, or diverting, water from] a water-course.
	The plaintiff's claim is for damages for wrongfully discharging water upon the plaintiff's land [or into the plaintiff's mine].
	The plaintiff's claim is for damages for wrongfully obstructing the plaintiff's use of a well.
Pasture.	The plaintiff's claim is for damages for the infringement of the plaintiff's right of pasture. [ <i>This Form shall be sufficient, whatever the nature of the right to pasture be.</i> ]
Light.	The plaintiff's claim is for damages for obstructing the access of light to plaintiff's house.
Patent.	The plaintiff's claim is for damages for the infringement of the plaintiff's patent.
Copy-right.	The plaintiff's claim is for damages for the infringement of the plaintiff's copy-right.
Trade-mark.	The plaintiff's claim is for damages for wrongfully using [or imitating] the plaintiff's trade-mark.
Work.	The plaintiff's claim is for damages for breach of a contract to build a ship [or to repair a house, &c.] The plaintiff's claim is for damages for breach of a contract to employ the plaintiff to build a ship, &c.
Nuisance.	The plaintiff's claim is for damages to his house, trees, crops, &c., caused by noxious vapours from the defendant's factory [or, &c.] The plaintiff's claim is for damages nuisance by noise from the defendant's works [or stables, or, &c.]. [ <i>Add to indorsement</i> ] :—and for an injunction. [ <i>Add to indorsement where claim is to land, or to establish title, or both</i> ] :—
Injunction.	
Mesne-profits.	and for mesne-profits.
Arrears of rent.	and for an account of rents or arrears of rent.

## THE FOURTH SCHEDULE.

FORMS OF CONCISE STATEMENTS.—*continued.*Breach of  
covenant.

and for breach of covenant for [repairs].

1. *Creditor to administer Estate.*

The plaintiff's claim is as a creditor of X. Y., of , deceased, to have the moveable and immoveable property, of the said X. Y., administered. The defendant, C. D., is sued as the administrator of the said X. Y. [and the defendants, E. F. and G. H., as his co-heirs at-law].

2. *Legatee to administer Estate.*

The plaintiff's claim is as a legatee under the will dated the      day of      18      , of X. Y., deceased, to have the moveable and immoveable property of the said X. Y. administered. The defendant, C. D., is sued as the executor of the said X. Y. [and the defendants, E. F. and G. H., as his devisees].

3. *Partnership.*

The plaintiff's claim is to have an account taken of the partnership-dealings between the plaintiff and defendant [under articles of partnership dated the      day of      ], and to have the affairs of the partnership wound up.

4. *By Mortgage.*

The plaintiff's claim is to have an account taken of what is due to him for principal, interest, and costs on a mortgage dated the      day of      , made between [parties] [or by deposit of title-deeds], and that the mortgage may be enforced by foreclosure or sale.

5. *By Mortgagor.*

The plaintiff's claim is to have an account taken of what, if anything, is due on a mortgage, dated      , and made between [parties], and to redeem the property comprised therein.

6. *Raising Portions.*

The plaintiff's claim is that the sum of      rs., which by a deed of settlement, dated      , was provided for the portions of the younger children of      , may be raised.

7. *Execution of Trusts.*

The plaintiff's claim is to have the trusts of an indenture, dated      , and made between [parties], carried into execution.

8. *Cancellation or Rectification.*

The plaintiff's claim is to have a deed, dated      , and made between [parties], set aside or rectified.

9. *Specific Performance.*

The plaintiff's claim is for specific performance of an agreement, dated the      day of      , for the sale by the plaintiff to the defendant of certain [freehold] hereditaments at      .



## THE FOURTH SCHEDULE.

liii

FORMS OF CONCISE STATEMENTS.—*continued.*

**No. 115.**

**PROBATE.**

**1.** *By an executor or legatee propounding a will in solemn form.*

The plaintiff claims to be executor of the last will, dated the      day of      , of C. D., late of      , deceased, who died on the      day of      , and to have the said will established. The summons is issued against you as one of the next-of-kin of the said deceased [*or as the case may be*].

**2.** *By an executor or legatee of a former will, or a next-of-kin, &c., of the deceased, seeking to obtain the revocation of a probate granted in common form.*

The plaintiff claims to be executor of the last will, dated the      day of      , of C. D., late of      , deceased, who died on the      day of      , and to have the probate of a pretended will of the said deceased, dated the      day of      , revoked. This summons is issued against you as the executor of the said pretended will [*or as the case may be*].

**3.** *By an executor, or a legatee of a will when letters of administration have been granted as in an intestacy.*

The plaintiff claims to be executor of the last will of C. D., late of      , deceased, who died on the      day of      , dated the      day of      .

The plaintiff claims that the grant of letters of administration of the estate of the said deceased obtained by you should be revoked, and probate of the said will granted to him.

**4.** *By a person claiming a grant of administration as a next-of-kin of the deceased, but whose interest as next-of-kin is disputed.*

The plaintiff claims to be the brother and sole next-of-kin of C. D., of      , deceased, who died on the      day of      , intestate, and to have as such a grant of administration of the personal estate of the said intestate. This writ is issued against you because you have entered a caveat, and have alleged that you are the sole next-of-kin of the deceased [*or as the case may be*].

## THE FOURTH SCHEDULE.

## F.—MISCELLANEOUS.

**No. 118.**

**Section 58 of the Code of Civil Procedure.**

**Court of the                      of                      holden at  
REGISTER OF CIVIL SUITS in the year 18 .**

PLAINTIFF.		DEFENDANT.	CLAIM.	APPEARANCE.	JUDGMENT.	APPEAL.	EXECUTION.	RETURN OF EXECUTION.
Name.	Description.	Place of abode.	Particulars.	Amount or value.	When the cause of action accrued.	Day for parties to appear.	Plaintiff.	Defendant.
							Date.	For whom.
							For what, or amount.	Date of appeal.
							Judgment in appeal.	Date of order.
							Against whom.	For what, and amount of money.
							Amount of Costs.	Amount paid into Court.
							Arrested.	Minute of other Return than Payment or Arrest, and date of every Return.

## THE FOURTH SCHEDULE.

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### No. 117.

#### SUMMONS FOR DISPOSAL OF SUIT.

Sections 64 and 68 of the Code of Civil Procedure.

(Title.)

To

dwelling at

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the court at any time before the trial, on your depositing their necessary subsistence-money.

2. If you admit the demand, you should pay the money into Court, with the costs of the suit, to avoid the summary execution of the decree, which may be against your person or property, or both, if necessary.

WHEREAS has instituted a suit against you for , you are hereby summoned to appear in this Court, in person or by a duly authorized pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions, on the day of 18 , at o'clock in the forenoon, to answer the above-named plaintiff; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence; and you will bring with you, or send by your pleader, which the plaintiff desires to inspect, and any documents on which you intended to rely in support of your defence.

GIVEN under my hand and the seal of the Court this day of 18 .

[L. S.]

Judge.

NOTE.—If written statements are required, say—You are [or such a party is, as the case may be] required to put in a written statement by the day of .

### No. 118.

#### SUMMONS FOR SETTLEMENT OF ISSUES.

Sections 64 and 68 of the Code of Civil Procedure.

(Title.)

To

dwelling at

NOTICE.—1. Should you apprehend your witnesses will not attend of

WHEREAS has instituted a suit against you for , you are hereby summoned to appear in this Court in person

## THE FOURTH SCHEDULE.

their own accord, you can have summonses from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court at any time before the trial, on your depositing their necessary subsistence-money.

2. If you admit the demand, you should pay the money into Court, with the costs of the suit, to avoid the summary execution of the decree, which may be against your person or property, or both, if necessary.

or by a duly authorized pleader of the Court, duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions on      , the      day of 18      , at o'clock in the forenoon, to answer the above-named plaintiff; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the issues will be settled in your absence; and you will bring with you, or send by your pleader,      , which the plaintiff desires to inspect and any document on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court this      day of      18      .

[L. S.]

*Judge.*

NOTE.—If written statements are required, say—You are [or such a party is, as the case may be] required to put in a written statement by the day of      .

## No. 119.

## SUMMONS TO APPEAR.

· Section 68 of the Code of Civil Procedure.

No. OF SUIT.

IN THE COURT OF

AT

To

Plaintiff.

Defendant.

[Name, description, and address.]

WHEREAS [here enter the name, description, and address of the plaintiff] has instituted a suit in this Court against you [here state the particulars of the claim as in the register]: you are hereby summoned to appear in this Court in person on the      day of      at      in the forenoon [if not specially required to appear in person, state—"in person or by a pleader of the Court duly instructed and able to answer all material questions relating to the suit, or who shall be accompanied by some other person able to answer all such questions"] to answer the above-named plaintiff. [If the summons be for the final disposal of the suit, this further direction shall be add-

## THE FOURTH SCHEDULE.

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*ed here—*“ and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce all your witnesses on that day”]; and you are hereby required to take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence; and you will bring with you [or send by your agent] *here mention any document the production of which may be required by the plaintiff*]; which the plaintiff desires to inspect, and any document on which you intend to rely in support of your defence.

GIVEN under my hand and the seal of the Court, this      day of      18      .

[L. S.]

*Judge.*

### No. 120.

#### ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT.

##### Section 85 of the Code of Civil Procedure.

IN THE COURT OF

AT

Civil Suit, No.

of 18      .

A. B., of

*against*

C. D., of

The      day of      18      .

WHEREAS it is stated in the plaint that      , the defendant in the above suit      , is at present residing in      , but that the right to sue accrued within the jurisdiction of this Court : it is ordered that a summons returnable on the      day of      18      , be forwarded for service on the said defendant, to the Court of      , with a duplicate of this proceeding.

[L. S.]

*Judge.*

### No. 121.

#### TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT.

##### Section 85 of the Code of Civil Procedure.

IN THE COURT OF

AT

Civil Suit, No.

of 18      .

The      day of      18      .

A. B., of

*against*

C. D., of

Read the proceeding from the      forwarding      for service on      in Civil      No.      of that Court.

Read bailiff's endorsement on the back of the process stating that the      and proof of the above having been duly taken by me on the [oath or] affirmation of      and      , it is ordered that the      be returned to the      with a copy of this proceeding.

[L. S.]

*Judge.*

**NOTE.**—*This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.*

**No. 122.****DEFENDANT'S STATEMENT.****Section 110 of the Code of Civil Procedure.**

(Title.)

I, the undersigned defendant [*or one of the defendants*], disclaim all interest under the will of the said E. F., in the plaint named [*or as heir-at-law, or as next-of-kin, or one of the next-of-kin, of E. F., deceased, in the said plaint named*].

*Or*, I, the undersigned defendant, state that I admit [*or deny*] *here repeat in the language of the plaint the statement's admitted or denied*.

*Or*, I, the undersigned defendant, submit that, upon the facts stated in the plaint, it does not appear that there is any agreement which can be legally enforced [*or that it appears upon the said plaint that I am jointly liable with one E. F., who is not a party to the suit, and not severally liable as by the plaint appears, [or that it appears by the said plaint that G. H. should have been a joint plaintiff with the said A. B. in the said suit, or as the case may be.]*

*Or*, that the plaintiff has conveyed his interest in the said mortgage [*or right to redeem*] to one I. J. [*or that I have conveyed or assigned to H. L., by way of further charge for securing the sum of Rs. , the right to redeem in the property sought by the suit to be foreclosed*].

*Or*, that since the dissolution of the partnership the plaintiff has executed an instrument, whereby the plaintiff covenants to discharge all debts and liabilities of the partnership, and generally to release me from all claims and liabilities either by or to himself and others in respect of the said partnership-trading [*or as the case may be*].

(Signed) C. D.  
Defendant.

**No. 123.****INTERROGATORIES.****Section 121 of the Code of Civil Procedure.**

IN THE COURT OF AT  
Civil Suit, No.

18 .

A. B.

against

C. D., E. F., and G. H.

Interrogatories on behalf of the above-named A. B. [*or C. D.*] for the examination of the above-named [E. F. and G. H., *or A. B.*]

1. Did not, &c.

2. Has not, &c.

The defendant E. F. is required to answer the interrogatories, numbered .

The defendant G. H. is required to answer the interrogatories numbered .



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### No. 124.

#### FORM OF NOTICE TO PRODUCE DOCUMENTS.

#### Section 131 of the Code of Civil Procedure.

IN THE COURT OF  
Civil Suit, No.

AT  
of 18 .

A. B.  
*against*  
C. D.

Take notice that the plaintiff [*or* defendant] requires you to produce for his inspection the following documents referred to in your plaint [*or* written statement *or* affidavit], dated the      day of      18 .

*Describe documents required.*

X. Y., Pleader for the plaintiff [*or* the defendant].

To Z.,

Pleader for the defendant [*or* plaintiff].

### No. 125.

#### SUMMONS TO ATTEND AND GIVE EVIDENCE.

#### Sections 159 and 163 of the Code of Civil Procedure.

(Title.)

To

WHEREAS your attendance is required to      on behalf of the      in the above cause, you are hereby required [personally to appear before this Court] on the      day of      18 , at the hour of      A. M. [and] to bring with you or to send to this Court .

A sum of Rs.      , being your travelling and other expenses and subsistence-allowance for one day, is herewith sent. If you do not comply with this order, you will be subject to the consequence of non-attendance laid down in the Code of Civil Procedure, section 170.

NOTICE.—(1.) If you are summoned only to produce a document, and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2.) If you are to be detained beyond the day aforesaid, a sum of Rs.      will be tendered to you for each day's attendance beyond the day specified.

GIVEN under my hand and the seal of the Court, this      day of      18 .

*Judge.*

### No 126.

*Another Form.*

No. OF SUIT.

IN THE COURT OF

AT

Plaintiff.  
Defendant.

## THE FOURTH SCHEDULE.

To

[Name, description, and address.]

You are hereby summoned to appear in this Court in person on the day of at in the forenoon, to give evidence in behalf of the plaintiff [or the defendant] in the above-mentioned suit, and to produce [here describe with convenient certainty any document the production of which may be required. If the summons be only to give evidence, or if it be only to produce a document, it must be expressed accordingly], and you are not to depart thence until you have been examined [or have produced the document] and the Court has risen, or unless you have obtained the leave of the Court.

## FORMS OF DECREES.

No. 127.

## SIMPLE MONEY-DECREE.

(Title.)

Claim for

THIS cause coming on for final disposal before in the presence of , on the part of the plaintiff, and on the part of the defendant, it is ordered that the do pay to the the sum of Rs. , with interest thereon at the rate of per cent. per from to the date of realization of the said sum, and do also pay to the the costs of this suit as taxed by the officer of the Court, with interest thereon at the rate aforesaid from the date of taxation to the date of realization.

Costs of Suit.

PLAINTIFF.

DEFENDANT.

	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ... ..				Stamp for power ... ..			
2. Do. for power ... ..				Do. petition ... ..			
3. Do. exhibits ... ..				Pleader's fee ... ..			
4. Pleader's fees on Rs. ... ..				Subsistence for witnesses ... ..			
5. Translation-fee ... ..				Service of process ... ..			
6. Subsistence for witness for attendance ... ..				Translation fee ... ..			
7. Commissioner's fee ... ..				Commissioner's fee ... ..			
8. Service of process ... ..							
9. &c. ... ..							
TOTAL ... ..				TOTAL ... ..			

GIVEN under my hand and the seal of the Court, this day of 18  
[L. S.]  
Judge.

No. 128.

DECREE FOR SALE IN A SUIT BY A MORTGAGEE OR PERSON ENTITLED TO A LIEN.  
(Title.)

It is ordered that it be referred to the Registrar [or Taxing Officer] to take an account of what is due to the plaintiff for principal and interest on

the mortgage [*or* lien] mentioned in the plaint, and to tax the plaintiff's costs of this suit, and that the Registrar [*or* Taxing Officer] do declare in Court on the            day of            what he shall find to be due for principal and interest as aforesaid, and for costs ; And upon the defendant paying into Court what shall be certified to be due to the plaintiff for principal and interest as aforesaid, together with the said costs, within six months from the date of declaring in Court the amount so due ; it is ordered that the plaintiff do re-convey the said mortgaged premises free and clear from all incumbrances done by him, or any claiming by, from, or under, him, and do deliver up to the defendant or to such person as he appoints all documents in his custody or power relating thereto, and that upon such re-conveyance being made, and documents being delivered up, the Registrar [*or* Taxing Officer] shall pay out to the plaintiff the said sum so paid in as aforesaid for principal, interest, and costs ; but in default of the defendant paying into Court such principal, interest, and costs as aforesaid by the time aforesaid, then it is ordered that the said mortgaged premises [*or* the premises subject to the said lien] be sold with the approbation of the Registrar [*or* Taxing Officer]. And it is ordered that the proceeds of such sale (after defraying thereout the expenses of the sale) be paid into Court, to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest, and costs as aforesaid, and that the balance (if any) shall be paid to the defendant or other person entitled to receive the same.

No. 129.

FINAL DECREE FOR FORECLOSURE.  
(Title.)

WHEREAS it appears to the Court that the defendant has not paid into Court the sum           , which was, on the            day of            last, declared in Court to be due to the plaintiff for principal and interest upon the mortgage in the plaint mentioned, and for costs, pursuant to the order made in this suit on the            day of            last, and that the period of six months has elapsed since the said            day of            : It is ordered that the defendant do stand absolutely debarred of all right to redeem the said mortgaged premises.

No. 130.

PRELIMINARY ORDER-ADMINISTRATION-SUIT.  
Section 213 of the Code of Civil Procedure.  
(Title.)

It is ordered that the following accounts and inquiries be taken and made ; that is to say :—

*In creditor's suit—*

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

*In suits by legatees—*

2. An account be taken of the legacies given by the testator's will.

*In suits by next-of-kin—*

An inquiry be made and account taken of what, or of what share, if any, the plaintiff is entitled to as next-of-kin [*or* one of the next-of-kin] of the intestate.

## THE FOURTH SCHEDULE.

*[After the first paragraph the Order will, where necessary order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law, and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph, and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]*

3. An account of the funeral and testamentary expenses.

4. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

5. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

6. And it is further ordered that the defendant do, on or before the day of            next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or to his use.

7. And that, if the Registrar shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

8. And that Mr. E. F. be Receiver in the suit [or proceeding], and receive and get in all outstanding debts and outstanding movable property of the deceased, and pay the same into the hands of the Registrar, [and shall give security by bond for the due performance of his duties to the amount of    rupees]. ●

9. And it is further ordered that, if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say,—

(a) an enquiry what immoveable property the deceased was seized of or entitled to at the time of his death ;

(b) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased, or any part thereof ;

(c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

10. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

11. And it is ordered that G. H. shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the Registrar, and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

12. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the Registrar shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the Registrar to give the most useful publicity to such inquiries.

13. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before

the            day of            , and that the Registrar do certify the result of the inquiries and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the            day of            .

14. And, lastly, it is ordered that this suit [or matter] stand adjourned for making final decree to the            day of            .

[Such part only of this order is to be used as is applicable to the particular case.]

**No. 131.**

**FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.**

**Section 213 of the Code of Civil Procedure.**

1. It is ordered that the defendant            do on or before the            day of            , pay into Court the sum of Rs.            , the balance by the said certificate found to be due from the said defendant on account of the estate of            , the testator, and also the sum of Rs.            for interest, at the rate of Rs.            per centum per annum, from the            day of            to the            day of            , amounting together to the sum of Rs.            .

2. Let the Registrar [or Taxing Officer] of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs.            ordered to be paid into Court as aforesaid, as follows :—

(a)—The costs of the plaintiff to Mr.            , his attorney\* [or pleader], and the costs of the defendant to Mr.            , his attorney [or pleader].

(b)—And (if any debts are due) with the residue of the said sum of Rs.            after payment of the plaintiff's and defendant's costs as aforesaid, let the sums found to be owing to the several creditors mentioned in the            schedule to the Registrar's certificate, together with subsequent interest on such of the debts as bear interest, be paid; and after making such payments, let the amount coming to the several legatees mentioned in the            schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

**DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.**

**Section 213 of the Code of Civil Procedure.**

1. Declare that the defendant is personally liable to pay the legacy of Rs.            , bequeathed to the plaintiff;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy;

3. And it is also ordered that the defendant do, within            weeks after the date of the Registrar's certificate, pay to the plaintiff the amount of what the Registrar shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

## FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

## Section 213 of the Code of Civil Procedure.

1. Let the Registrar of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of E. F., the intestate, within one week after the taxation of the said costs by the said Registrar, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows :—

(a)—Let the defendant, within one week after the taxation of the said costs by the Registrar as aforesaid, pay one-third share of the said residue to the plaintiff's, A. B, and C., has wife, in her right, as the sister and one of the next-of-kin of the said E. F., the intestate.

(b)—Let the defendant retain for her own use one other third share of the said residue, as the mother, and one other of the next-of-kin of the said E. F., the intestate.

(c)—And let the defendant, within one week after the taxation of the said costs by the Registrar as aforesaid, pay the remaining one third share of the said residue to G. H., as the brother and the other next-of-kin of the said E. F., the intestate.

## 132.

## ORDER—DISSOLUTION OF PARTNERSHIP.

## Section 215 of the Code of Civil Procedure.

(Title.)

It is declared that the partnership in the plaint mentioned between the plaintiff and defendant ought to stand dissolved as from the day of , and it is ordered that the dissolution thereof as from that day be advertised in the *Gazette, &c.*

And it is ordered that be the Receiver of the partnership-estate and effects in this suit, and do get in all outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property, and effects now belonging to the said partnership.

2. An account of the debts and liabilities of the said partnership ;

3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit, and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the good-will of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the Registrar may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken and all the other acts required to be done be completed before the day of , and



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And, lastly, it is ordered that this suit stand adjourned for making a final decree to the            day of            .

A. B., of  
against  
C. D., of

And that the defendant [or plaintiff] do, on or before the      day of      ,  
pay to the plaintiff [or defendant] the sum of Rs.      being the balance  
of the said sum of Rs.      due to him, which will then remain due.

of 18 .  
A B., of  
*against*  
C. D., of

[L. S.]  
Judge.

## THE FOURTH SCHEDULE.

## No. 135.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE.

Section 248 of the Code of Civil Procedure.

IN THE COURT OF

AT

Civil Suit, No.

of 18 .

Miscellaneous, No.

of 18 .

A. B., of

against

C. D., of

To

WHEREAS has made application to this court for execution of decree in Civil Suit No. 18 , this is to give you notice that you are to appear before this court on the day of 18 , either in person, or by a pleader of this court, or agent duly authorized and instructed, to show cause, if any, why execution should not be granted.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

Judge.

## 136.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN DEFENDANT'S POSSESSION IN EXECUTION OF A DECREE FOR MONEY.

Section 254 of the Code of Civil Procedure.

(Title.)

TO THE BAILIFF OF THE COURT.

WHEREAS

was ordered by decree of this court, passed on the

DECREE.						
Principal	...	...				
Interest	...	...				
Costs	...	...	...			
Costs of decree	...					
Interest thereon	...					
Total of attachment	...					
TOTAL...						

day of 18 , in Suit No. of 18 , to pay to the plaintiff the sum of Rs. as noted in the margin; and whereas the said sum of Rs. has not been paid.

THESE ARE TO COMMAND YOU to attach the moveable property of the said as set forth in the list hereunto annexed, or which shall be pointed out to you by the said , and unless the said shall pay to you the said sum of Rs. , together with Rs. , the costs of this attachment, to hold the same until further orders from this court.

YOU ARE FURTHER COMMANDED to return this warrant on or before the

day of 18 , with an endorsement certifying the date and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the court, this day of 18 .

Schedule.

[L. S.]

Judge.

## THE FOURTH SCHEDULE.

### No. 137.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, &c.  
Sections 263 of the Code of Civil Procedure.

(Title.)

TO THE BAILIFF OF THE COURT.

WHEREAS , in the occupancy of , has been decreed to the plaintiff in this suit : you are hereby directed to put the said in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

Judge.

### No. 138.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF  
MOVEABLE PROPERTY, TO WHICH THE DEFENDANT IS ENTITLED SUBJECT  
TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE  
POSSESSION THEREOF.

Section 268 of the Code of Civil Procedure.

(Title.)

To

WHEREAS has failed to satisfy a decree passed against on the day of 18 , in favour of for Rs. : it is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said , that is to say, to which the defendant is entitled, subject to any claim of the said , and the said is hereby prohibited and restrained until the further order of this court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

Judge.

### No. 139.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS  
NOT SECURED BY NEGOTIABLE INSTRUMENTS.

Section 268 of the Code of Civil Procedure.

(Title.)

To

WHEREAS has failed to satisfy a decree passed against on the day of 18 , in Civil Suit, No. of 18 , in favour of for Rs. : it is ordered that the defendant be, and hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said de-

## THE FOURTH SCHEDULE.

fendant, namely,                      and that you, the said                      be, and you are hereby, prohibited and restrained, until the further order of this court, from making payment of the said debt, or any part thereof, to any person whomsoever.

GIVEN under my hand and the seal of the court, this                      day of 18 .

[L. S.]  
*Judge.*

### No. 140.

#### ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES  
IN A PUBLIC COMPANY, &C.

Section 268 of the Code of Civil Procedure.

(Title.)

Defendant, and to                      Manager of  
Company.

WHEREAS                      has failed to satisfy a decree passed against                      on the day of                      18 , in Civil Suit, No.                      of 18 , in favour of                      for Rs.                      : it is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this court, from making any transfer of                      shares in the aforesaid Company, namely,                      , or from receiving payment of any dividends thereof; and you                      , the Manager of the said Company, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the court, this                      day of 18 .

[L. S.]  
*Judge.*

### No. 141.

#### ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF  
IMMOVEABLE PROPERTY.

Section 274 of the Code of Civil Procedure.

(Title.)

To                      Defendant.

WHEREAS you have failed to satisfy a decree passed against you on the day of                      18 , in Civil Suit, No.                      of 18 , in favour of                      for Rs.                      : it is ordered that you, the said                      , be, and you are hereby, prohibited and restrained, until the further order of this court, from alienating the property specified in the schedule hereunto annexed, by sale, gift, or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift, or otherwise.

GIVEN under my hand and the seal of the court, this                      day of 18 .

*Schedule.*

[L. S.]  
*Judge.*

THE FOURTH SCHEDULE.

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No. 142.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR  
OF ANY SECURITY IN THE HANDS OF A COURT OR JUSTICE  
OR OFFICER OF GOVERNMENT.

Sections 272 and 486 of the Code of Civil Procedure.

IN THE COURT OF

AT .

Civil Suit, No.

of 18

A. B., of

against

C. D., of

SIR,

THE plaintiff having applied, under section of the Code of Civil  
Procedure for an attachment of certain money now in your hands (*here state  
how the money is supposed to be in the hands of the person addressed, on what  
account &c.*), I request that you will hold the said money subject to the  
further order of the court.

I have the honour to be,

SIR,

Your most obedient servant,

Dated the day of 18 .

[L. S.]

Judge.

No. 143.

ORDER FOR PAYMENT TO THE PLAINTIFF, &C., OF MONEY, &C., IN  
THE HANDS OF A THIRD PARTY.

Sections 277 of the Code of Civil Procedure.

IN THE COURT OF

AT .

Civil Suit, No.

of 18 .

Miscellaneous, No. of 18 .

A. B., of

against

C. D., of

TO THE BAILIFF OF THE COURT AND TO

WHEREAS the following property has been attached in execution of  
a decree in Civil Suit, No. of 18 , passed on the day of 18 ,  
in favour of for Rs. : it is ordered that the property so attached,  
consisting of Rs. in money, and Rs. in currency-notes, or a  
sufficient part thereof to satisfy the said decree, shall be paid over by you  
the said , to , and that the said property, so far as may be necessary  
for the satisfaction of the said decree, shall be sold by you, the bailiff of  
the court, by public auction, in the manner prescribed for sale in execution  
of decrees, and that the money which may be realized by such sale, or a  
sufficient part thereof, to satisfy the said decree, shall be paid over to the  
said , and the remainder if any, shall be paid to you, the said.

under my hand and the seal of the court, this day of 18 .

Judge.

## THE FOURTH SCHEDULE.

## No. 144.

## NOTICE TO ATTACHING CREDITOR.

## Section 278 of the Code of Civil Procedure.

IN THE COURT OF AT  
 Civil Suit, No. of 18 .  
 Miscellaneous, No. of 18 .  
 A. B., of  
*against*  
 C. D., of

To

WHEREAS has made application to this court for the removal of attachment on , placed at your instance in execution of the decree in Civil Suit No. of 18 , this is to give you notice to appear before this court on , the day of , 18 , either in person or by a pleader of the court duly instructed, to support your claim as attaching creditor.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

## No. 145.

Judge.

## WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY.

## Section 287 of the Code of Civil Procedure.

IN THE COURT OF AT  
 Civil Suit, No. of 18 .  
 Miscellaneous, No. of 18 .  
 A. B., of  
*against*  
 C. D., of

## TO THE BAILIFF OF THE COURT.

THESE ARE TO COMMAND YOU to sell by auction, after giving days' previous notice, by affixing the same in this court-house, and after making due proclamation,\* the property attached under a warrant from this court, dated the day of 18 , in execution of a decree in favour of , in Suit No. of 18 , or so much of the said property as shall realize the sum of Rs. , being the of the said decree and costs still remaining unsatisfied.

YOU ARE FURTHER COMMANDED to return this warrant on or before the day of 18 , with an endorsement certifying the manner which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

Judge.

## No. 146.

## NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN EXECUTION.

## Section 300 of the Code of Civil Procedure.

\* This proclamation shall specify the time, the place of sale, the property to be the revenue assessed, should the property consist of land paying revenue to Government, and the amount for the recovery of which the sale is ordered, and as fairly and accurately as possible the other particulars required by section 287 to be specified.



THE FOURTH SCHEDULE.

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IN THE COURT OF  
Civil Suit, No.

AT .  
of 18 .  
A. B., of  
against  
C. D., of

To

WHEREAS has been the purchaser at a sale by auction in execution of the decree in the above suit of , now in your possession, you are hereby prohibited from delivering possession, of the said of any person except the said.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]  
Judge.

No. 147.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION  
TO ANY OTHER THAN THE PURCHASER.

Section 301 of the Code of Civil Procedure.

IN THE COURT OF  
Civil Suit, No.

AT .  
of 18 .  
A. B., of  
against  
C. D., of

To and to

WHEREAS has become the purchaser at a public sale in execution of the decree in the above suit of certain debt due from you to you , that is to say , it is ordered that you be, and you are hereby, prohibited from receiving, and you from making payment of the debt to any person or persons except the said .

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]  
Judge.

No. 148.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION.

Section 301 of the Code of Civil Procedure.

IN THE COURT OF  
Civil Suit, No.

AT .  
of 18 .  
A. B., of  
against  
C. D., of

To

and , Manager of Company.

WHEREAS has become the purchaser, at a public sale in execution of the decree, in the above suit of certain shares in the above company, that is to say, of standing in the name of you it is ordered that you be, and you are hereby, prohibited from making any transfer of the said shares to any person except the said , the purchaser aforesaid, or from receiving any dividends thereon ; and you , Manager of

THE FOURTH SCHEDULE.

the said company, from permitting any such transfer or making any such payment to any person except the said , the purchaser aforesaid.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

Judge.

No. 149.

ORDER CONFIRMING SALE OF LAND, &c.

Section 312 of the Code of Civil Procedure.

IN THE COURT OF  
Civil Suit, No.

AT  
of 18 .

A. B., of  
against  
C. D., of

WHEREAS the following land [or immoveable property] was, on the day of 18 , sold by the bailiff of this Court in execution of the decree in this suit; and whereas days have elapsed, and no application has been made [or objection allowed] to the said sale, it is ordered that the said sale be, and the said sale is hereby, confirmed.

GIVEN under my hand and the seal of the court, this day of 18 .

Schedule.

[L. S.]

Judge.

No. 150.

CERTIFICATE OF SALE OF LAND.

Section 316 of the Code of Civil Procedure.

IN THE COURT OF  
Civil Suit, No.

AT  
of 18 .

A. B., of  
against  
C. D., of

THIS is to certify that has been declared the purchaser at a sale by public auction, on the day of 18 , of , in execution of decree in this suit, and that the said sale has been duly confirmed by the court.

under my hand and the seal of the court, this day of 18 .

Judge.

No. 151.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A  
SALE IN EXECUTION.

Section 388 of the Code of Civil Procedure.

IN THE COURT of  
Civil Suit, No.

AT  
of 18 .

A. B., of  
against  
C. D., of

TO THE BAILIEF OF THE COURT.

WHEREAS has become the certified purchaser of at a sale in execution of the decree in Civil Suit, No. of 18 ; and whereas such

**THE FOURTH SCHEDULE.**

**lxxiii**

land is in the possession of , you are hereby ordered to put the said , the certified purchaser, as aforesaid, into possession of the said , and if need be, to remove any person who may refuse to vacate the same.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

*Judge.*

**No. 152.**

**AUTHORITY TO THE COLLECTOR TO STAY PUBLIC SALE OF LAND.**

**Section 326 of the Code of Civil Procedure.**

**IN THE COURT OF**

**AT**

**Civil Suit, No.**

**of 18 .**

**A. B., of**

**against**

**C. D., of**

**To**

*Collector of*

**SIR,**

IN answer to your communication, No. , dated , representing that the sale in execution of the decree in this suit of and, lying within your district, paying revenue to Government, is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you instead of proceeding to a public sale of .

I have the honour to be,

Sir,

Your most obedient servant,

[L. S.]

*Judge.*

**No. 153.**

**ORDER FOR COMMITTAL FOR RESISTING, &c., EXECUTION OF**

**DECREE FOR LAND.**

**Section 329 of the Code of Civil Procedure.**

**(Title.)**

**To**

WHEREAS it appears to the Court that has, without just cause, resisted [or obstructed] the execution of the decree of the Court, passed against on the day of 18 , in Civil Suit, No. of 18 , whereby certain land or immoveable property was adjudged to ; it is ordered that the said be committed to custody for a period of days.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

*Judge.*

**154.**

**OF ARREST IN**

**Section 337 of the Code of Civil Procedure.**

THE FOURTH HEDULE.

IN THE COURT OF  
Civil Suit, No.  
Miscellaneous, No.                      of 18  
AT  
of 18  
A. B., of  
against  
C. D., of

TO THE BAILIEF OF THE COURT.

WHEREAS was adjudged by a decree of the court, in , No. of 18 ,

Principal ...			
Interest ...			
Costs ...			
Execution ...			
TOTAL...			

dated 18 , to pay to the plaintiff the sum of Rs. as noted in the margin, and whereas the said sum of Rs. has not been paid to the said plaintiff in satisfaction of the said decree, these are to command you to arrest the said defendant, and unless the said defendant shall pay to you the said sum of Rs. , together with Rs. for the costs of executing this process, to bring the said defendant before the court with

all convenient speed.

You are further commanded to return this warrant on or before the day of 18 , with an endorsement certifying the day and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]  
Judge.

No. 155.

NOTICE OF PAYMENT INTO COURT.

Section 377 of the Code of Civil Procedure.

IN THE COURT OF                      AT  
B. No.                      18 .

A. B. v. C. D.

TAKE notice that the defendant has paid into court Rs. , and says that that sum is enough to satisfy the plaintiff's claim [or the plaintiff's claim for, &c.]

To Mr. X. Z.,  
the Plaintiff's Pleader  
Z.,  
Defendant's Pleader.

No. 156.

COMMISSION TO EXAMINE ABSENT WITNESSES

Section 386 of the Code of Civil Procedure.

IN THE COURT OF                      AT  
Civil Suit, No.                      of 18 .

A. B., of  
against  
C. D., of

To

WHEREAS the evidence of is required by the in the above suit ; and whereas you are requested to take the examination on interrogatories [or viva voce] of such witnesses , and you are hereby ap-

## THE FOURTH SCHEDULE.

pointed a commissioner for that purpose, and you are further requested to make return of such examination so soon as it may be taken [process to require the attendance of the witness will be issued by this court on your application].\*

GIVEN under my hand and the seal of the court, this      day of 18 .

[L. S.]

*Judge.*

### No. 157.

COMMISSION FOR A LOCAL INVESTIGATION OR TO EXAMINE ACCOUNTS.  
Sections 392 and 394 of the Code of Civil Procedure.

IN THE COURT OF  
Civil Suit, No.

AT  
of 18 .

A. B., of  
*against*

C. D., of

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for      should be issued; you are hereby appointed commissioner for the purpose of      [process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this court on your application].\*

A sum of Rs.      , being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the court, this      day of 18 .

[L. S.]

*Judge.*

### No. 158.

WARRANT OF ARREST BEFORE JUDGMENT.  
Section 478 of the Code of Civil Procedure.

IN THE COURT OF  
Civil Suit, No.

AT  
of 18 .

A. B., of  
*against*

C. D., of

TO THE BAILIFF OF THE COURT.

WHEREAS      , the plaintiff in the above suit, has proved to the satisfaction of the court that there is probable cause for believing that the defendant      is about to      ; these are to command you to take the said      into custody, and to bring      before the court, in order that he may show cause why he should not furnish security to the amount of rupees      for      personal appearance before the court, until such time as the said suit shall be fully and finally disposed of, and until execution or satisfaction of any decree that may be passed against      in the suit.

GIVEN under my hand and the seal of the court, this      day of 18 .

[L. S.]

*Judge.*

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\* Not necessary where the commission goes to another court.





THE FOURTH SCHEDULE.

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No. 161.

ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE  
TO FURNISH SECURITY.

Section 485 of the Code of Civil Procedure.

IN THE COURT OF

AT

Civil Suit No.

of 18 .

A. B., of

against

C. D., of

TO THE BAILIFF OF THE COURT.

WHEREAS , the plaintiff in this suit, has applied to the court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against in the suit, and whereas the court has called upon the said to furnish such security, which has failed to do ; these are to command you to attach , the property of the said , and keep the same under safe and secure custody until the further order of the Court, and in what manner you shall have executed this warrant make appear to this court immediately after the execution hereof, and have you here then this warrant.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

Judge.

No. 162

ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, TO WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF  
MOVEABLE PROPERTY, TO WHICH THE DEFENDANT IS ENTITLED,  
SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSONS  
TO THE IMMEDIATE POSSESSION THEREOF.

Section 486 of the Code of Civil Procedure.

IN THE COURT OF

AT

Civil Suit, No.

of 18 .

A. B., of

against

C. D., of

To

Defendant.

It is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from receiving from the following property in the possession of the said , that is to say, to which the defendant is entitled, subject to any claim of the said , and the said , is hereby prohibited and restrained, until the further order of the court, from delivering the said property to any persons whomsoever.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

Judge.

## THE FOURTH SCHEDULE.

## No. 163.

## ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF  
IMMOVEABLE PROPERTY.

## Section 486 of the Code of Civil Procedure.

IN THE COURT OF

AT

Civil Suit, No.

of 18 .

A. B., of

*against*

C. D., of

To

Defendant.

It is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this court, from alienating the property specified in the schedule hereunto annexed, by sale, gift, or otherwise, and that all persons be, and that they are hereby, prohibited from receiving the same by purchase, gift, or otherwise.

GIVEN under my hand and the seal of the court, this day of 18 .

*Schedule.*

[L. S.]

*Judge.*

## No. 164.

## ATTACHMENT BEFORE JUDGMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY  
IN THE HANDS OF OTHER PERSONS, OR OF DEBTS NOT BEING  
NEGOTIABLE INSTRUMENTS.

## Section 486 of the Code of Civil Procedure.

Civil Suit, No,

of 18 .

A. B., of

*against*

C. D., of

To

It is ordered that the defendant be, and he is hereby, prohibited and restrained, until the further order of this court, from receiving from the [money now in hands belonging to the said defendant or debts as the case may, be describing them], and that the said be, and , hereby prohibited and restrained, until the further order of this, court, from making payment of the said [money, &c.], or any part thereof to any person whomsoever.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

*Judge.*

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**ATTACHMENT BEFORE JUDGMENT.**

**Section 486 of the Code of Civil Procedure.**

**To**

**Manager of** \_\_\_\_\_ **Company.**

GIVEN under my hand and the seal of the court, this      day of 18 .

[L. S.]  
Judge.

## TEMPORARY INJUNCTIONS.

UPON motion made unto this court by \_\_\_\_\_, pleader of [or counsel for] the plaintiff, A. B., and upon reading the petition of the said plaintiff in this matter, filed [this day] [or the plaint filed in this case on the \_\_\_\_\_ day of \_\_\_\_\_], or the written statement of the said plaintiff, filed on the \_\_\_\_\_ day of \_\_\_\_\_], and upon hearing the evidence of \_\_\_\_\_ and \_\_\_\_\_ in support thereof [*if after notice and defendant not appearing : add, and also the evidence of \_\_\_\_\_* as to service of notice of this motion upon the defendant, C. D.] : This court doth order that an injunction be awarded to restrain the defendant C. D., his servants, workmen, and agents, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [or in the written statement, or petition of the plaintiff and evidence at the hearing of this motion mentioned], being No. 9, Oilmongers' Street, Hindupur, in the taluk of \_\_\_\_\_, and from selling the materials whereof the said house is composed, until the hearing of this cause, or until the further order of this court.

**Dated this            day of            18 .**

**Civil Judge.**

[Where the injunction is sought to restrain, the negotiation of a note or bill, the ordering part of the order may run thus:—]                      to restrain the defendants                  and                  from parting with out of the custody of them or any of them, or endorsing assigning, or negotiating the promissory note

[*or bill or exchange*] in question, dated on or about the , &c., mentioned in the plaintiff's plaint [*or petition*] and the evidence heard at the motion, until the hearing of this cause, or until the further order of this court.

[*In Copyright cases*] to restrain the defendant, C. D., his servants, agents, or workmen, from printing, publishing, or vending a book, called , or any part thereof, until the, &c.

[*Where part only of a book is to be restrained*] to restrain the defendant, C. D., his servants, agents, workmen from printing, publishing, selling, or otherwise disposing of such parts of the book in the plaint [*or petition and evidence, &c.*] mentioned to have been published by the defendant as hereinafter specified, namely that part of the said book which is entitled , and also that part which is entitled [*or which is contained in page to page both inclusive*], until the , &c.

[*In Patent cases*] to restrain the defendant, C.D., his agents, servants, and workmen, from making or vending any perforated bricks *or as the case may be*] upon the principle of the inventions in the plaintiff's plaint [*or petition, &c., or written statement, &c.,*] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [*or as the case may be*] mentioned, and from counterfeiting, imitating, or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, &c.

[*In cases of trade-marks*] to restrain the defendant, C. D., his servants, agents, or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking [*or as the case may be*] described as or purporting to be blacking manufactured by the plaintiff, A. B., in bottles having affixed thereto such labels as in the plaintiff's plaint [*or petition, &c.,*] mentioned, of any other labels so contrived or expressed as, by clourable imitation or otherwise to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff, A. B, and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff, A. B., until the, &c.

[*To restrain a Partner from, in any way, interfering in the business*] to restrain the defendant, C. D., his agents and servants, from entering into any contract, and from accepting, drawing, endorsing, or negotiating any bill of exchange, note, or written security, in the name of the partnership-firm of B. & D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement, or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B. & D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise, or undertaking, until the, &c.

No. 167.

NOTICE OF APPLICATION FOR INJUNCTION.

Section 494 of the Code of Civil Procedure.

IN THE COURT OF

AT

A. B., of  
against

C. D., of

TAKE notice that I, A. B., intend to apply, at the sitting of the Court at aforesaid, on the day of , for an injunction to restrain C. D., from further prosecuting a suit which he has commenced against me in , to recover damages for the breach of the contract for the specific performance of which this suit was commenced [or to restrain him from receiving and giving discharges for any of the debts due to the partnership in the matter of the partnership between us for the winding-up of which the suit was commenced, or from digging the turf from the land which was agreed to be sold by him to me by the agreement, the specific performance of which this suit is commenced to enforce, or as the case may be].

Dated this day of 18 .

To C. D.

A. B.

*N. B.*—Where the injunction is to be applied for against a party whose name and address do not appear upon any proceeding already filed in the suit, such name and address must be stated in full to enable the proper officer to serve the notice.]

No. 168.

APPOINTMENT OF A RECEIVER.

Section 503 of the Code of Civil Procedure.

IN THE COURT OF

AT

Civil Suit, No. of 18 .

A. B., of  
against

C. D., of

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 18 , in favour of : you are hereby [subject to your giving security to the satisfaction of the Registrar] appointed Receiver of the said property under section 503 of the Code of Civil Procedure, with full powers under the provisions of that section.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this day of 18 .

*Judge.*

THE FOURTH SCHEDULE.

No. 169.

BOND TO BE GIVEN BY RECEIVER.

Section 503 of the Code of Civil Procedure.

IN THE COURT OF  
Civil Suit, No.

AT  
of 18

A. B., of  
against  
C. D., of

KNOW all men by these presents, that we, I. J., of, &c., and K. L., of, &c., and M. N., of, &c., are jointly and severally bound to G. H., *Registrar* of the Court of , in Rs. to be paid to the said G. H., or his attorney, executors, administrators, or assigns. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors, and administrators jointly and severally by these presents.

Dated this day of .

And whereas a plaint has been filed in this court by A. B., against C. D. for the purpose of [ *here insert the object of suit* ].

And whereas the said I. J. has been appointed, by order of the above-mentioned court, to receive the rents and profits of the immoveable property, and to get in the outstanding moveable property of O. P., the testator in the said plaint named.

Now, the condition of this obligation is such that, if the above-bounden I. J. shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property of the said O. P. [*or as may be*] at such periods as the said court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

I. J.  
K. L.  
M. N.

Signed and delivered by the above-bounden in the presence of .

NOTE.—If deposit of money be made, the memorandum thereof should follow the terms of the condition of the bond.

No. 170.

ORDER OF REFERENCE TO ARBITRATION UNDER AGREEMENT OF PARTIES.

Section 508 of the Code of Civil Procedure.

(Title.)

To

WHEREAS the above-mentioned plaintiff and defendant have agreed to refer the matters in difference between them in the above suit to your arbitration and award, you are hereby appointed accordingly to determine all the said matters in difference between the parties, and with power, by consent of the parties to determine which party shall pay the costs of this reference.



## THE FOURTH SCHEDULE.

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You are required to deliver your award in writing to this Court on or before the . day of 18 , or such other day as this Court may further fix.

Process to compel the attendance before you of any witnesses, or for the production of any documents which you may desire to examine or inspect, will be issued by this Court on your application, and you are empowered to administer to such witnesses oath or affirmation.

A sum of Rs. , being your fee in the above suit, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this day of 18 .

[L. S.]

*Judge.*

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### No. 171.

#### ORDER OF REFERENCE TO ARBITRATION BY COURT, WITH CONSENT.

#### Section 508 of the Code of Civil Procedure.

(Title.)

UPON reading a petition of the plaintiff, filed this day, and on the consent of for the defendant, and upon hearing for the plaintiff, and for the defendant, it is ordered, by and with the consent of all the parties, that all matters in difference in this suit, including all dealings and transactions between all parties, be referred to the final determination of , who is to make his award in writing, and submit the same to this Court together with all proceedings, depositions, and exhibits in this suit, within one month from the date hereof. And it is ordered further, by and with the like consent, that the said arbitrator is to be at liberty to examine the parties and their witnesses upon oath or affirmation, which he is empowered to administer, and that the said arbitrators shall have all such powers or authorities as are vested in arbitrators under the Code of Civil Procedure, including therein power to call for all books of account that he may consider necessary. And it is further ordered, by and with the like consent, that the costs of this suit, together with the costs of reference to arbitration, up to and including the award of the said arbitrator, and the enforcement thereof, do abide the result of the finding of the said arbitrator. And it is further ordered, by and with the like consent, that the said arbitrator be at liberty to appoint a competent accountant to assist him in the investigation of the several matters referred to him as aforesaid, and that the remuneration of such accountant and other charges attending thereto be in the discretion of the said arbitrator.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

*Judge.*

## THE FOURTH SCHEDULE.

### No. 172.

#### SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT.

##### Section 532 of the Code of Civil Procedure.

No. OF SUIT.

IN THE COURT OF

AT

Plaintiff.

Defendant.

To [*Here enter the defendant's name, description and address.*]

WHEREAS [*here enter the plaintiff's name, description, and address*] has instituted a suit in this court against you under Chapter XXXIX of the Code of Civil Procedure for Rs.            principal and interest [*or* Rs.            balance of principal and interest], due to him as the payee [*or* endorsee] of a bill of exchange [*or* hundi, *or* promissory note], of which a copy is hereto annexed, you are hereby summoned to obtain leave from the court within ten days from the service hereof, inclusive of the day of such service, to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs.            [*here state the sum claimed*] and the sum of Rs.            for costs.

Leave to appear may be obtained on an application to the court, supported by affidavit or declaration showing that there is a defence to the suit on the merits or, that it is reasonable that you should be allowed to appear in the suit.

[*Here copy the bill of exchange hundi, or promissory note ; and all endorsements upon it.*]

### No. 173.

#### MEMORANDUM OF APPEAL.

##### Section 541 of the Code of Civil Procedure.

#### MEMORANDUM OF APPEAL.

∴, as in Register.) Plaintiff—Appellant.

(Name, &c., as in Register.) Defendant—Respondent.

(Name of Appellant) [plaintiff or defendant] above-named appeals to the High Court at [or District Court at           , as the case may be] against the decree of            in the above suit, dated the            day of           , for the following reasons, namely [*here state the grounds of objection*].

# REGISTER OF APPEALS FROM DECREES in the year 18

[illegible]

## No. 175.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL.

Section 553 of the Code of Civil Procedure.

IN THE COURT OF

AT

, *Appellant* v., *Respondent*.

APPEAL from the of the Court of , dated the day of 18 .

*Respondent.*

To

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 18 , has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided *ex parte* in your absence.

GIVEN under my hand and the seal of the court, this day of 18 .

[L. S.]

*Judge.*

[NOTE.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

## No. 176

DECREE ON APPEAL.

Section 579 of the Code of Civil Procedure.

IN THE COURT OF

AT

, *Appellant*, v, *Respondent*.

APPEAL from the of the Court of , dated the day of 18 .

Memorandum of Appeal.

, *Plaintiff*., *Defendant*.

Plaintiff [*or defendant*] above-named appeals to the Court at against the decree of in the above suit, dated the day of 18 , for the following reasons, namely :—

[*here state the reasons.*]

This appeal coming on for hearing on the day of 18 , before , in the presence of for the appellant, and of for the respondent, it is ordered—

[*here state the relief granted.*]

The costs of this appeal, amounting to , are to be paid by .

The costs of the original suit are to be paid by .

GIVEN under my hand this day of 18 .

[L. S.]

*Judge.*

# REGISTER OF APPEALS FROM APPELLATE DECREES.

**Section 587 of the Code of Civil Procedure.**

# HIGH COURT AT

# REGISTER OF APPEALS FROM APPELLATE DECREES.

	Date of Memorandum.	
	No. of Appeal.	
	Name.	APPELLANT.
	Description.	
	Place of Abode.	
	Name.	RESPONDENT.
	Description.	
	Place of Abode.	
	Of what Court.	DECREE APPEALED FROM.
	No. of Original Suit and of appeal.	
	Particulars.	
	Amount or value.	
	Day for parties to appear.	APPEARANCE.
	Appellant.	
	Respondent.	
	Date.	JUDGMENT.
	Confirmed, reversed, or altered.	
	For what, or Amount.	

**THE FOURTH SCHEDULE.**

**No. 178.**

**NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED.**

**Section 626 of the Code of Civil Procedure.**

**IN THE COURT OF**

**AT**

**:**

**, Plaintiff, v.**

**, Defendant.**

**To**

**TAKE notice that**                      **has applied to this court for a review of its judgment passed on the**                      **day of**                      **18**                      **in the above case. The**                      **day**                      **of**                      **18**                      **is fixed for you to show cause why the court should not grant a review of its judgment in this case.**

**GIVEN under my hand and the seal of the court, this**                      **day of**                      **18 .**

**[L. S.]**

**Judge.**

**No. 179.**

**NOTICE OF CHANGE OF PLEADER.**

**IN THE COURT OF**

**AT**

**:**

**A. B., of**

**against**

**C. D., of**

**TO THE REGISTRAR OF THE COURT.**

**TAKE notice that I, A. B. [or C. D.], have hitherto employed as my pleader G. H., of**                      **in the above-mentioned cause, but that I have ceased to employ him, and that my present pleader is J. K., of**

**A. B. [or C. D.]**

**No. 180.**

**MEMORANDUM TO BE PLACED AT FOOT OF EVERY SUMMONS, NOTICE, DECREE, OR ORDER OF COURT, OR ANY OTHER PROCESS OF THE COURT.**

**Hours of attendance at the office of the Registrar [place of office] from ten till four, except on [here insert the day on which the office will be closed], when the office will be closed at one.**



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